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[1] Judge pro tem. Sept. 3, 1943–Oct. 30, 1943.

[2] On leave of absence to enter military service.

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22 Cal.2d 316

BASCH v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

S. F. 16867.

Supreme Court of California.

June 16, 1943.

Rehearing Denied July 15, 1943.

1. Banks and banking 🔑119, 148(1)

A bank, in receiving ordinary deposits, becomes depositor's debtor, impliedly contracts with him to discharge indebtedness by honoring checks drawn by him, and in so doing is charged with knowledge of his signature.

2. Banks and banking 🔑148(1)

A bank pays forged check at its peril and such payment will be considered to have been made from bank's own funds, so that it has no right to charge depositor's account with amount disbursed and is liable to him for so doing.

3. Banks and banking 🔑148(3)

While no degree of care by bank will excuse it from liability to depositor for amount paid on forged check against his account, bank may justify such payment on principles of "estoppel" or on basis of depositor's negligent or misleading conduct directly or proximately causing payment but bank must show due diligence before it can assert such defenses.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

4. Banks and banking 🔑148(3)

When bank depositor's passbook has been written up and returned to him with canceled check charged to his account, it is his duty to examine checks within reasonable time and report to bank forgeries or alterations disclosed by them, failing in which he cannot dispute correctness of payments thereafter made by bank on similar checks, if such failure results in detriment to bank.

5. Banks and banking 🔑148(3)

A bank which could have discovered alteration or forgery of checks, drawn on depositor's account, by exercising proper care, must bear loss resulting from its payment thereof, though depositor failed to examine his passbook and canceled checks returned to him by bank.

6. Banks and banking 🔑148(1), 151

A bank is under obligation to depositor to use care in scrutinizing checks drawn on depositor's account in order to detect forgeries and to render accounts to depositor in order to prevent perpetration of frauds on him.

7. Banks and banking 🔑154(9)

Whether bank was negligent in paying forged or fraudulently altered check drawn on depositor's account is generally question for jury.

8. Banks and banking 🔑148(3)

While provisions at bottoms of monthly statements, sent by bank to depositor with his canceled checks, that his account would be considered correct, if no error therein was reported within ten days, could not be given dignity and effect of contract, either to constitute statements accounts stated or to relieve bank from liability for payment of forged checks, where such provision was never called to depositor's attention nor noticed by him before discovery of forgeries, depositor had legal duty to examine statements within reasonable time and report without delay any discrepancies revealed on comparison thereof with his own records.

9. Banks and banking 🔑148(3)
Principal and agent 🔑178(2)

A depositor, delegating duty of examining bank's monthly statements of his account and canceled checks thereon to dishonest employee, who forges checks on such account, is chargeable as principal with such information as an honest employee, unaware of wrongdoing, would acquire from such examination, though not imputed with knowledge of such dishonest employee's fraud.

10. Banks and banking 🔑148(3)

A depositor, delegating to trusted employee duty to examine bank's monthly statements of depositor's account and canceled checks returned therewith, had duty of properly supervising such employee's conduct, and in absence of reasonable supervision thereof, depositor's mere designation of employee as agent to discharge such duty cannot be deemed equivalent of depositor's performance thereof.

11. Banks and banking 🔑148(3)

A bank depositor, learning that funds on deposit are disappearing, as on receipt from bank of notice of overdraft resulting from its payment of checks forged by depositor's employee, is guilty of "negligence" in failing to take steps which careful and prudent business man would take in such situation to stop issuance of such checks.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

12. Banks and banking 🔑148(3)

A bank depositor, making no personal examination of his records after receiving notice from bank of overdraft against his account as result of bank's payments of checks forged by depositor's employee, but contenting himself with superficial inquiry of such employee and making no challenge of his explanation of overdraft, was not charged with knowledge of employee's fraud or precluded from recovering amount of such payments from bank on ground that he adopted forged checks as genuine, "ratified" payment thereof, or "estopped" himself from asserting forgeries by depositing funds sufficient to cover overdraft, in absence of showing of bank's freedom from negligence in failing to detect forgeries without depositor's aid.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Ratify".

13. Banks and banking 🔑154(8)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, evidence *held* to show that bank's employees, by exercising proper care and skill, could and should have discovered some of forgeries, so as to establish bank's "negligence" rendering it liable to plaintiff, notwithstanding his negligence in failing to examine canceled checks and bank's monthly statements of plaintiff's account.

14. Appeal and error 🔑930(1)

On appeal, conflicts in evidence before trial court must be resolved against appellant.

15. Banks and banking 🔑154(9)

In depositor's action against bank for amounts paid on forged checks drawn against plaintiff's account by his employee, quality of forgeries was fact question for jury to determine from conflicting evidence on question of bank employee's negligence in passing forged instruments.

16. Banks and banking 🔑154(8)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, evidence of bank's uniform treatment of all such checks and its employees' failure to exercise reasonable diligence in handling plaintiff's account during ten months' period involved *held* sufficient to support jury's implied finding that bank was negligent in passing forged checks which were destroyed by such employee and hence unavailable for production at trial, as well as in cashing checks introduced in evidence.

17. Banks and banking 🔑148(3)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, where evidence supported jury's implied finding that bank was negligent in cashing forged checks which were destroyed by such employee and hence unavailable for production at trial, as well as in cashing checks introduced in evidence, there was no basis for invocation of doctrine of "equitable estoppel" in bar of plaintiff's claim for amount represented by missing checks.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

18. Banks and banking 🔑148(3)

A bank depositor's negligence in failing to examine bank's monthly statements of his account and canceled checks returned therewith after his employee's forgery of checks paid by bank, as well as his prior carelessness in hiring such dishonest employee, is available to relieve bank from absolute liability on forged instruments only in event of its own freedom from negligence in failing to discover forgeries.

19. Banks and banking 🔑154(6)

In depositor's action against bank for amounts paid on forged checks drawn against plaintiff's account, where plaintiff makes out prima facie case by showing that bank made such payments and refused on demand to pay sum represented by such checks, burden is not on plaintiff to show that bank was negligent in cashing checks and that he was free from negligence, but burden is on bank to show by way of defense that plaintiff was negligent and bank free from negligence.

20. Banks and banking 🔑148(3)

A bank must establish its freedom from negligence in cashing forged checks on depositor's account as prerequisite condition to asserting depositor's "estoppel" by conduct to claim amount paid.

21. Banks and banking 🔑148(3)

Due diligence being necessary to enable one to assert "estoppel" of another in equity, a bank must show due diligence to discover forgeries of checks on depositor's account before it can assert depositor's negligence as defense to his action for amount paid on such checks.

22. Banks and banking 🔑154(9)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, the import of various factors bearing on respective parties' negligence in failing to discover forgeries was for jury to determine.

23. Appeal and error 🔑1001(1)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, jury's conclusion, based on reasonable inferences from evidence, as to bank's negligence in cashing forged checks, which were subsequently destroyed by such employee and hence not available for production at trial, is binding on bank's appeal from judgment on verdict for plaintiff.

24. Trial 🔑191(6)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, instruction that if bank was negligent in failing to detect first forgeries, jury might consider whether such negligence was proximate cause of forger continuing his wrongdoing, was not erroneous as assuming that evidence showing that forger predicated pursuit of his fraudulent scheme on his initial success in passing forged instruments was introduced.

25. Banks and banking 🔑154(9)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, instruction that if bank was negligent in failing to detect forgeries first committed, it was responsible for all loss to plaintiff proximately caused by such negligence, was proper.

26. Trial 🔑253(3)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, instruction that if bank was negligent in failing to detect forgeries first committed, it was responsible for all loss to plaintiff proximately caused by such negligence, and that jury might consider whether such negligence was proximate cause of forger being able to continue his wrongdoing, was not erroneous as failing to recognize legal effect of plaintiff's imputed knowledge of forgeries, in view of proper treatment of such subject in connection with same instruction and in several other instructions given at bank's instance.

27. Banks and banking 🔑154(9)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, instruction that if bank was negligent in failing to detect forgeries, plaintiff's subsequent negligence in failing to examine his monthly statements and canceled checks with reasonable care or to report to bank any errors in his account within reasonable time would constitute no defense to bank, was proper.

28. Banks and banking 🔑154(9)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, bank's proposed instruction not to consider forged checks charged in statement of account, delivered to plaintiff by defendant on certain date, in determining whether bank failed to exercise ordinary care and prudence in paying checks, was properly refused as containing erroneous statement of law.

29. Trial ⚷253(8)

In depositor's action against bank for amount paid on forged checks drawn against plaintiff's account by his employee, bank's proposed instructions, failing to make proper allowance for jury's consideration of evidence as to bank's liability in conformity with legal proviso that bank must show its freedom from negligence in order to invoke defense of depositor's negligence in failing to examine his monthly bank statements and canceled checks, were properly refused.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Carlo Basch against the Bank of America National Trust and Savings Association to recover the amount paid by defendant on forged checks drawn against plaintiff's account with defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see Cal.App., 129 P.2d 742.

Louis Ferrari, G. D. Schilling, James S. De Martini, and D. Bianco, all of San Francisco, and Hugh L. Preston, of Ukiah, for appellant.

Belli & Leahy and Marshall E. Leahy, all of San Francisco, for respondent.

CURTIS, Justice.

For many years the plaintiff, Carlo Basch, owned and operated a retail drugstore—Basch's Pharmacy—in San Francisco, and since the establishment of such business he had maintained a commercial account in its name with the defendant bank at the main office at No. 1 Powell Street in said city. In May, 1938, he employed as a part-time bookkeeper one Herbert C. Lahr, who thereupon took charge of the office routine matters in connection with his employer's bank account and faithfully performed his work for the ensuing five months. About the first of November of said year Lahr conceived the scheme of fraudulently diverting from this bank account sums of money for his own use, and between November 3, 1938, and September 9, 1939, he forged plaintiff's signature to a series of one hundred and twenty-seven checks payable to himself, all but four of which called for the payment of $37.50 each. These checks cashed in various places by Lahr and in due course presented to the defendant's main office, were paid by the bank and, together with the genuine checks drawn during the same period, were charged to plaintiff's account. Plaintiff did not examine the bank's monthly statements or inspect the accompanying canceled checks as they were forwarded to him at regular intervals, but he delegated that duty to his bookkeeper Lahr. Consequently the forgeries were not discovered by plaintiff until the early part of September, 1939, after Lahr had absconded under circumstances which will be reviewed later. Prior thereto plaintiff had realized that his profits were decreasing, but inasmuch as no monthly profit and loss statements were made and a physical inventory was taken only once a year, he had simply assigned the decline to poor business. Immediately upon learning of the forgeries plaintiff notified the bank and demanded that it restore to him the total amount paid on the forged checks. After investigating the matter, the bank refused to make such reimbursement of plaintiff's account, and plaintiff thereupon commenced this action against the bank to recover such sum. The bank pleaded several special defenses, charging, in particular, negligence on the part of plaintiff (1) in failing to examine his monthly bank statements with the corresponding returned checks for the respective periods in question, thus permitting the continuance of the forgeries, which otherwise would have been detected; and (2) in entrusting the management of his banking affairs to Lahr without having made any inquiry at the time of the latter's employment as to his reputation for honesty and integrity. The cause was tried before a jury and a verdict was rendered against the bank for $4,740, the aggregate sum of the forgeries. From the judgment entered accordingly in favor of the plaintiff, the defendant bank prosecutes this appeal. Insufficiency of the evidence to support the verdict and error in the giving and refusal of certain instructions are urged as the grounds for reversal.

A preliminary statement of the general principles governing the question of liability as between a bank and its depositor when forged checks are involved will facilitate the discussion of the controversial points raised for consideration on this appeal.

[1-5] It is settled law that a bank in receiving ordinary deposits becomes the debtor of the depositor, that its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and that in so doing it is charged with knowledge of its depositor's signature. Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 P. 704, 41 L.R.A.,N.S., 529; National Dredging Co. v. President, etc. of Farmers' Bank, 6 Pennewill, Del., 580, 69 A. 607, 16 L.R.A.,N.S., 593, 130 Am.St.Rep. 158; 4 Cal.Jur. 211, § 100; 9 C.J.S., Banks and Banking, p. 730, § 356, subsec. a. Consequently, a bank pays a forged check at its peril; and in such event, payment in legal contemplation will be considered to have been made from the bank's own funds so that it has no right to charge the depositor's account with the amount disbursed contrary to his genuine order, and it will be liable to him for so doing. Its responsibility in such case is, and should be, rigid. Glassell Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417; Frankini v. Bank of America, etc., Ass'n, 12 Cal.App.2d 298, 55 P.2d 232; Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116; 4 Cal.Jur. 215, 216, §§ 103, 104; Michie on Banks and Banking, vol. 5, p. 498, § 274. While no degree of care on the part of the bank will excuse it from liability, it may justify the payment of a forged check on principles of estoppel, or on the basis of negligent or misleading conduct of the depositor which directly or proximately caused the bank to pay. However, the bank must show due diligence before it can assert such defenses. Glassell Dev. Co. v. Citizens' Nat. Bank, supra; Union Tool Co. v. Farmers', etc., Nat. Bank, supra; Sommer v. Bank of Italy, etc., Ass'n, 109 Cal.App. 370, 293 P. 98; Wussow v. Badger State Bank of Milwaukee, 204 Wis. 467, 234 N.W. 720, 236 N.W. 687; 9 C.J.S., Banks and Banking, pp. 730–732, § 356, subsec. a. Expository of the law in this regard is the statement in Glassell Dev. Co. v. Citizens' Nat. Bank, 191 Cal. 375, 380, 216 P. 1012, 1014, 28 A.L.R. 1427:

"The weight of authority, and perhaps of reason, supports the view that when a depositor's passbook has been written up and returned to him with canceled checks which have been charged to his account, it is his duty to examine such checks within a reasonable time, and if they disclose forgeries or alterations to report them to the bank, failing in which he cannot, if his failure results in detriment to the bank, dispute the correctness of payments thereafter made by it on similar checks. 7 C.J. 687; California Vegetable Union v. Crocker Nat. Bank, 37 Cal.App. 743, 174 P. 920; Morgan v. United States Mortgage & Trust Co., 208 N.Y. 218, 101 N.E. 871, L.R.A. 1915D, 741, Ann.Cas.1914D, 462.

"This rule, however, assumes that the bank itself has not been guilty of negligence in making the payment, for when by the exercise of proper care it could have discovered the alteration or forgery, it must bear the loss notwithstanding that the depositor failed in his duty to examine the accounts. [Citing numerous authorities from other jurisdictions.]"

[6, 7] The import of the relationship between a bank and its depositor is authoritatively treated in 7 American Jurisprudence, page 371, section 516, as follows:

"A bank is under an obligation to its depositor to use care in scrutinizing checks paid in order to detect forgeries, and to render its accounts to prevent the perpetration of frauds upon its depositor. Therefore, if a bank, in the exercise of proper care, could have discovered the alteration or forgery of a customer's checks, it cannot throw the loss caused by paying them upon the depositor merely because he failed to examine his account. Or, stating the rule in terms of negligence, a bank which is guilty of negligence in failing to discover an alteration or forgery cannot avoid liability on the ground that the depositor was negligent in failing to examine his balanced passbook, statement of account, or returned checks. Consequently, in every case where suit is brought by a depositor to recover from a bank money deposited by him, which the bank has paid out otherwise than in conformity with his orders, and the bank sets up the defense that it is nevertheless entitled to charge the depositor with such payments because of conduct of the depositor subsequent to such payment, *the preliminary question to be determined is whether the bank was or was not guilty of negligence in making the payments.* If it was negligent, if its officers are found to have failed to exercise due and reasonable care in detecting the forgery or fraud, then the subsequent negligence of the depositor, his failure to perform his duty in examining his passbook and vouchers with reasonable care and to report to the bank in a reasonable time any errors or mistakes, will constitute no defense." (Italics added.) The question of whether a bank was negligent in paying a forged or fraudulently altered check is generally one for the jury. Sommer v. Bank of Italy, etc., Ass'n, supra; Frankini v. Bank of America, etc., Ass'n, supra; National Dredging Co. v. President, etc., Farmers' Bank, supra; Leather Manufacturers' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811.

Measured in the light of the foregoing legal principles, the undisputed facts in this case establish beyond doubt that plaintiff was guilty of negligence not only in failing to exercise ordinary care and prudence in entrusting his employee Lahr with his banking affairs, but in disregarding the duty imposed upon him by law to examine and verify the bank's monthly statements and corresponding returned checks in relation to his own books of account. In this connection the record discloses the following points of consideration: Lahr, a stranger to plaintiff at the time he employed him in May, 1938, as a part-time bookkeeper at a salary of $25 per month, was so hired on the recommendation of plaintiff's nephew, for whom Lahr had been competently performing similar services for a short time. Plaintiff made no further inquiry of his new employee as to his antecedents or prior work. However, immediately following the discovery of the forgeries plaintiff learned that Lahr had a previous criminal record as a forger and embezzler; that he had served several jail sentences therefor, and that at the precise time plaintiff employed him he was posted in police headquarters as wanted by the State Division of Criminal Identification as a parole violator on a forgery conviction in El Dorado County, California. Moreover, upon slight investigation it was revealed that prior to his employment by plaintiff, Lahr had been discharged from other clerical positions in San Francisco on grounds showing want of confidence in him. In fact, a few weeks after Lahr entered plaintiff's service, he cashed with plaintiff a fictitious check drawn on an out-of-state bank, and plaintiff compelled him to make it good; yet plaintiff continued to employ him in a responsible position.

Lahr's principal duties under the terms of his employment with plaintiff consisted in preparing bank checks against vouchers for plaintiff's signature, in keeping certain accounting records in connection with the banking transactions, in examining the monthly bank statements and accompanying canceled checks, and in reconciling such items with plaintiff's books of account. The checkbooks used by plaintiff were of a uniform type—each page containing three checks attached to correspondingly numbered stubs and identifying, by appropriate printing in the lower right-hand corner above the line for plaintiff's signature, the chargeable account as "Basch's Pharmacy." One of the accounting records plaintiff required Lahr to keep was a "combination cash journal and bank account." Each page thereof was divided into columns; and in one of the double columns labeled "Bank" Lahr was supposed to enter the dates and amounts of the bank deposits, and the dates, amounts and numbers of the checks drawn against the deposits; and to enter the total amounts of the deposits and withdrawals at the bottom of the respective columns.

Being thus entrusted by plaintiff with the office management of the pharmacy's banking affairs, Lahr was in a position to pursue his criminal enterprise in the following manner: He would detach from the checkbook a complete sheet of blank checks and destroy the stubs; he would then place a piece of carbon paper and a canceled check bearing plaintiff's genuine signature over a blank check and trace the true signature with a hard lead pencil; then he would remove the blank check and trace thereon with pen and ink the thin carbon impression of plaintiff's signature, and afterwards erase the carbon stains from the spurious checks and any pencil marks appearing on the canceled check employed in the tracing operation. Thereupon Lahr filled in the face of the check, making it payable to himself. He made no entry of the forged checks in the "combination cash journal and bank account." During the period of the forgeries, Lahr, upon receipt of the respective envelopes containing the bank's monthly statements and the corresponding canceled checks, would immediately withdraw therefrom all the forged checks, some of which he destroyed. Then after reconciling the genuine checks with the stubs and entries in plaintiff's "combination cash journal and bank account," wherein he had itemized only the genuine checks, Lahr would falsify the totals at the bottom of the accounting book column and in the checkbook to coincide with the balance shown on the pertinent bank statement, return the genuine checks to the appropriate envelope, and mark it "O. K."

Lahr's forgeries were finally discovered by plaintiff in this way: In September, 1939, Lahr gave to an airline company in payment of his fare to Los Angeles one of the forged checks for $37.50, which he stated to be his salary remittance. After the plane had left the airfield, a representative of the company telephoned to Basch's Pharmacy to verify the authenticity of the check, and was informed by plaintiff that the check was a forgery and would not be honored. Upon the arrival of the plane in Los Angeles Lahr, when told that he had passed a bad check in the airline's San Francisco office, made good the amount to the company, and he was permitted to depart. Immediately upon receiving the telephone message from the airline company plaintiff, with the assistance of the police and an accountant, investigated his bank statements, canceled checks and books of account, and such examination at once disclosed the prior forgeries. In the meantime plaintiff notified the bank of these defalcations. Lahr was subsequently apprehended, convicted of the forgery here involved, and sentenced to imprisonment in the penitentiary. He gave his testimony at the present trial by way of deposition.

Lahr negotiated a total of one hundred and twenty-seven forged checks over a period of ten months. In November, 1938, the first month of his fraudulent undertaking, he cashed four of the spurious checks; the first for $40.00, the second for $35.00, the third for $37.50, and the fourth for $27.50. He then devised the scheme of drawing each check for a uniform amount—$37.50—so that the series would appear to be salary payments, and his only variance from this plan occurred in January, 1939, in the case of a check for $25.00. Accordingly, for this fixed amount he cashed four checks in December, 1938, five in January, 1939, nine in February, ten in March, eight in April, fifteen in May, eighteen in June, twenty-two in July, twenty-three in August, and eight in September. The forged checks were listed on the bank's respective monthly statements sent to plaintiff and were included in the corresponding envelopes of canceled checks returned to him with these periodical itemizations. At the bottom of each statement was printed the following language: "Please examine this statement at once. If no error is reported in ten days the account will be considered correct. All items are credited subject to final payment." But, as previously mentioned, plaintiff did not examine or verify any of the bank's monthly statements or canceled checks, nor did he undertake to reconcile the same with his books of account or the check stubs. He left these matters of bookkeeping reconcilement entirely to Lahr. Not even in May, 1939, when required to cover with a sizable deposit an overdraft standing against his account—the first time such charge had been made against plaintiff during the many years he had been a depositor with the defendant bank—did plaintiff undertake to investigate his banking records, but he accepted without question Lahr's explanation that the latter's bookkeeping mistake in combination with the payment of several large bills a few days previously had caused the unexpected deficiency in the account.

[8] While the undisputed testimony of plaintiff that the above-quoted ten-day time limitation—a reiteration of a provision appearing on the authorization card for the mailing of statements as it was signed by plaintiff on the occasion of opening his bank account—was never called to his attention nor noticed by him prior to the discovery of the forgeries precludes giving to such provision the dignity and effect of a contract, either to constitute the statements accounts stated or to relieve the bank from its liability for the payment of forged checks (Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193; Frankini v. Bank of America, 31 Cal.App.2d 666, 88 P.2d 790; Wussow v. Badger State Bank of Milwaukee, 204 Wis. 467, 234 N.W. 720, 236 N.W. 687), plaintiff nevertheless as a depositor had a legal duty, according to the authorities cited in the forepart of this opinion, to examine *within a reasonable time* the documentary evidence forwarded to him by the bank as indicative of the status of his account and to report without delay any discrepancies revealed upon comparison with his own records. Obviously, if plaintiff had performed that duty of verification in regard to the conduct of his banking business, he would have easily detected the forgeries, and the exposure of the first or any of the succeeding ones would have avoided a repetition. As a matter of fact, when the suspicions of plaintiff were aroused and the ensuing investigation undertaken, the discrepancies were discovered in a few minutes. On this subject the court in the case of California Vegetable

Union v. Crocker Nat. Bank, 37 Cal.App. 743, 174 P. 920, after stating that the numerous authorities recognizing the duty of a depositor to examine his balanced bankbook apply with equal force to the analogous modern situation where statements are periodically furnished by a bank to its depositors on balancing their accounts and returning the canceled checks to them, pertinently added the following observation at page 751 of the opinion in 37 Cal.App., 174 P. at page 923: "If depositors may regularly at frequent intervals receive their vouchers and be notified, as was the [depositor] here, of reduced balances of their accounts in banks consequent upon the unfaithfulness of trusted employés during a period of nearly a year, and by neglecting to exercise reasonable supervision over their own business fail to discover fraud which has been perpetrated upon them and the bank, and may thus leave the bank in ignorance of the frauds thus committed, and charge the bank with the losses thus occasioned, then banks and their paying tellers face hard conditions indeed. We do not feel justified in establishing any such rule in this state."

[9, 10] Nor does the fact that plaintiff delegated the duty thus imposed upon him by law to a faithless employee serve as a legal excuse for not discharging this duty himself. According to the generally adopted rule, when the agent to whom the duty of examination is intrusted is a dishonest employee who by forgery has obtained funds of his employer from the bank, and whose consequent adverse interest causes him to conceal from his employer the circumstances which would naturally have been disclosed in the course of a proper verification, the employer though not imputed with knowledge of the fraud of his faithless agent, is, as principal, chargeable with such information as an honest employee, unaware of the wrongdoing, would have acquired from the examination of the canceled checks and bank statements. 9 C.J.S., Banks and Banking, p. 745, § 356, subsec. d(2); Dana v. National Bank of Republic, 132 Mass. 156; First Nat. Bank v. Allen, 100 Ala. 476, 14 So. 335, 27 L.R.A. 426, 46 Am.St.Rep. 80; Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529; National Dredging Co. v. President, etc., Farmers' Bank, 6 Pennewill, Del., 580, 69 A. 607, 16 L.R.A.,N.S., 593, 130 Am.St.Rep. 158; Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116; Leather Manufacturers' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L. Ed. 811; see, also, annotations: 15 A.L.R. 162, 67 A.L.R. 1124, 103 A.L.R. 1148. Consistent with the settled principles upon which the relation of bank and depositor is founded, this rule reasonably imposes upon the depositor the further duty of properly supervising the conduct of his trusted employee, for "aside from its own diligence, a bank's only protection against forgeries by a confidential agent to whom settlement of the bank account has been delegated is verification of statements by the depositor himself, who in such case is clearly responsible for the acts and omissions of his agent in the course of duties with which he had entrusted him. Myers v. Southwestern National Bank, 193 Pa. 1, 44 A. 280, 74 Am.St.Rep. 672. In such instances the cases hold that knowledge of a dishonest agent of fraudulent entries and incorrect balance is equally the knowledge of his principal, with the qualification, however, that the principal is chargeable, not with the knowledge of wrongdoing the agent possessed from the fact that he himself was dishonest, but with knowledge of such facts as an honest agent, unaware of the wrongdoing, would acquire when examining the statements within the scope of his employment. The dishonesty of the agent does not change his relationship to his principal, and accordingly does not change the rule charging his principal with knowledge of such facts. (Citing authorities.)" First National Bank v. Farrell, 3 Cir., 272 F. 371, 376, 16 A.L.R. 651. Thus, in the absence of such reasonable supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal—the depositor—cannot be deemed the equivalent of performance by the latter. Leather Manufacturers' Nat. Bank v. Morgan, supra; Michie on Banks and Banking, vol. 5, p. 554, § 285.

[11, 12] In connection with the consideration of the duty plaintiff owed the bank by way of examination of his canceled checks and monthly statements, his failure to heed the import of the singular notice of overdraft in his account in May, 1939, as above-mentioned, merits some passing comment. A depositor may not sit idly by after knowledge has come to him that his funds seem to be disappearing or that there may be a leak in his business, and refrain from taking the steps that a careful and prudent business man would take in

such situation, and which, if taken, would result in stopping the issuance of the forged checks. The failure to take such steps would support a charge of negligence against the depositor. Detroit Piston Ring Co. v. Wayne County & Home Savings Bank, 252 Mich. 163, 233 N.W. 185, 75 A.L.R. 1273. The isolated occurrence of this overdraft in the many years of plaintiff's maintenance of his account with the defendant bank was a fact of impressionable force and should have apprised him that something was amiss with the management of his banking affairs. Instead of making some personal examination of his pertinent records, a course of action which the dictates of ordinary prudence ought to have suggested as a proper precautionary measure incident to covering the amount of the overdraft charged against his account, plaintiff contented himself with a superficial inquiry of Lahr, the bookkeeper whom he mistakenly trusted, and made no challenge of that employee's easily discreditable explanation that the default was attributable in part to a bookkeeping error and in part to large withdrawals to meet unusual business expenses a few days prior to receipt of the bank's notice of the deficiency. However, these circumstances of plaintiff's remissness furnish no ground for holding that he, by depositing a sum sufficient to cover the overdraft, either adopted the forged checks as genuine and ratified the payment or estopped himself from asserting the forgeries. It would strain the doctrine of ratification to hold that a person had ratified or adopted as his own the unauthorized act of another, of which he had no information, or which was promptly repudiated as soon as brought to his knowledge. First National Bank v. Allen, 100 Ala. 476, 14 So. 335, 27 L.R.A. 426, 46 Am.St.Rep. 80; Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529. No more in this than in any other instance of failure to exercise reasonable supervision over his banking affairs is plaintiff to be imputed with knowledge of his dishonest agent's fraud or his recovery precluded on the basis of ratification of his faithless employee's wrongdoing. All such situations simply involve considerations of lack of due diligence on the part of the depositor and require the application of like legal principles in the measure of the effect of *his negligence* with reference to the bank's payment of the forged checks.

Under the authorities above cited, as well as others, the remiss conduct of the depositor in such cases as this is available as a defense to the bank *only* where it appears that the bank itself is free from negligence in the first instance in the payment of the forged checks. If in the exercise of due care the bank would have detected the forgeries without the aid of the depositor, the bank cannot then escape its contractual liability merely because the depositor was also at fault. In such circumstances the bank does not pay because previous forgeries were not reported to it, but it pays because on its own negligent inspection it supposed the checks were genuine. Moreover, in line with the rigor of the rule that a bank pays out the money of its depositors on forged instruments at its peril, it was held in Sommer v. Bank of Italy, etc., Ass'n, 109 Cal.App. 370, 376, 293 P. 98; that a bank seeking to escape liability for cashing unauthorized checks drawn against its depositor's account has the burden of proving as a preliminary point its own freedom from negligence in the matter.

[13-15] It is plaintiff's contention that the record establishes that the bank was negligent in the following respects: (1) that its "system was wrong" in that it gave no instructions to its employees "relative to detecting forgeries, or in handwriting"; (2) that it assigned duties to employees who were not competent to "discharge the system set up" by the bank; and (3) that the employees were negligent in the performance of their duties. There is no merit to plaintiff's first two charges. Without detailing the evidence bearing on these initial points, it will suffice to state that the undisputed testimony of qualified witnesses on the subject shows that the bank's system of examining checks for irregularities and training its employees to that end is essentially the same as that followed in all San Francisco banks, and is regarded as the accepted modern practice. However, as to the third proposition here advanced by plaintiff, there is substantial evidence indicating that by the exercise of proper care and skill the bank's employees could and should have discovered some of the forgeries. In this connection the record shows that eighty-three of the series of forged checks were produced by plaintiff at the trial and were received in evidence; that some twenty of those so produced were shown to the teller who had been in charge of the division handling plaintiff's banking

account during the period of the forgeries, and some three or four years prior thereto; that after inspecting these twenty checks, he admitted that several of them bore evidence of forgery and should not have been passed. Three of those so specified by him were of the group of four forged and cashed during the first month of Lahr's criminal undertaking—November, 1938—and two of them he himself had previously honored as genuine. Furthermore, three or four of the others which he said showed evidence of irregularities and palpable line tremor in the signature were originally passed by him. It is true that certain other witnesses gave testimony to the effect that they would have passed these same checks, but on appeal such conflicts in the record must be resolved against the appellant. The evidence also discloses that it was the standard practice of the bank that tellers should not honor checks which were postdated or without date, or which showed trace of erasures; that all such checks were to be referred to an officer of the bank for verification and disposition; that despite these established rules of procedure, of the forged checks on exhibit at the trial as passed by tellers handling plaintiff's bank account, one was postdated, another was undated, and many of them showed erasure marks. It further appears that as to a large group of the forged checks in evidence, certain witnesses called by the bank testified that the signatures attached thereto were "excellent facsimiles" of the genuine signature. However, in the final analysis the quality of the forgeries was a question of fact peculiarly appropriate for the jury to determine from these several opposing considerations, and apparently it was convinced that the bank's employees were negligent in passing the forged instruments.

[16] Nor can it be said under this state of the record that the unavailability of forty-four of the forged checks for production at the trial precluded a finding by the jury that the bank was responsible to plaintiff for their payment. It appears from the evidence that the missing group consisted of all the forged checks cashed during the months of December, 1938, and January, February, March and May, 1939; that Lahr, when confronted with plaintiff's banking records was able to identify beyond dispute these items as to time of execution and amount (each for $37.50 except one in January for $25.00, or a total of $1,637.50); that all of these missing checks had been theretofore delivered to plaintiff by the bank with his respective monthly statements and had been subsequently destroyed by Lahr as part of his scheme of concealing his wrongdoing from plaintiff. The fact that Lahr employed the precise same modus operandi with respect to all of the forgeries—that is, he traced plaintiff's genuine signature from a legitimate check onto the forged one under the conditions heretofore outlined—gives rise to a reasonable inference that the checks destroyed were substantially similar in appearance to the eighty-three introduced as exhibits in the course of the trial. Moreover, as previously noted, the four checks forged in the first month were in evidence and the bank's teller particularly concerned with plaintiff's account conceded that three of them were obvious forgeries and should not have been passed. Had these been exposed by the bank, the subsequent forgeries would not have occurred. Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969, 973, 57 L.R.A. 529. In addition all of the checks were made to the order of the same payee, and all but four of the one hundred and twenty-seven were for the same amount—$37.50—a suspicious circumstance that should have put the bank on notice. Frankini v. Bank of America, etc., Ass'n, 12 Cal.App.2d 298, 55 P.2d 232. These several observations relating to the bank's uniform treatment of the entire series of forged checks and its employees' failure to exercise reasonable diligence in the handling of plaintiff's banking account over the ten-month period here involved constitute ample support for the jury's implied finding that the bank was as negligent in cashing the missing checks as it was in cashing the ones in evidence—that the same considerations governed in measuring the liability for the total resulting loss.

[17-21] In such situation there is no basis for invocation of the doctrine of equitable estoppel in bar of plaintiff's claim for the amount represented by the missing checks. The bank argues that the unavailability of these forged instruments at the trial, because of their previous destruction by Lahr, placed it at a disadvantage on the issue of the quality of such forgeries, and that as the absence of such evidentiary matter was attributable to plaintiff's own negligence in connection with his failure to exercise reasonable supervision over his banking affairs, he cannot recover the amount of such unauthorized payments from his bank account. But the depositor's negligence *subsequent* to the commission of the forgeries—remiss conduct predicate of the defense of estoppel—like his *prior* carelessness in hiring a dishonest employee—is available to relieve a bank from its absolute liability on forged instruments *only* in the event it has itself been free from negligence. Union Tool Co. v. Farmers', etc., Nat. Bank, 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417. The general proposition distinguishing the present situation from the ordinary negligence case is aptly stated in Sommer v. Bank of Italy, etc., Ass'n, 109 Cal.App. 370, 376, 293 P. 98, 101, as follows: "When the depositor makes out a *prima facie* case by showing that the bank has made payment from his account on forged checks and has refused upon demand to pay the sum represented by the forged checks, the burden is not upon the depositor to show that the bank was negligent in cashing the checks and that he was free from negligence. The burden is then upon the bank to show by way of defense that the depositor was negligent and that the bank was free from negligence." Nor, in line with the principle of this strict rule of liability, is it unreasonable to require of the bank the establishment of its own freedom from negligence as a prerequisite condition to asserting an estoppel by conduct in defeat of the depositor's claim. As was said in this regard in Wussow v. Badger State Bank of Milwaukee, 204 Wis. 467, 474, 234 N.W. 720, 722, 236 N.W. 687: "The right to assert an estoppel in equity does not arise unless the one asserting it has acted with due diligence. Due diligence being necessary to enable one to assert an estoppel, the bank must show due diligence before it can assert the negligence of the depositor. The whole doctrine of estoppel is a creation of equity and is governed by equitable principles. [2] Pomeroy Eq.Jur. (4th Ed.) § 813." To like effect, see Coleman Drilling Co. v. First Nat. Bank, Tex.Civ.App., 252 S.W. 215, and Graham v. Southington Bank & Trust Co., 99 Conn. 494, 121 A. 812. The basic principle of application of this fundamental rule in the law of estoppel would not fluctuate in pertinency according to the nature of the subsequent negligence chargeable against the depositor, but it would be equally operative whether his objectionable conduct following his dishonest employee's commission of the forgeries concerned the failure to examine the monthly bank statements or the loss of the checks on which recovery is sought.

[22, 23] The import of the various factors bearing upon the negligence of the respective parties to this action was for the jury to determine (Frankini v. Bank of America, etc., Ass'n, 12 Cal.App.2d 298, 55 P.2d 232; National Dredging Co. v. President, etc., Farmers' Bank, 6 Pennewill, Del., 580, 69 A. 607, 16 L.R.A.,N.S., 593, 130 Am. St.Rep. 158; Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116; Leather Manufacturers' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811), and the rule that the defense of estoppel is not available to the bank in the face of its own negligence must prevail in this case in view of the implied finding of the jury that the bank's failure to exercise due care to discover the forgeries before cashing the forty-four missing checks was the proximate cause of that resulting loss. The unavailability of this group of checks did not change the burden of proof placed upon the bank in order to escape liability for such unauthorized payments, and the jury's conclusion as to the question of its negligence in this regard, based upon reasonable inferences from the evidence as above detailed, is binding on this appeal. Sommer v. Bank of Italy, etc., Ass'n, supra; Frankini v. Bank of America, etc., Ass'n, supra. Moreover, in other jurisdictions in cases wherein the failure to produce the checks at the trial, because of their previous destruction by the forger, presented the question of the effect of their negligent loss upon the depositor's right to recover thereon, judgment in favor of the depositor for the full amount of the forgeries has been sustained in view of the jury's finding on competent evidence that the bank was negligent in the first instance in passing the forged instruments. First Nat. Bank of Weslaco v. Patty, Tex.Civ.App., 62 S.W.2d 629; New York Produce Exchange Bank v. Houston, 2 Cir., 169 F. 785, 95 C.C.A. 251.

[24-26] Passing to a consideration of the matter of the instructions, there is nothing in the points advanced by the bank which calls for a reversal of the judgment. The first objection is directed against the latter portion of an instruction wherein the jury was charged that if it found that the bank was negligent in failing to detect the forgeries committed in November, 1938, then the bank would be responsible for all

loss to the plaintiff proximately caused by that negligence, and that it "may consider under such a finding of negligence" the question of whether "that negligence was the proximate cause of the forger being enabled to continue his wrongdoing on any or all future checks and as well in determining whether or not the bank was negligent in the examination and payment of subsequent forged checks received * * * and charged to plaintiff's account." The term "proximate cause" was fully and correctly defined in the next instruction given to the jury. The bank argues that even though it was negligent in the payment of the forged checks during this first month, such circumstance in no event could be legally considered the proximate cause of the forger's continuance of his wrongdoing; and further, that the instruction was misleading in that it erroneously assumed that evidence was introduced showing that the forger predicated the pursuit of his fraudulent scheme upon his initial success in passing the forged instruments. However, an examination of the entire instruction reveals that it does not embody such assumption. It states merely that if the jury should find as a fact that the bank was negligent in cashing the November checks, the jury "may consider" such fact in determining whether it was the proximate cause of the forger continuing in his wrongdoing. Moreover, a complete answer to the bank's position relative to the effect of evidence of its negligence for the first month's unauthorized payments is furnished by one of the authorities cited and emphasized by the bank on another point, the well-considered case of Critten v. Chemical National Bank, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529, wherein the New York Court of Appeals stated in substance that it might well be found that had the bank not been negligent in failing to detect the first forgeries, the forger would not have been able to have continued with the subsequent series until the time of his arrest. Likewise pertinent is the analysis in Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116, as to the possible consequence of the bank's original negligence in relation to the forger's continuance of his wrongdoing. Nor on this basis is there merit to the bank's final objection to this same instruction—that it erroneously failed to give recognition to the legal effect of the plaintiff's imputed knowledge as to the existence of the forgeries. This subject not only was properly treated in connection with this particular charge referable to the determinative correlation of duties of the respective parties, but also in several of the instructions which the trial court gave at the instance of the bank this matter was amply and carefully covered.

[27] The second instruction here under attack directed the jury that if it "should find from the evidence * * * that the * * * bank was negligent in failing to detect the forgery of Basch's checks, then the subsequent negligence of Basch, if any, or any failure to perform his duty to the bank in examining his monthly statements and cancelled checks with reasonable care * * * or any failure to report to the bank within a reasonable * * * time any errors * * * in his account will constitute no defense to the Bank." This charge, predicated upon the bank's obligation to establish its own freedom from negligence as a condition precedent to its exemption from liability, is in strict accord with the rules of law hereinabove discussed as applicable in the disposition of this case, and the bank's objection thereto is therefore untenable. As was said in Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 178, 146 So. 116, 121: "It has been thought that a bank engaging in the business of depositing and paying out money on checks and other exchange is equipped to discover forgeries and to safely preserve its depositors' money. The bank holds out to the public that its officers and agents are skilled in all matters connected with, and relating to, its ability to detect and prevent forgery."

[28, 29] The court's refusal to give certain proposed instructions of the bank as quoted in its opening brief was required under the established authorities. The first of these contained the following erroneous statement of law with regard to the forgeries committed in the first month, November 1938: "In determining whether or not the bank failed to exercise ordinary care and prudence in the payment of the forgeries in this case, you are instructed not to take into consideration the forged checks charged to the statement of account delivered to plaintiff by defendant on or about December 1, 1938." The other two of these rejected instructions misstate the applicable doctrine of negligence in such situation as is here involved, for in con-

nection with the respective references to the plaintiff's duty to examine his monthly bank statements and canceled checks, each instruction erroneously neglects to make proper allowance for the jury's consideration of evidence relating to the bank's liability in conformity with the legal proviso that in order to invoke the defense of the depositor's negligence—whether prior or subsequent to the dishonest employee's commission of the forgeries—the bank must show that it was free from negligence.

From the foregoing consideration of the points presented for review on this appeal, it is clear that the record presents no ground of reversible error, and the judgment is therefore affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, Justice (concurring).

I concur in the judgment on the ground that the defendant bank failed to establish its own freedom from negligence in any of the instances in which it honored forged checks against plaintiff's account and, hence, that negligence of the plaintiff is immaterial. Regardless of all other discussion, that one proposition is determinative of this appeal. (See Sommer v. Bank of Italy, etc., Ass'n (1930), 109 Cal.App. 370, 376, 293 P. 98; Union Tool Co. v. Farmers', etc., Nat. Bank (1923), 192 Cal. 40, 47, 48, 218 P. 424, 28 A.L.R. 1417; Glassell Dev. Co. v. Citizens' Nat. Bank (1923), 191 Cal. 375, 380, 216 P. 1012, 28 A.L.R. 1427.)

EDMONDS, J., concurred.

Rehearing denied; SCHAUER, J., dissenting.

22 Cal.2d 304

LINCOLN v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. No. 18622.

Supreme Court of California.
June 16, 1943.

1. Pleading 🔑106(2)

A plea of another action pending is merely dilatory.

2. Judgment 🔑958(1)

Defense of res judicata constitutes bar to action if such defense is properly pleaded and proved, but does not oust court of jurisdiction.

3. Husband and wife 🔑295

In action by wife for separate maintenance, fact that wife was then receiving support from husband, pursuant to order of Virginia court in divorce suit filed therein by husband, was material evidence on hearing on order to show cause why temporary support should not be allowed wife.

4. Husband and wife 🔑289

Where husband against whom wife filed action in superior court for separate maintenance appeared in response to order to show cause with reference to temporary support, and filed affidavit in opposition to wife's application, superior court had jurisdiction of the parties.

5. Mandamus 🔑31

Where superior court, in action by wife for separate maintenance, issued order directing husband to show cause why husband should not be required to make payments for wife's temporary support and conducted hearing thereon, receiving husband's evidence as to divorce suit instituted by husband in Virginia, as well as wife's affidavit and complaint, and dismissed the proceeding, court thereby exercised "jurisdiction", and hence could not be compelled by writ of mandate to hear order to show cause on the merits thereof, notwithstanding superior court in dismissing suit may have believed that Virginia court had exclusive jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

6. Divorce 🔑214

An application for temporary alimony, though not a "separate suit", is a "collateral proceeding" within the basic suit, and a proceeding for separate judgment independent of the final judgment in the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Proceeding" and "Separate Suit".

7. Appeal and error 🔑77(1)

An order denying an application for temporary support and suit money is regarded as a "final judgment", and is directly appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

8. Appeal and error 🔑77(1)

Order dismissing order to show cause proceeding in action by wife for separate maintenance is equivalent of an order denying the application, and as such must be regarded as a "final judgment" in the order to show cause proceeding for purposes of appeal.

9. Appeal and error 🔑71(3)

Dismissal of order to show cause proceeding in action by wife for separate maintenance, which proceeding included application for injunction, constituted a denial of the application and hence was appealable. Code Civ.Proc. § 963.

10. Mandamus 🔑4(3)

Where, in proceeding by wife for writ of mandate to compel superior court to set order to show cause in wife's separate maintenance action for immediate hearing and determine the matter on its merits, it did not appear that writ of mandate would be more efficacious than appeal in mitigating the hardship or averting the prejudice which petitioner averred would result if writ were not allowed, the averment failed to state ground for issuance of the writ on ground that appeal would not furnish an "adequate remedy".

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy".

11. Mandamus 🔑3(2)

Mandamus may not be resorted to as a substitute for an adequate legal remedy, by appeal or otherwise.

12. Mandamus 🔑42

Fact that order of superior court dismissing order to show cause proceeding, in separate maintenance action by wife to compel payment of temporary support, may have constituted an abuse of discretion, did not by itself make mandamus proper remedy to correct the claimed error.

13. Mandamus 🔑3(3)

Judgment and discretion of trial court, both as to facts and as to law applicable thereto, in a matter within court's jurisdiction, cannot be controlled by writ of mandate where aggrieved party has a plain, speedy and adequate remedy in the ordinary course of law.

14. Mandamus 🔑31

A hearing conducted by trial court on order to show cause with reference to temporary support in wife's separate maintenance action, at which hearing court received proofs of both parties, considered such proofs, gave to the proofs what court thought was proper legal effect and dismissed the proceedings, was, jurisdictionally, a complete "trial" of the proceeding, precluding resort to mandamus proceeding to compel trial court to rehear the cause and to reverse its ruling.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

15. Appeal and error 🔑854(1)

Generally, reasons motivating trial court in reaching decision are immaterial on review.

In Bank.

Proceeding in mandamus by Dorothy C. Lincoln to compel the Superior Court of Los Angeles County to grant a hearing on an order to show cause with reference to alimony and attorney's fees.

Petition for peremptory writ of mandate denied.

Prior opinion, 132 P.2d 262.

Roger Marchetti, of Los Angeles, for petitioner.

Jerry Giesler, Meyer M. Willner, and Thornwell Rogers, all of Los Angeles, for respondent.

SCHAUER, Justice.

This is an application for a writ of mandate to compel a superior court to "set [an order to show cause in a separate maintenance suit] * * * for immediate hearing and to determine said matter on its merits." The application is before us on the petition for the writ and on the answer of the real party in interest and has been submitted upon the record of the proceedings in the trial court as reflected in such documents.

There are two controverted issues of fact which are to be determined upon the sufficiency of the evidence (the record of the proceedings in the trial court) to establish the allegations of the petition. The dispute is not as to the *substance*, but only as to the *effect,* of such evidence. Such issues are: (1) The petition alleges (and the answer in proper form denies all the averments) "That said Superior Court refused to hear or consider, and has not heard or considered said motion for temporary alimony, costs and attorney's fees or said order to show cause, and has held that it has no jurisdiction to hear or determine said motion or determine whether said plaintiff is entitled to relief thereby sought and will not do so unless required by order and mandate of this Court"; (2) The petition alleges (and the answer in proper form denies the averments) "That petitioner has no plain, speedy or adequate remedy at law; that the remedy by appeal is neither speedy nor adequate for the reason that the action of the court of which complaint is made *can only be reviewed on appeal by appeal from the judgment to be rendered in said action,*[1] and that even if a direct and immediate appeal was allowed by law the delay would result in great and unusual hardship to petitioner and prejudice her substantial rights in the determination of her case in said Superior Court." We find the record insufficient to sustain petitioner in either of the controverted issues.

An examination of the record discloses that petitioner filed an action for separate maintenance in the Superior Court of Los Angeles County and caused an order to show cause in re temporary support, etc., to be issued and served on her husband. He appeared on the date set by the order and by way of opposition to the wife's application filed his affidavit and presented exemplified records from the Circuit Court of Smyth County in the State of Virginia showing that the petitioner, previous to filing her complaint in the Superior Court in Los Angeles, had submitted herself to the jurisdiction of the Virginia court by filing a cross-complaint therein in a suit for divorce which had been instituted there by the husband, and that an order for petitioner's support had been made in that court and was being complied with by the husband.

[1-3] As an avowed premise for making the showing of the facts above epitomized, the defendant husband filed a written motion "to vacate, set aside and quash the order to show cause and affidavit" and declared that he "objects to the hearing of said order to show cause." The defendant's written motion specified two grounds: (1) that the superior court was "without jurisdiction to proceed with the hearing on said order to show cause by reason of the fact that there is another action [the Virginia suit] pending between the above named plaintiff and defendant covering the identical subject matter"; and (2) that "the matters to which the defendant Charles C. Lincoln is directed to appear and show cause are res *ad*judicata" by virtue of the Virginia proceedings. Neither of such grounds raises a jurisdictional point. A plea of another action pending is merely dilatory (1 Cal.Jur. 24, § 4; Conner v. Bank of Bakersfield (1917), 174 Cal. 400, 402, 163 P. 353) and the defense of res judicata, while it constitutes a bar to the later action if properly pleaded and proved, does not oust the court of jurisdiction (Rideaux v. Torgrimson (1939), 12 Cal.2d 633, 638, 86 P.2d 826; Brown v. Superior Court (1936), 13 Cal.App.2d 693, 695, 57 P.2d 965). The fact that the plaintiff was then receiving support from the defendant pursuant to a court order was, however, material evidence upon the hearing. See Smith v. Smith (1905), 147 Cal. 143, 81 P. 411. The order to show cause came on for hearing upon the complaint and plaintiff's affidavit upon which the order had been issued, and upon defendant's showing in opposition as heretofore set forth.

After receiving the evidence of the parties, as above related, the superior court made an order which is reflected in its minutes as follows: "Order to Show Cause re Alimony Pendente Lite, Costs, Attorney's Fees and Restraining Order *comes on for hearing:* plaintiff is present with her attorney, Roger Marchetti, and defendant is also present *with his attorney, Jerry Giesler, who appears specially on the Motion to Quash.* Defendant's Motion to Quash *and Dismiss* is granted." Petitioner now contends that the trial court, by the action above related, *refused to exercise its jurisdiction* to hear and determine the order to show cause, and seeks the mandate of this court to compel the superior court "at a specified time and place, to set said order to show cause * * * for immediate hearing and to determine said matter on its merits." The answer to petitioner's demand is that the superior court *has exercised its jurisdiction* and has conducted a hearing on the merits. Whether its order was erroneous is not now before us.

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[1] Emphasis within quotations is added.

[4, 5] It is patent in the record that the superior court had jurisdiction of the cause and of the parties. It is likewise patent that the court exercised that jurisdiction by issuing its order directing the defendant to appear and show cause why he should not be required to make the payments and do the things recited in the order, by conducting the hearing on the order, by receiving and considering evidence, and by entertaining and granting a motion to dismiss. The defendant complied with the order to show cause by appearing and making the showing above narrated in opposition to petitioner's application. If the superior court had made an order in language to the effect that "plaintiff's application for alimony pendente lite, etc., is denied" or that "the order to show cause is discharged," this proceeding in mandamus probably would never have been instituted as it would have been unmistakably apparent that the court had entertained and passed on the plaintiff's application. However, by reason both of the form of defendant's motion to quash and the language of the court's order, the action actually taken by the court is confusingly portrayed. But the fact remains that the court did exercise jurisdiction in the premises when it (1) issued the order to show cause, (2) conducted the hearing thereon, receiving and considering defendant's evidence as to the Virginia court suit, as well as plaintiff's affidavit and her complaint, and (3) entertained the motion for and made its order dismissing the proceeding.

[6] The petition herein discloses that in addition to the written motion to quash the order to show cause the defendant, through his counsel, made an oral motion to *dismiss* the proceeding and that such motion to dismiss was granted. If the defendant in the trial court had confined himself to an objection to the proceeding therein, on the ground of want of jurisdiction, and if that court had merely sustained such objection and *left the proceeding still pending,* we should have an essentially different case: there would then appear a failure to exercise jurisdiction. But on the showing made the superior court did not stop there. Upon defendant's application it *dismissed* the proceeding. The effect is the same, so far as this mandamus application is concerned, as though the suit had been dismissed. An application for temporary alimony, while not a separate suit, is a collateral proceeding within the basic suit (1 Cal.Jur. p. 960, § 16) and is a proceeding for a separate judgment, independent of the final judgment in the action (Robbins v. Mulcrevy (1929), 101 Cal.App. 300, 301, 281 P. 668; Biltmore Drug Store v. Superior Court (1929), 101 Cal.App. 363, 365, 281 P. 710). That the trial judge in the case here involved may have *believed* that the Virginia court had exclusive jurisdiction is inconsequential. A mere belief in an erroneous proposition of law cannot oust a court of jurisdiction and does not establish a refusal to act. If the trial court here had *acted* in accordance with such a belief and merely sustained an objection to proceeding with the hearing, we should have a proper factual base, jurisdictionally, for the intervention of mandate. But we are concluded on this phase of the case by the fact that the court, regardless of what its *theory* may have been, in the *action it took* exercised its jurisdiction. Obviously, petitioner's allegation that the trial court refused to and did not hear, consider or determine her application for temporary alimony, etc., is not supported by the record.

[7-9] As to the second controverted issue of fact, that petitioner (plaintiff in the suit) has no plain, speedy or adequate remedy at law, the record likewise fails to sustain the averments of the petition. In fact, the petition itself is defective in this averment. The general allegation is qualified by the limited and specific one "that the remedy by appeal is neither speedy nor adequate *for the reason* that the action of the court of which complaint is made *can only be reviewed on appeal by appeal from the judgment to be rendered* in said action, and that even if a direct and immediate appeal was allowed by law the delay would result in great and unusual hardship to petitioner and prejudice her substantial rights in the determination of her case."

The first proposition declared in the above-quoted excerpt from the petition falls as a matter of law. Contrary to the allegation, an order denying an application for temporary support and suit money, etc., is directly appealable. 1 Cal.Jur., p. 966, sec. 20, and p. 993, § 47; White v. White (1890), 86 Cal. 212, 213, 24 P. 1030. It is regarded as a final judgment. Robbins v. Mulcrevy (1929), supra, 101 Cal.App. 300, 301, 281 P. 668; Biltmore Drug Store v. Superior Court (1929), supra, 101 Cal.App.

363, 365, 281 P. 710. The order dismissing the order to show cause proceeding is the equivalent of an order denying the application and as such must be regarded as a final judgment in that proceeding for purposes of appeal (see 9 Cal.Jur. 524, § 16; Dowling v. Polack (1861), 18 Cal. 625, 628; Associated Oil Co. v. Mullin (1930), 110 Cal. App. 385, 391, 294 P. 421). Furthermore, the proceeding in the instant case included an application for an injunction. The dismissal constituted a denial of that application and was appealable under the terms of section 963 of the Code of Civil Procedure specifically applicable to injunction proceedings. See Associated Oil Co. v. Mullin, supra.

[10, 11] The second or alternative proposition, averred in the above-quoted excerpt from the petition, "that even if a direct and immediate appeal was allowed by law the delay would result in great and unusual hardship to petitioner and prejudice her substantial rights in the determination of her case," appears to be no more pertinent to the delay ensuing from an appeal than it is to the delay which is ordinarily entailed in a proceeding for a writ of mandate. It does not appear that mandamus would be any more efficacious than appeal in mitigating the hardship or averting the prejudice. No sound basis has been shown for concluding that petitioner's remedy by appeal is not plain, speedy and adequate. If we hold that she is entitled to a writ of mandate upon the showing here, we shall be laying the foundation for the contention that, regardless of the availability of a remedy by appeal, a party is entitled to the writ to correct errors at law in the trial of a case where the court in the exercise of its jurisdiction erroneously grants a nonsuit or excludes pertinent evidence or misconstrues a statute. We reaffirm that "Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise." Andrews v. Police Court (1943), 21 Cal.2d 479, 480, 133 P.2d 398.

Notwithstanding the fact that the averments of her petition are not supported in the material elements noted above, petitioner contends in effect that the trial court egregiously erred in its rulings of law on the hearing, that it abused its discretion in granting the motion to dismiss, and that such errors may properly be corrected by mandamus. As support for this proposition she relies principally on the case of MacPherson v. Superior Court (1937), 22 Cal. App.2d 425, 71 P.2d 91, 94. In that case the proceeding in the trial court was an order to show cause in re contempt for failure to deliver custody of children to the plaintiff in obedience to a prior order. The defendant there attempted to appear specially by his attorneys to object to the jurisdiction of the court, but filed two motions, one for the purpose of striking out certain portions of the "Petition for Order to Show Cause and the Affidavit in Support" thereof on the ground that such portions were "irrelevant, immaterial, surplusage, sham and conclusions of law," and the other "for the purpose of moving to quash and/or dismiss and/or strike Order to Show Cause and Petition and Affidavit * * * and to quash service of Order to Show Cause." Obviously, each of the two motions *asked* the court for some relief which could be granted only by the exercise of general jurisdiction over both the cause and the parties, and it was correctly held that the defendant by *asking* such relief submitted himself to the jurisdiction of the court. That court, however, held that it had no jurisdiction over the person of the defendant and apparently granted the motion to *quash the service* of the order to show cause. *It does not appear that any other relief was granted by the trial court.* Therefore, while in that case the defendant subjected himself to the court's jurisdiction by the relief he *asked,* the court by limiting the relief it *granted* to the jurisdictional point, created a situation where mandamus was an available remedy, viz., to compel it to exercise the jurisdiction which it possessed but refused to exercise. It may be noted that the question as to whether an appeal was the appropriate remedy is not discussed in that case and apparently no contention was (or properly could have been) made that the criticized order was appealable.

Another case relied upon by petitioner is Smith v. Superior Court (1937), 21 Cal. App.2d 160, 69 P.2d 176. That case also was an application for a writ of mandamus and an issue of fact seems to have been raised and disposed of in the District Court of Appeal. That court at page 163 of 21 Cal.App.2d at page 177, of 69 P.2d, says that at the hearing in question "it was urged that the superior court had no jurisdiction to make the order * * * and the said order was beyond the jurisdiction of the court. Thereupon the superior court *sustained said objections* and held that the order was beyond the jurisdiction of the court, and refused to enforce the order * * *." Furthermore, depicting what it found to be the factual basis for its conclusion, it said: "It is the contention of respondent in regard to the foregoing that the court did not hold that the order of July 14, 1936, was beyond the jurisdiction of the court, but alleged that the court *did hear the matter* and found that defendant was not guilty of contempt and dismissed said proceeding. *With this contention we do not agree.*" The opinion then quotes from a memorandum of the trial judge, which apparently was included in the record, and construes such memorandum as a holding by the court that it was without jurisdiction. The District Court of Appeal also construed the order of the trial court "that the pending contempt proceedings be dismissed," coupled with the memorandum opinion of such trial court, as evidence that it "did not hear and determine the contempt proceedings, but expressly refused to hear the same * * *." Thus, in the light of the factual inferences it drew, its decision on the law is not in conflict with our views. It will be noted, also, that the matter involved was a contempt proceeding, and that there was no contention that the attacked order was appealable.

[12] On behalf of petitioner it is also argued, in effect, that even if the trial court did exercise (and act within) its jurisdiction in the premises, nevertheless its action in dismissing the proceeding upon the showing made was error, and that such error properly can be corrected by mandate because the order was an abuse of discretion and mandamus is a proper remedy for controlling a lower court in the exercise of its discretion. Assuming, as contended for by petitioner, that the order did constitute an abuse of discretion, such circumstance does not by itself make mandamus a proper remedy. It is only when an abuse of discretion is manifest that a trial judge's order respecting temporary alimony, suit money, etc., will be disturbed *on appeal.* See 1 Cal.Jur. p. 966, § 20, and p. 994, § 47; Rose v. Rose (1895), 109 Cal. 544, 546, 42 P. 452; Smith v. Smith (1905), supra, 147 Cal. 143, 145, 81 P. 411; Stewart v. Stewart (1909), 156 Cal. 651, 656, 105 P. 955.

[13] As to *mandamus* as a means of controlling a lower court in the exercise of its discretion, it was declared in Hilmer v. Superior Court (1934), 220 Cal. 71, 73, 29 P.2d 175, 176, that "It is well settled that *mandamus* will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way." Such statement approaches being paradoxical in its implication that any area of discretion remains when "it can be legally exercised in but one way." The quoted statement is followed by the court's interpretation of its own language, "Stated differently, a court can be compelled to act, but, having acted, its act cannot be reviewed on *mandamus.*" It thus appears that the crux of the holding is that by *mandamus* a lower court may be compelled to act *jurisdictionally* but cannot by that means be compelled to act *correctly.* At least where there is a remedy by appeal, as long as it acts within, and does exercise, its jurisdiction, an erroneous act equally with one which is legally correct gives it immunity from control by mandamus. The doctrine from the Hilmer case above quoted was reiterated by this court in O'Bryan v. Superior Court (1941), 18 Cal. 2d 490, 496, 116 P.2d 49, 136 A.L.R. 595. Enunciating the same principle, in an earlier case (Stearns v. Superior Court (1919), 44 Cal.App. 285, 288, 186 P. 390, 391) the District Court of Appeal in discussing the refusal of a trial court to include a certain provision in a judgment said, "Whether the trial court be right or wrong in so deciding is not involved in this proceeding, since if the court erroneously denies plaintiff a judgment warranted by the findings, her remedy, as in other cases, is by an appeal. No principle is better settled than that the judgment and discretion of the trial court, both as to the facts and as to the law applicable thereto, in a matter within its jurisdiction, cannot, where the aggrieved party has a plain, speedy, and adequate remedy in the ordinary course of law, be controlled by writ of mandate."

In the case out of which this proceeding arose, the defendant's motion to dismiss and the evidence which he presented to the trial court did not constitute a mere objection to the jurisdiction of such court. On the contrary, such procedure was a challenge on the merits to the plaintiff's application and called for an affirmative exercise of jurisdiction by the court. This was not a situation where the court's discretion could "be legally exercised in but one way" and where there was no remedy by appeal for an error in, or abuse of, such discretion.

[14] As shown by the record, the trial court conducted a hearing on the mooted order to show cause. It had before it and received the proofs both of plaintiff and of defendant. It considered such proofs, gave to them what it thought was their proper legal effect, and made its order dismissing the proceeding. This was, jurisdictionally, a complete trial of such proceeding. Hence, the only objects that would be attained by granting the writ applied for would be to require the trial judge (1) to *reverse* his ruling in granting the motion to quash and the motion to dismiss, and (2) to resume the hearing of the order to show cause and dispose of it either differently as to result or on a different ground. In other words, the legal objective sought to be attained by the writ is not to compel the trial court to hear and determine a cause, but rather to compel it to rehear and redetermine and reverse its ruling on a question of law in a cause it *has* heard and determined. That it might on such rehearing receive additional evidence, or give different legal effect to the evidence it had received, is beside the point. If we issue the writ for such purposes the effect will be to make the mandamus proceeding the mere alternative or substantially the counterpart of an appeal in its overlapping functions. We are not willing to give it such scope of application, being of the opinion that the orderly and expeditious dispatch of judicial proceedings in the several tribunals of the State will best be served by preserving disparate in their respective functions, as in their origins, bases and historical objects, the ordinary legal remedy of appeal and the extraordinary equitable remedy of mandamus.

[15] In all legal aspects petitioner's case is precisely the same as was before the District Court of Appeal in Brock v. Superior Court (1931), 119 Cal.App. 5, 5 P.2d 659. There the trial court in refusing to grant an application for temporary support, etc., entered in its minutes the statement that its action was taken "on account of this Court not having *jurisdiction* to award temporary attorney fees, costs, or support on two grounds; that the child is not within the jurisdiction of this Court, also that provisions in section 137, Civ. Code, in re Attorney's fees, costs and support money do not apply in this case." The District Court of Appeal in denying a petition for a writ of mandamus in that case said, "It thus appears that the court did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have authority to make such allowance" under the circumstances there depicted. Exactly the same statement is appropriate to the case before us. It is a general rule that the reasons which motivate a trial court in reaching its decision are immaterial on review. As stated in 2 California Judisprudence 810, § 476, "it is judicial action, and not judicial reasoning or argument, which is the subject of review." See Davey v. Southern Pacific Co. (1897), 116 Cal. 325, 329, 330, 48 P. 117; International, etc., Workers v. Landowitz (1942), 20 Cal.2d 418, 423, 126 P.2d 609; Stearns v. Superior Court (1919), supra, 44 Cal.App. 285, 287, 186 P. 390. It cannot be successfully urged here that the court *denied its jurisdiction* when the record shows that by the action it took *it exercised that jurisdiction.*

Petitioner's medium for presenting the points complained of lies in an appeal. The alternative writ of mandate heretofore issued in this cause by the District Court of Appeal is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

22 Cal.2d 337

BEALMEAR v. SOUTHERN CALIFORNIA EDISON CO., Limited, et al.

L. A. 18528.

Supreme Court of California.

June 23, 1943.

1. Appeal and error 🔑854(1)

An appellate court is concerned with the correctness of trial court's action, and not with the reasons assigned therefor.

2. Malicious prosecution 🔑56

In malicious prosecution actions, plaintiff must prove that the proceedings complained of were prosecuted without probable cause.

3. Malicious prosecution 🔑24(5)

Conviction of a defendant is conclusive evidence, in absence of fraud, of existence of "probable cause" for the prosecution, even though the conviction is reversed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

4. Electricity 🔑21

The statute penalizing the making of electric connections and tampering with electric meters to avoid payment for current, etc., does not define separate offenses, but defines a single offense and enumerates a series of acts, either of which separately, or all together, may constitute the offense. Pen.Code, § 499a.

5. Criminal law 🔑984

Co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted therefor as one offense.

6. Indictment and information 🔑125(4)

Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, they may be coupled in one count.

7. Indictment and information 🔑125(4)

Where statute defining an offense enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count for all of the acts together constitute but one offense.

8. Electricity 🔑21

The statute penalizing the making of electric connections and tampering with electric meters to avoid payment for current, etc., is intended to prevent theft of electricity by the specified methods, and the four prohibited acts are all means by which theft of electricity is accomplished, are co-operative acts, and, to be punishable, each act must be committed willfully and knowingly with the intent to injure or defraud. Pen.Code, § 499a.

9. Criminal law 🔑29

The identity of intent fixed by a statute in doing all the prohibited acts indicates that a single offense is created.

land, for respondents.

10. Criminal law 🔑29

Whether the indictable acts may be considered as representing a stage in commission of the same offense is a guide in determining whether statute is intended to create one or more offenses.

11. Electricity 🔑21

The statute penalizing the making of electric connections and tampering with electric meters to avoid payment for current, etc., does not manifest a legislative intention to impose multiple penalties, where, as part of a single transaction, a person with intent to defraud commits any one or more of the four inhibited acts. Pen.Code, § 499a.

12. Malicious prosecution 🔑24(5)

Where original complaint charged plaintiff with making a connection with defendant's electric lines with intent to defraud by using current without passing it through a meter and amended complaint, filed after conviction was reversed and cause was remanded, charged that plaintiff tampered with meter of defendant, conviction on first complaint conclusively established "probable cause" for proceeding on amended complaint, and on termination of proceedings on such complaint in plaintiff's favor defendant was not liable for malicious prosecution. Pen.Code, § 499a.

In Bank.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action for malicious prosecution by William C. Bealmear against the Southern California Edison Company, Limited, and another. From a judgment entered upon the granting of defendants' motion for nonsuit made at close of plaintiff's opening statement, plaintiff appeals.

Affirmed.

For prior opinion, see 128 P.2d 553.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for appellant.

Roy V. Reppy, E. W. Cunningham, and Rollin E. Woodbury, all of Los Angeles, for respondents.

Earl Warren, Atty. Gen., and T. G. Negrich and R. S. McLaughlin, Deputy Attys. Gen., as amici curiae for petitioner.

GIBSON, Chief Justice.

This is an appeal from a judgment entered upon the granting of defendants' motion for nonsuit made at the close of the plaintiff's opening statement in an action for malicious prosecution. At the beginning of the trial, plaintiff stated he would prove the following facts: On May 14, 1938, plaintiff was arrested on a complaint filed by defendant Southern California Edison Company Ltd. which charged him with violating section 499a of the Penal Code by making or causing a connection to be made with an electric wire operated by the company, and using or causing such connection to be used in such manner as to consume electric current which did not pass through a meter for measuring and registering the same. Plaintiff was tried on this charge before a jury in the justice's court and found guilty. On appeal the judgment of conviction was reversed and the cause remanded for new trial. Thereafter the complaint was dismissed at the request of the district attorney and an amended complaint was filed which, in addition to repeating the averments contained in the original complaint, charged plaintiff with further violating section 499a by altering and procuring to be injured and altered an electric meter and using or causing the same to be used. Plaintiff was rearrested and again tried before a jury in the justice's court and upon plaintiff's motion a dismissal was entered because of "insufficiency of evidence to establish the charge." Plaintiff was thereupon discharged and no further criminal proceedings were taken against him.

[1] The motion for nonsuit was made on the grounds "1. that there was no final and legal termination of the * * * criminal cause upon the amended complaint in favor of the plaintiff * * * 2. that * * * conviction on the original complaint * * * conclusively shows probable cause for the criminal prosecution under both the original and the amended complaints." The motion was granted on the first ground, but we find it unnecessary to determine the issue presented thereby because if we were to assume a favorable termination, the judgment of nonsuit would nevertheless have to be affirmed on the second ground. See Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 71 P.2d 817. An appellate court is concerned with the correctness of a trial court's action and not with the reasons assigned therefor. 2 Cal.Jur. 808, § 476, and authorities there collected.

[2, 3] In an action to recover damages for malicious prosecution the plaintiff must prove that the proceedings complained of were prosecuted without probable cause. McAfee v. Los Angeles Gas, etc., Corp., 215 Cal. 219, 9 P.2d 212; Holliday v. Holliday, 123 Cal. 26, 55 P. 703; see cases cited in 16 Cal.Jur. 737, § 9. Conviction of a defendant is conclusive evidence, in the absence of fraud, of the existence of probable cause for the prosecution (Roos v. Harris, 203 Cal. 201, 263 P. 225; see Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775; Prosser, Torts, 878), even though the conviction is reversed on appeal. Holliday v. Holliday, supra; Carpenter v. Sibley, 153 Cal. 215, 94 P. 879, 15 L.R.A.,N.S., 1143, 126 Am.St.Rep. 77, 15 Ann.Cas. 484; Eustace v. Dechter, 53 Cal.App.2d 726, 128 P.2d 367; Norton v. John M. C. Marble Co., 30 Cal.App.2d 451, 86 P.2d 892; Bullock v. Morrison, 118 Cal. App. 112, 4 P.2d 812; see Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Black v. Knight, 44 Cal.App. 756, 187 P. 89; Rest. of the Law of Torts, 667.

Plaintiff was convicted of violating section 499a and it is not claimed such conviction was procured by fraud. Plaintiff contends, however, that his conviction upon the original complaint does not constitute conclusive evidence that there was probable cause for the proceedings upon the amended complaint. He argues that section 499a creates four different crimes, and that although both the original and amended complaints charged a violation of the section, the former merely accused him of making or causing a connection to be made with an electric wire and using or causing the same to be used, while the latter also accused him of altering or procuring the alteration and injury of an electric meter and using or causing the same to be used.

[4] Section 499a provides as follows: "Every person who shall willfully, and knowingly with intent to injure or defraud, make or cause to be made any connection * * * with any electric wire or * * * appliance * * * operated by any * * * corporation authorized to generate, transmit and sell electric current, or who shall so willfully and knowingly with intent to injure or defraud, use or cause to be used any such connection in such manner as to supply any electric current * * * to any * * * apparatus * * * by or at which electric current * * * is consumed or otherwise used or wasted, without passing through a meter for the measuring and registering of the quantity passing through such electric wire * * *, or who shall, knowingly and with like intent injure, alter or procure to be injured or altered any electric meter, or obstruct its working, or procure the same to be tampered with or injured, or use or cause to be used any electric meter * * * so tampered with or injured, shall be deemed guilty of a misdemeanor." Contrary to plaintiff's contention, the statute does not define four or any other number of separate offenses. It defines a single offense and "enumerates a series of acts, either of which separately, or all together, may constitute the offense." People v. Clemett, 208 Cal. 142, 280 P. 681, 682; People v. Twedt, 1 Cal.2d 392, 35 P.2d 324; People v. McClennegen, 195 Cal. 445, 234 P. 91; People v. Gusti, 113 Cal. 177, 45 P. 263; People v. Thompson, 111 Cal. 242, 43 P. 748; People v. Leyshon, 108 Cal. 440, 41 P. 480; People v. Shotwell, 27 Cal. 394; People v. Kinsley, 118 Cal.App. 593, 5 P.2d 938; People v. Kuder, 93 Cal.App. 42, 269 P. 198, 630.

[5-7] In the Clemett case, supra, the defendant was convicted under separate counts charging possession and operation of a still. This court reversed the conviction on the possession count, declaring (page 144 of 208 Cal., page 681 of 280 P.) that "As early as People v. Shotwell, 27 Cal. 394, and People v. Frank, 28 Cal. 507, it was held that co-operative acts constituting but one offense, when committed by the same person at the same time, when combined, charge but one crime, and but one punishment can be inflicted as one offense. 'Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a stage in the same offense, it has in many cases been ruled they may be coupled in one count. Thus, setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table, and inducing others to bet upon it, may also constitute a distinct offense; for either, unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted.' Wharton, Criminal Law, approved in People v. Shotwell, 27 Cal. 394. Again, in People v. Frank, 28 Cal. 507, it was said: 'The indictment is good, whether it be regarded as containing two counts or but one. Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.'"

The same rule is announced in the Twedt case, supra, page 398 of 1 Cal.2d, 35 P.2d 324, where it was separately charged that defendant offered for sale, negotiated for the sale of and sold securities in violation of the Corporate Securities Act.

Under this rule the Criminal Syndicalism Act was held to embrace but one offense although the inhibited acts were in no way included in one another and the commission of each act required proof of facts additional to those involved in the others. People v. McClennegen, 195 Cal. 445, 452, 234 P. 91.

In People v. Thompson, supra, a statute penalizing such acts as throwing a switch, removing a rail, or placing any obstruction on any railroad with the intention of derailing any train, boarding a train with the intention of robbing the same, placing dynamite or other explosive material on any track with the intention of blowing up or derailing any train, and setting fire to any bridge or trestle with the intent of wrecking a train was in like manner construed to define but a single offense. The court stated that the whole tenor and purpose of the act is directed toward the suppression of train wrecking.

[8] It is apparent from the terms of section 499a that it was intended to prevent the theft of electricity by the methods specified therein. In commenting on section 498 of the Penal Code which has to do with the theft of illuminating gas by a series of acts similar to those specified in section 499a involving the theft of electricity, this court remarked that "The essence of the offense is the use of gas by any contrivance and under the circumstances denounced by the statute in such manner as to supply such gas 'without passing through any meter provided for the measuring and registering the quantity of gas' so used." McAfee v. Los Angeles Gas, etc., Corp., 215 Cal. 219, 9 P.2d 212, 214. The fact that a technical name is not given to the offense is immaterial. People v. Thompson, supra. The four prohibited acts embraced in the single sentence composing section 499a are all means by which the theft of electricity is accomplished or made possible. They are, in that sense, "cooperative acts." See People v. Shotwell, supra; People v. Frank, 28 Cal. 507; People v. Twedt, supra; People v. Clemett, supra. To be punishable, each act must be committed willfully and knowingly with the "intent to injure or defraud."

[9-11] Various tests are applied in determining whether statutes are intended to create one or more offenses. The identity of intent fixed by the statute in the doing of all the prohibited acts is said to indicate a single offense. People v. Thompson, supra. Whether the indictable acts may be considered as representing a stage in the commission of the same offense is also a guide to construction. Wharton on Criminal Law, cited with approval in People v. Shotwell, supra; People v. Frank, supra; People v. Clemett, supra; People v. Twedt, supra. The considerations suggested by both tests to support the conclusion that a statute defines a single offense are found in section 499a. The charges preferred against plaintiff were based upon the same transaction, and clearly it was not the legislative intention to impose multiple penalties under the section where, as part of a single transaction, a person with intent to defraud commits any one or more of the several inhibited acts.

Our conclusion that the section enunciates a series of acts constituting but a single offense is not in conflict with the decision in Matter of Roberts, 157 Cal. 472, 108 P. 315, and People v. Plath, 166 Cal. 227, 135 P. 954, relied on by appellant. Those cases involved a construction of section 337a of the Penal Code, relating to gambling by pool-selling, book-making, bets, and wagers. After it was pointed out that section 337a covered such different acts as the making of a lease by the owner of property and the making of a bet between two individuals, it was properly held that several distinct offenses were described therein. The cited cases declare that the enumerated acts "are apparently as distinct and independent of each other as if they had been enacted in separate sections" Matter of Roberts, supra, 157 Cal. 474, 108 P. 315, and "there is no necessary connection between them" People v. Plath, supra, 166 Cal. 231, 135 P. 956. Thus, the very marked difference in the essential qualities of the prohibited acts required the conclusion that the Legislature intended to define separate and distinct offenses. The conclusion was fortified in the Plath case by the fact that the Legislature had placed the inhibited acts in separate and distinct enumerated subdivisions. There is nothing in the nature of the acts specified in section 499a nor in the structure of the section, however, which necessitates such a conclusion here.

[12] As stated above, the whole tenor and purpose of section 499a is directed against the theft of electricity and, in our opinion, the section states but one offense. It follows that the conviction of plaintiff on the original complaint charging a violation thereof conclusively established that there was probable cause for the prosecution and that the proceeding on the amended complaint was merely a retrial necessitated by the reversal of the conviction.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and PETERS, Justice pro tem., concurred.

In re AXCELROD'S ESTATE.

WILENCE v. AXCELROD'S ESTATE.

Civ. 14137.

District Court of Appeal, Second District, Division 2, California.

June 29, 1943.

Hearing Granted Aug. 26, 1943.

1. Descent and distribution ⚷71(3)

Allegations in petition to determine heirship are deemed denied, so as to create fact issues for trial court's determination, though respondents filed no pleading in response to petition. Probate Code, § 1080.

2. Appeal and error ⚷907(3)

On appeal on judgment roll alone, trial court's fact findings are conclusively presumed to be supported by evidence.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

In the matter of the estate of Diane Axcelrod, also known as Daine Axcelrod and Diane Wilence. On a petition by Ben Wilence to determine heirship. From an order establishing the heirship of Etta Pocker, also known as Hattie Parker, and others, petitioner appeals.

Affirmed.

Ralph Bernstein, of Huntington Park, for appellant.

Louise Mason, of Los Angeles, for respondents.

A. Joseph Shapiro and Irving Friedman, both of Los Angeles, for Etta Pocker, contestant and respondent.

McCOMB, Justice.

From an order establishing heirship, petitioner appeals. The appeal is on the judgment roll alone.

The essential facts are:

Diane Wilence executed a will December 9, 1935, which contained, among others, the following provisions:

"Sixth. I have intentionally omitted all of my heirs who are not specifically mentioned herein, intending thereby to disinherit them, and if any such persons, or heirs, or any devisees or legatees under this Will, or their successors in interest, shall either directly or indirectly seek to establish or assert any claims to my estate or any part thereof, excepting under this Will, or attack, oppose or seek to set aside the probate of this Will, or to impair, invalidate or set aside its provisions, or any of them, or to have the same or any part thereof, or any legacy herein contained eliminated, declared void or diminished, or to defeat or change any part of the testamentary plan of this Will, directly or indirectly, either in Court or out of Court, or shall endeavor to secure or take any part of my estate in any manner other than through or under this Will, then in any or all of the above mentioned cases and events, I hereby give and bequeath to such person or persons the sum of One ($1.00) Dollar and no more, in lieu of any other share or interest in my said estate * * *."

On April 17, 1936, the testatrix married Ben Wilence, petitioner herein. Diane Wilence died November 3, 1941. Thereafter her will was duly admitted to probate, and after the time for presenting claims had elapsed petitioner filed a Petition to Determine Heirship in which he alleged that respondents were the heirs named by decedent in her will executed December 9, 1935; that said will was revoked by his marriage to decedent after the will had been executed, and that as a result he was entitled to one-half of decedent's estate. The petition then prayed that the probate court determine who were entitled to the estate of the decedent.

The court made findings against petitioner's claim and found that the persons named in the will of the testatrix were the heirs of decedent and that as a result petitioner was not entitled to one-half of decedent's estate.

Respondents did not file any pleading in response to the petition.

It is necessary for us to determine two questions which will be stated and answered hereunder seriatim.

[1] *First: Was an issue created in the trial court in view of the fact that respondents did not file any pleading in response to petitioner's Petition to Determine Heirship?*

This question must be answered in the affirmative. Allegations in a petition to determine heirship are deemed to be denied. (Section 1080 of the Probate Code.) Under the foregoing rule it is evident that, since the allegations of the Petition to Determine Heirship filed by petitioner were deemed denied, issues of fact were created for the determination of the trial court.

[2] *Second: Was there substantial evidence to sustain the trial court's findings of fact?*

This question must likewise be answered in the affirmative. The law is established in California that where the appeal is on the judgment roll alone the findings of fact will be *conclusively* presumed to be supported by the evidence. (Estate of Mautner, 38 Cal.App.2d 521, 522, 101 P.2d 520; Estate of Woods, 23 Cal.App.2d 187, 191, 72 P.2d 258.)

Therefore applying the foregoing rule to the facts of the instant case, since the appeal is on the judgment roll alone, the findings of fact are conclusively presumed to be supported by evidence, and as no error appears on the face of the judgment roll the order must be affirmed.

The order appealed from is affirmed.

MOORE, P. J., concurs.

WOOD, Justice (dissenting).

I dissent. In his brief appellant makes the positive statement that no evidence was offered or received at the hearing in the trial court. Respondents do not deny this statement but impliedly admit that no evidence was presented. There was no issue of fact to be decided and there was no occasion for the making of findings by the trial court. Waller v. Weston, 125 Cal. 201, 57 P. 892. Although the document which the court filed under the heading, Findings of Fact, contains the direct statement that appellant was married to the executrix subsequent to the execution of the will, it also contains statements which under the circumstances are erroneous conclusions of law, especially the statement that appellant "was one of the class of persons included within the meaning of the word 'heirs' as used in Section Six of said will".

The intent of the testatrix must be determined as of the date of the execution of the will. Estate of Carter, 49 Cal.App.2d 251, 254, 121 P.2d 540. On that date appellant was not the husband of the testatrix and did not become her husband until more than four months later. Section 70 of the Probate Code provides: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." In my opinion the testatrix by inserting the sixth provision in her will was merely adopting the means in common use of preventing a contest of the will or of its provisions. She was not providing for her future husband in the will or mentioning him in such way as to show an intention not to make such a provision. See Estate of Rozen-Goldberg, 1 Cal.App.2d 631, 37 P.2d 132. No claim is made that there was a marriage contract. In my opinion the will was revoked as to appellant by the marriage of the executrix to him after the making of the will.

TAKASHI KATAOKA et al. v. MAY DEPARTMENT STORES CO. et al.

Civ. 13822.

District Court of Appeal, Second District, Division 3, California.

June 19, 1943.

Rehearing Granted July 9, 1943.

Subsequent Opinion Aug. 9, 1943.

See 140 P.2d 467.

1. Trial 🔑**178**

In passing on motion for directed verdict, trial court has no power to weigh evidence, but must view it in light most favorable to party against whom direction is asked and accept every legitimate inference and presumption therefrom in his favor.

2. Trial 🔑**142**

A motion for directed verdict can be granted only when consideration of evidence in light most favorable to party against whom direction is asked, with every legitimate inference and presumption therefrom in his favor, results in determination that there is no evidence of sufficient substantiality to support verdict for such party.

3. Carriers 🔑**238**
Negligence 🔑**32(4)**

A four year old boy, whose mother went with him to infants' wear department of store to exchange suit bought therein for another of her children, was not a "passenger" at time of catching his hand in store escalator while mother was talking to department manager, but a "business invitee", to whom store owner owed duty to use only ordinary care to keep premises reasonably safe, not highest degree of care.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitee" and "Passenger".

4. Negligence 🔑7, 85(2)

A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and reasonable man is presumed to know such fact and required to govern his actions accordingly.

5. Evidence 🔑14

It is matter of common experience that children of tender years are guided in their actions by childish instincts and lacking in discretion ordinarily sufficient to enable persons of more mature years to appreciate and avoid danger.

6. Negligence 🔑23(1)

It is "negligence" to leave unguarded and exposed to little children's observation dangerous and attractive machinery, which they would naturally be tempted to go about or upon and against danger of which action their immature judgment interposes no warning or defense.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

7. Negligence 🔑23(1)

A person inviting children on his premises is subject to standard of care required to be exercised by landowners toward infant trespassers in turn-table or "attractive nuisance" cases.

See Words and Phrases, Permanent Edition, for all other definitions of "Attractive Nuisance".

8. Negligence 🔑23(1)

The rule of turn-table or "attractive nuisance" cases as to care required of landowners for safety of infant trespassers applies to department store owner as respects danger of small child catching fingers in store escalator, though such apparatus cannot be constructed without sufficient space between its moving parts to receive such a child's fingers and such rule does not apply unless danger can be easily guarded against without impairing usefulness of instrumentality, as protection against such danger may be effected by stationing guards at places of danger.

9. Negligence 🔑136(16, 19, 24)

In action against department store owner for injuries to four year old boy catching his hand in store escalator, whether escalator was object naturally attractive to children, whether defendant, in exercise of ordinary care, should have known such fact and anticipated such an accident, and whether ordinary care required placing of guard at escalator, were fact questions for jury under evidence.

10. Negligence 🔑23(1)

The floor manager of store department, wherein customer's four year old boy was injured as result of catching his hand in escalator, regarding which such manager had no responsibility except to stop and start it in case of accident, was not liable to boy for damages under "attractive nuisance" doctrine.

11. Negligence 🔑8

A store department manager, reversing escalator in order to release customer's infant child's hand from comb plate, instead of calling mechanics to remove plate, which would have required 15 or 20 minutes, was not guilty of "negligence" rendering him liable to child for loss of parts of his fingers, even if such reversal aggravated child's injuries.

12. Negligence 🔑121(3)

In action against department store owner and department manager for injuries to customer's child catching his hand in store escalator, "res ipsa loquitur" doctrine was inapplicable as against either defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur Doctrine".

13. Negligence 🔑121(2)

A fundamental element of "res ipsa loquitur" doctrine is that thing causing injury sued for be under defendant's management and control.

14. Negligence 🔑121(2)

The reason for "res ipsa loquitur" rule is that injured person is ordinarily in no position to know more than that he was injured by some unusual movement of instrumentality, whereas one operating it should know and be able to explain precise cause of accident.

15. Negligence 🔑121(2)

Where evidence affirmatively shows that operator or manager of instrumentality, by means of which injuries are inflicted on another, has no superior knowledge of, or is unable by exercise of reasonable care to secure information regarding, cause of accident, or establishes fact that injured person has all such knowledge or information reasonably accessible to operator, "res ipsa loquitur" doctrine is inapplicable.

16. Negligence 🔑121(2)

When cause of injury sued for is established by either party to action, "res ipsa loquitur" doctrine is inapplicable.

17. Negligence 🔑89(2)

A wife's negligence in caring for spouses' children is imputable to husband and a defense to his action in behalf of community to recover damages for children's injuries to which such negligence contributed.

18. Negligence 🔑136(30)

In action against department store owner for injuries to minor child catching his hand in store escalator, whether plaintiff's mother, who took plaintiff to store, was guilty of contributory negligence in failing to keep proper watch over plaintiff and prevent accident *held* for jury under evidence.

19. Negligence 🔑89(2)

An action by husband to recover amount paid by him from his separate property for medical, hospital and nursing treatment of his minor son for injuries sustained as result of defendant's negligence should not be regarded as brought in behalf of community of plaintiff and his wife, so that her contributory negligence in failing to keep proper watch over child is no defense to such action.

20. Appeal and error 🔑148

One who is not a party to record in action may not appeal from judgment rendered, but person against whom judgment is entered, though not a party to action, becomes sufficiently a party to record to entitle him to appeal.

21. Judgment 🔑243

A judgment against one who is not party to action in which it is rendered is erroneous.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Takashi Kataoka, by his guardian ad litem, and Tsutomu Kataoka against the May Department Stores Company and Jerry Goddard for personal injuries to first named plaintiff and medical, hospital and nursing expenses incurred by last named plaintiff. Judgment for defendants, and plaintiffs and Toki Kataoka appeal.

Affirmed as to defendant Goddard against plaintiffs, reversed and remanded for a new trial as to defendant company, and reversed as to appellant Toki Kataoka.

Albert E. Coger, of Los Angeles, for appellants.

Schell & Delamer, of Los Angeles, for respondents.

SHAW, Justice pro tem.

This action is brought to recover damages for personal injuries suffered by plaintiff, Takashi Kataoka, who was, when he was injured, a boy four years of age. The first three counts of the complaint set forth, in varying forms, his cause of action to recover damages for his own injuries. In a fourth count, plaintiff Tsutomu Kataoka, who is the father of the other plaintiff, seeks recovery of liabilities he has incurred for medical, hospital and nursing treatment for his son. In the following opinion the word "plaintiff" will be used to designate the plaintiff Takashi Kataoka, unless otherwise indicated. Both plaintiffs appeal from a judgment against them entered after a directed verdict in favor of defendants.

The defendant corporation conducts a large department store in the city of Los Angeles. At the time plaintiff was injured this store had, upon its third floor, a department selling infants' and children's wear, for babies and for children between the ages of two and six. Plaintiff's mother went to this department to exchange a suit bought for another of her children, taking plaintiff with her. While she waited for and talked to the manager of this department (defendant Goddard) the plaintiff was walking around at a distance of about 15 feet from her. In the store were a series of escalators for carrying the public from floor to floor, and the place where plaintiff was walking around on the third floor was quite near to the lower end of the escalator coming down from the fourth floor to the third floor. When plaintiff's mother started to talk to defendant Goddard she called plaintiff to come to her. He was then two or three feet from the escalator and she saw him come two or three feet toward her. After that she talked to Goddard two or three minutes without observing plaintiff. At the end of that time she heard plaintiff cry and she and Goddard rushed to him and found his right hand caught in the escalator.

This escalator had at its lower end, fastened to the floor where the moving steps disappeared under the floor, a device designated as a "comb plate," the purpose of which was, if some passenger did not lift his feet up, to slide them gradually up on the plate. This comb plate had forty or fifty teeth 3½ inches long and 9/16 inch apart, which were sloped up slightly and so were somewhat thicker where they joined the comb plate than at their tips. Between the comb plate and the steps as they passed under it there was a space about 1/4 inch deep. There was no guard or attendant stationed at this or any of the escalators at the time of the accident, although on busy days it was the custom to have such an attendant.

Plaintiff's hand was caught in the space between the comb plate and the steps passing under it. Goddard stopped the escalator, took hold of plaintiff's wrist and tried to pull his hand out, but was unable to do so. Then he got a key which was kept nearby and reversed the escalator. When it started going in the opposite direction plaintiff's hand at once came out. Two fingers were mangled, crushed and cut off, so that now only short stumps are left and the back of his hand was "torn and blistered like," as his mother put it.

No witness saw plaintiff just before his hand was caught and hence there is no direct testimony disclosing how it happened. The theory of plaintiff's counsel is that plaintiff was attracted to the escalator by its bright appearance and moving steps, went to it and in childish curiosity reached out his hand to investigate the steps and thus got caught. Confirmatory of this theory, there is testimony by plaintiff's mother that "he was very active and he was very much interested in everything, like a boy. He was always breaking it up and trying to look into the inside, and things like that * * * he was very anxious to know everything that was around him." There is also testimony that the sidewalls of the escalator were of steel or chrome and the steps of steel. It had been installed only ten months to a year before the accident, so each of these metals was probably bright at that time. A moving device like an escalator would attract the attention of most children of plaintiff's age, but especially that of one with such an active curiosity as that shown by his mother's description of plaintiff. Defendants suggest other possible causes for the plaintiff's mishap, but we think the jury would have been warranted by the evidence in accepting that advanced in plaintiff's behalf.

[1, 2] The question here for decision is whether, on the foregoing facts, and a few others which we shall mention as they become pertinent to our discussion, the court should have directed a verdict for defendants. The power of the court in passing upon such a motion is strictly limited. It has no power to weigh the evidence, but must view it in the light most favorable to the party against whom the direction is asked and accept every inference and presumption in his favor that may legitimately be drawn therefrom, and the motion can be granted only when, on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given. Gish v. Los Angeles Ry. Corp., 1939, 13 Cal.2d 570, 573, 90 P.2d 792; Newson v. Hawley, 1928, 205 Cal. 188, 190, 270 P. 364; Wiswell v. Shinners, 1941, 47 Cal.App.2d 156, 159, 163, 117 P.2d 677; Barty v. Collins, 1930, 109 Cal.App. 94, 96, 292 P. 979.

[3-6] In answering the question above put as to the propriety of the directed verdict, we deal with the defendants separately, reaching different answers for each of them. We take up first the case of the defendant corporation. Plaintiff contends that it was required to exercise the highest degree of care toward him, likening the escalator to an elevator and citing cases where operators of elevators and escalators were held to the exercise of such care toward their passengers. But while the rule of care which plaintiff invokes may bind carriers of passengers, in proper cases,

both before and after the actual carriage, it does not extend to cases where the relation of carrier and passenger does not exist. Plaintiff here was not using the escalator as a means of transportation when he was injured, he had not previously done so and there is nothing to indicate that he or his mother intended to use it thereafter. The business which his mother was then transacting, and the activities of plaintiff himself, bore no relation to the matter of transportation. Plaintiff cannot be regarded as a passenger. He was, at the time in question, simply a business invitee of defendant corporation, and to him it owed the duty which exists in all such cases, that is, to use ordinary care to keep the premises reasonably safe for those so invited to go upon them. Koppelman v. Ambassador Hotel Co., 1939, 35 Cal.App.2d 537, 540, 96 P.2d 196; Tuttle v. Crawford, 1936, 8 Cal.2d 126, 130, 63 P.2d 1128. The place where the accident happened was the infants' and children's wear department of a large store, and while there is no evidence of the number of children visiting that department, it is clear that they were among those invited to go there and that the defendant storekeeper should have expected their presence and acted accordingly. The children so invited were of such an age, not over six, that ordinarily they could not appreciate the danger of putting their fingers in or around moving machinery, but would be attracted by such machinery, especially if it were bright, and would be likely to investigate with their fingers anything to which they were attracted. As the court said in Barrett v. Southern Pacific Co., 1891, 91 Cal. 296, 302, 27 P. 666, 667, 25 Am.St.Rep. 186: "In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and, in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense." This case was approved in Cahill v. E. B. & A. L. Stone & Co., 1908, 153 Cal. 571, 574, 96 P. 84, 19 L.R.A.,N.S., 1094, and Pierce v. United Gas & Elec. Co., 1911, 161 Cal. 176, 181, 118 P. 700.

[7] The Barrett case, just cited, was one of the "turn-table" or "attractive nuisance" cases and the other two were similar in nature. The doctrine of those cases was declared, in the first place, as an exception to the rule that a landowner has no duty towards trespassers except to abstain from wilful or wanton injury. There has been much discussion in the briefs herein, whether the instant case is to be classified with them. Literally, it differs from them because plaintiff here was not a trespasser, but an invitee. But they set up a standard of care which is even more applicable in case of an invitee than in case of a trespasser, and we think a person who invites children upon his premises is subject to it.

This matter has been considered in several cases from other jurisdictions, in which not only were escalators in stores involved, but the facts were that small children had gotten their fingers caught in them, and it has been held that the proprietors of the stores might be held liable for negligence in not anticipating and guarding against such accidents, and that the question whether their failure in that respect did constitute negligence was one of fact for the jury. Hillerbrand v. May Mercantile Co., 1909, 141 Mo.App. 122, 121 S.W. 326, 328; Graves v. May Dept. Stores Co., Mo.App.1941, 153 S.W.2d 778, 783; Jablonski v. May Dept. Stores Co., Mo.App.1941, 153 S.W.2d 786; Reynolds v. May Dept. Stores Co., 8 Cir., April 8, 1942, 127 F.2d 396. In Hillerbrand v. May Mercantile Co., supra [141 Mo.App. 122, 121 S.W. 328], the court said: "Proprietors of premises who invite children on them must use care to keep them reasonably safe, not omitting precautions against injury from childish impulses. * * * This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them—an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends on the degree of danger to be apprehended. [Citing cases.] Because children are more heedless and have less discretion and capacity to avoid danger than adults, more care must be exercised by others for their safety." Part of this language was quoted with approval in Graves v. May Dept. Stores Co., supra [153 S.W.2d 783], where the court further said: "We think that the evidence in the case at bar was sufficient to warrant the jury in saying that the moving escalator was such an instrumentality as was likely to attract a small child's curiosity and likely to cause it to put its hand upon the moving step at the point where the opening was located, and justified a finding that it presented a condition of such a dangerous nature to children of tender age that a reasonably prudent person, exercising ordinary care, would have anticipated such danger to a child and guarded against it." The evidence there was not substantially different from that here, except that the injured child there was only 2½ years old. It was also held, we think correctly, in Hillerbrand v. May Mercantile Co., supra, and Graves v. May Dept. Stores Co., supra, that the fact that there was no evidence of previous similar accidents did not prevent the finding of negligence, the statement being made in the Hillerbrand case and repeated in the Graves case that "* * * the jury might say from their knowledge of the instincts of childhood that the construction and movement of the machinery was likely to excite a small child's curiosity, and allure it into thrusting its hand into the box * * *."

[8] Defendant insists that the rule of the turntable or attractive nuisance cases cannot be applied here because it is impossible to construct such an apparatus as an escalator without space between its moving parts, that any practicable space would be sufficient to receive the fingers of a small child, and that the rule does not apply unless the danger can be easily guarded against without impairing the usefulness of the instrumentality. The rule is qualified as thus contended. Morse v. Douglas, 1930, 107 Cal.App. 196, 201, 290 P. 465; Polk v. Laurel Hill Cemetery Ass'n, 1918, 37 Cal.App. 624, 629, 174 P. 414; Loftus v. Dehail, 1901, 133 Cal. 214, 217, 65 P. 379. But this qualification of the rule does not necessarily mean that the guard against danger must be wrought into the instrumentality. In this case the same result could have been accomplished by stationing guards at the places of danger, as was done when visitors were more numerous.

[9] We do not intend, by what we have just said, to declare that negligence of defendant corporation here was established as a matter of law, or that a verdict for it would have been without support in the evidence. But upon the evidence questions of fact arose for the jury, which should have been allowed to determine whether the escalator was of the class of objects naturally attractive to children, whether defendant corporation should in the exercise of ordinary care have known that it was of that class and anticipated accidents such as that which happened to plaintiff, and if so, whether ordinary care required the stationing of guards at the escalator to prevent such accidents. Upon these issues findings in favor of plaintiff would have been supported and would have required judgment in his favor against the defendant corporation. Another question, in a proper case, might be, whether defendant should have covered or protected the opening into which plaintiff's fingers were thrust; but there was here no evidence to show that this was possible or practicable and so no verdict for plaintiff could be based on that theory.

[10] The foregoing conclusions do not apply to defendant Goddard. He did not install or maintain the escalator and was not in charge of its operation. He was merely the floor manager in charge of the department of the store where plaintiff was injured. He had been instructed how to stop and start the escalator, in case accidents should happen, but is not shown to have had any other responsibility regarding it. He cannot be held liable to plaintiff on any of the grounds above suggested. Plaintiff contends, however, that other grounds of liability exist as to him, growing out of his conduct after the accident happened.

[11] This contention is based on the testimony of plaintiff's mother that plaintiff was kneeling down facing toward the escalator with his hand caught in it, that when Goddard came up he stopped the escalator, took hold of plaintiff's wrist and tried for "about two minutes * * * a little while" to extract the hand, that failing in this effort, Goddard reversed the

escalator and "then Takashi's finger came out with the blood shooting out," that before the escalator was reversed there was no blood visible on plaintiff's hand, and the blood appeared "just when the escalator was reversed." From this plaintiff seeks to draw the conclusions that the reversal of the escalator was the cause of the loss of parts of his fingers and that Goddard was negligent in reversing the escalator instead of calling mechanics, who were somewhere about the building, to remove the comb plate, an operation which would take 15 or 20 minutes after the mechanics arrived. In addition to the facts thus relied on by plaintiff, the mother's testimony also shows that the back of plaintiff's hand was injured "quite a bit * * * torn and blistered like." These facts do not justify the inference suggested by plaintiff. From the fact that the back of the hand received the injuries above stated—injuries which were impossible unless the back of the hand were drawn in between comb plate and step—it is clear that the fingers were not visible when plaintiff's mother looked at the hand before the escalator was reversed. Hence her failure to see blood affords no basis for an inference that the fingers were not then bleeding. It is easy to understand how the forward movement of the steps pulling on the fingers when the hand was caught in the escalator might inflict the injuries suffered by the fingers; but it is not so clear how the backward movement of the steps, freeing the fingers from detention, could have produced that result. We have no information regarding the internal construction of the escalator to aid us in reaching the conclusion that it did so. Any such conclusion must be based on pure conjecture, which is not a basis on which a verdict may be founded.

Moreover, Goddard knew that it would take 15 or 20 minutes to remove the comb plate and thus free plaintiff's hand, after the mechanics arrived, in addition to the time necessary to get them there. He had discovered that the hand could not be released by such efforts as he could make with the escalator stopped. Plaintiff was already crying with the pain of his injuries. Goddard's conclusion that a reversal of the escalator would at once free the hand was a reasonable one, under the circumstances, and was proved correct by the event. It is not shown that anything apparent to him should have caused him to know, or even to suspect, that reversal of the escalator would result in the cutting off of plaintiff's fingers or otherwise increase the injuries he had obviously suffered already. If Goddard decided, as apparently he did, that it was better to free plaintiff's hand at once than to keep him in a strained and necessarily painful position for a period of time which might considerably exceed 15 or 20 minutes, we see no reasonable ground on which a jury could have found that his conduct in that respect was negligent, even if we assume that, in fact, the reversal of the escalator did aggravate plaintiff's injuries.

[12-16] Plaintiff also contends that the doctrine of res ipsa loquitur is applicable here and that under it an inference of negligence on the part of both defendants may be supported without anything more than appears in the record. That doctrine is clearly not applicable in support of plaintiff's case against defendant Goddard. One of its fundamental elements is that the thing causing the injury be under the management and control of the defendant. 19 Cal.Jur. 704, 708. No such condition existed as to him. The doctrine is likewise not applicable to defendant corporation, but for other reasons. "The reason for the rule is that ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident." 19 Cal. Jur. 705–707; Alexander v. Wong Yick, 1938, 25 Cal.App.2d 265, 269, 77 P.2d 476. "The converse of this rule is likewise true. If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application." Johnson v. Ostrom, 1932, 128 Cal.App. 38, 43, 16 P.2d 794, 795; Alexander v. Wong Yick, supra, and cases therein cited; Jorgensen v. East Bay Transit Co., 1941, 46 Cal.App. 2d 189, 193, 115 P.2d 556. "* * * When the cause is established by either party to the action the doctrine is not then applicable." Manuel v. Pac. Gas & Elec. Co., 1933, 134 Cal.App. 512, 517, 25 P.2d 509,

511. Here the evidence clearly establishes the immediate cause of the plaintiff's accident. It resulted from the facts that the escalator was in operation and that it was so constructed that there was an opening in which plaintiff's fingers could get caught. It did not result from any abnormality in the operation of the escalator, such as the sudden jars or jolts which the operators of moving vehicles have been required, under this doctrine, to explain. Whether defendant corporation was to be held liable for the injuries thus caused depended on the consideration of matters which were as open to investigation by one party as by the other. Defendant could be held liable in this case, as we have held, for failure to station guards to keep watch over the escalators. But this conclusion of liability does not depend on the res ipsa loquitur rule. Since we hold that an inference of negligence was otherwise possible this point is perhaps not of great importance; but we determine it for the purpose of a new trial, to guide the trial court in its instructions to the jury, or its own consideration of the case if there is no jury.

[17-19] Defendant contends that plaintiff's mother was guilty of contributory negligence in failing to keep proper watch over plaintiff and to prevent him from getting caught in the escalator. As defendant concedes, such negligence would not bar plaintiff Takashi's action for his own injuries (Zarzana v. Neve Drug Co., 1919, 180 Cal. 32, 37, 179 P. 203, 15 A.L.R. 401), and it was not pleaded as a defense thereto; but defendant argues that any recovery by plaintiff Tsutomu would be community property of himself and his wife, the mother of the other plaintiff, and hence her contributory negligence would constitute a defense to Tsutomu's action. It is true that negligence of the wife, if any, in caring for the children of herself and her husband is imputable to the husband and is a defense to any action brought by him in behalf of the community to recover for injuries to the children to which such negligence contributed. Dull v. Atchison, T. & S. F. Ry. Co., 1938, 27 Cal.App.2d 473, 479, 81 P.2d 158. But from the evidence it appears that the wife took some precautions by way of watching over and caring for the son, and we cannot say, as a matter of law, that they were not sufficient. The question was one for the jury. See Healy v. Market St. Ry. Co., 1940, 41 Cal.App.2d 733, 738, 107 P.2d 488; Carrisosa v. Southern Service Co., 1932, 128 Cal.App. 160, 163–165, 16 P.2d 1032. The parties appear to assume that this action is, so far as plaintiff Tsutomu is concerned, one brought in behalf of the community. Nothing in the record indicates otherwise; but, if plaintiff Tsutomu had actually paid the bills for treatment, for which, only, he sues, from his separate property, we see no reason why his action should be regarded as one brought in behalf of the community.

[20, 21] The notice of appeal names Toki Kataoka, who is the mother of plaintiff Takashi, as an appellant. She was not made a plaintiff by the complaint and it stated no cause of action in her favor, no relief was sought against her by the answers, and although we have what purport to be complete clerk's and reporter's transcripts, no amendment of the complaint or other proceedings appear therein by which she was made a party to the action. Nevertheless, in the caption of both verdict and judgment she is named as a plaintiff and the judgment for defendants' costs runs against her by name. One who is not a party to the record may not appeal (2 Cal.Jur. 209); but when the court reaches out and enters judgment against one not theretofore a party to an action, we think such person becomes sufficiently a party to the record to entitle him to appeal. It also seems plain that a judgment against one who is not a party to the action in which it is rendered is erroneous.

The judgment in favor of defendant Goddard is affirmed in so far as it runs against plaintiffs Takashi Kataoka and Tsutomu Kataoka. The judgment in favor of defendant May Department Stores Company is reversed and the cause is remanded for a new trial as to that defendant. The judgment against Toki Kataoka is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

JOHNSON v. JOHNSON.

Civ. 12406.

District Court of Appeal, First District, Division 1, California.

June 26, 1943.

Rehearing Denied July 26, 1943.

Hearing Denied Aug. 23, 1943.

1. Automobiles ⚷244(36, 37, 58)

In action for injuries arising out of head-on automobile collision, resulting when defendant, while driving at excessive speed and under influence of liquor, lost control of his automobile as he came over crest of hill and allowed automobile to cross onto wrong side of highway, evidence sustained finding that defendant's negligence was "proximate cause" of collision, and finding that plaintiff's act in passing another automobile before reaching hill did not contribute to accident and supported verdict for plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Trial ⚷260(8)

Where court adequately instructed on effect of contributory negligence, court did not err in denying additional requested instruction that negligence of plaintiff, however slight, bars a recovery if it proximately contributed to accident.

3. Trial ⚷260(8)

Where court fully instructed on doctrine of imminent peril, requested instruction that, if defendant was free from negligence up to moment when collision was apparent and he then quickly applied brakes in attempt to stop and avoid automobile collision, the sudden application of brakes was not negligence, was properly denied as repetitious.

4. Army and navy ⚷34

Motion for continuance until after war supported by affidavits of defendant's attorney and another alleging on information and belief that defendant was in Navy, in absence of any showing that defendant would not be available until after the war, was properly denied. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

5. Army and navy ⚷34

Where it appeared that defendant was in Navy and would be on duty in another city on trial date but his commander would give him time off for purpose of taking deposition, that insurance company was undertaking defense, and that plaintiff was in hospital and was testifying by deposition, denial of defendant's motions for a continuance and for a stay was proper. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 201, 204, 50 U.S.C.A.Appendix, §§ 521, 524.

6. Army and navy ⚷34

The Soldiers' and Sailors' Civil Relief Act does not grant an absolute right to a stay whenever it is made to appear that one of the parties is in military service. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

7. Army and navy ⚷34

Purpose of Soldiers' and Sailors' Civil Relief Act is to relieve those in military services from strain of litigation where fact of their service would adversely affect their prosecution or defense of a pending case. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A. Appendix, § 501 et seq.

8. Army and navy ⚷34

Provision of Soldiers' and Sailors' Civil Relief Act pertaining to stay of civil proceedings is intended solely for benefit of those in military service, and is inapplicable unless rights of one in service will or might be prejudiced in which event court is required to protect his interests. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

9. Army and navy ⚷34

In determining whether a personal injury action should be stayed under Soldiers' and Sailors' Civil Relief Act because defendant is in military service, fact that defendant is insured is a factor to be considered by trial court in exercise of its discretion. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

10. Army and navy ⚷34

Soldiers' and Sailors' Civil Relief Act discloses congressional intent to vest in trial court wide discretion on motions for a stay to consider rights of civilian litigant and serviceman and to grant stay if it appears that serviceman's rights are adversely affected by his service. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

11. Army and navy ⚷34

Normally, a litigant in military service is entitled to be present at trial in order to defend or prosecute his action adequately. Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix, § 501 et seq.

12. Army and navy ⚷34

Where sailor, in personal injury action arising out of automobile collision, was ably represented by insurance company attorneys and prior to trial was available for consultation with attorneys and testified by deposition and there was no showing except by sailor's unsupported assertion that he was unavailable for trial, trial court was justified in denying a stay under Soldiers' and Sailors' Civil Relief Act, notwithstanding that sailor's reputation for sobriety was involved and that he had made conflicting statements as to the details of the automobile accident. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

13. Army and navy ⚷34

Congress did not intend that Soldiers' and Sailors' Civil Relief Act should be used by an insurance company as a means of defeating a cause of action in cases where no material benefit would be received by serviceman by delay. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

14. Army and navy ⚷34

Under Insurance Code provision authorizing a judgment creditor of insured to sue insurance company on judgment, that judgment for injuries sustained in automobile collision was against insured personally and not against insurance company did not authorize insurance company to take advantage of provisions of Soldiers' and Sailors' Civil Relief Act to obtain a stay because insured was in military service. St.1935, p. 716, § 11580; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

15. Army and navy ⚷34

Fact that complaint against insured sailor, in action defended by insurance company, asked for more than amount of policy, did not require granting of stay under Soldiers' and Sailors' Civil Relief Act to protect sailor's interests, since trial court had power to award new trial if verdict were for an amount greater than amount of policy. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

16. Army and navy ⚷34

On application for stay of personal injury action against serviceman, fact that serviceman is insured does not compel denial of application but existence of insurance is factor to be considered, so that, where it appears that insurer is attempting to use Soldiers' and Sailors' Civil Relief Act to postpone or defeat liability without material benefit to serviceman, trial court may properly refuse a stay. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

17. Army and navy ⚷34

The showing that one in military service is required to make under Soldiers' and Sailors' Civil Relief Act for a stay or limited continuance is much less than is required from a litigant requesting a limited continuance independently of the act, hence a showing insufficient to require a stay under the act is also insufficient independent of the act. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

18. Appeal and error ⚷966(1)
Continuance ⚷7

An application for a continuance is addressed to sound discretion of trial court, and an abuse of discretion must be shown to justify a reversal of its decision.

19. Continuance ⚷12

The inability of a party to attend on the court does not ipso facto require granting of an application for a continuance particularly, where showing justifies conclusion that injustice will be as likely to follow from granting of continuance as from its refusal.

WARD, J., dissenting.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Guy Johnson against Allan Johnson to recover for injuries sustained in an automobile collision. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco, and Mannon & Brazier, of Ukiah (A. Dal. Thomson, of San Francisco, of counsel), for appellant.

Burke & Rawles, of Ukiah, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment based on a jury verdict awarding plaintiff $3,000 general damages and $600 special damages, as compensation for injuries received by plaintiff when his car collided with that of defendant. The parties are not related although both possess the same last name.

The accident occurred at about 1:30 a. m. on the morning of October 26, 1941. Plaintiff was driving his car north, and defendant was driving his car south on a state highway south of Fort Bragg. The accident happened on the east side of the highway—in other words, defendant was on the wrong side of the highway at the point of impact. The evidence amply supports the inference that defendant's car was traveling at a high rate of speed. The force of the impact tore the motor from defendant's car and caused it to be thrown a distance of fifty-eight feet. Defendant's car traveled some sixty-seven feet after the collision. Defendant admitted in his deposition that he had had five glasses of beer and four whiskey highballs preceding the accident, and testified that he could not remember anything that happened immediately before, at, or after the accident. In a signed statement given to a deputy district attorney the day after the accident he admitted having more drinks before the accident than he later testified to in his deposition.

[1] Defendant concedes that the evidence supports the implied finding of the jury that he was guilty of negligence proximately contributing to the accident, but urges that, as a matter of law, plaintiff was guilty of contributory negligence. This contention is based on the following facts: South of the point of collision was a sharp turn in the highway. North of the place of impact was the crest of a hill. Between the turn and the crest of the hill was a straightaway of over 500 feet. According to the evidence plaintiff had been following closely behind one Snyder who was driving a Ford. Plaintiff followed Snyder around the sharp turn above mentioned and, on reaching the straightaway passed him. The collision took place immediately after plaintiff had passed the Ford and after he had cut back to and had reached his side of the highway. Defendant's theory is that on coming over the crest of the hill he was suddenly confronted with the headlights of two cars; that, confronted with this emergency, he applied the brakes and skidded over onto the wrong side of the highway; that plaintiff was negligent in thus passing the Snyder car so close to the crest of the hill; and that such contributory negligence, as a matter of law, proximately contributed to the accident. There is no merit to this contention. Even if it be assumed that the jury could have found that plaintiff was guilty of contributory negligence, the evidence does not compel that conclusion, nor does it compel the conclusion that the negligence, if any, of plaintiff proximately contributed to the accident. The evidence amply supports the inferences that as defendant came over the crest of the hill at a high rate of speed he lost control of his car; that this was due to the liquor he had consumed; and that the plaintiff's act in passing the Ford had nothing to do with the accident. Under such circumstances the jury's findings cannot be disturbed by an appellate court.

[2] Defendant also contends that the trial court was guilty of prejudicial error in failing to give two instructions requested by him. The first of these was on the doctrine of contributory negligence, and stated that the negligence of plaintiff "however slight" bars a recovery if it proximately contributed to the accident. The court did instruct that if plaintiff was "negligent in any particular at the time and place and under the circumstances" and such negligence proximately contributed to the accident, he could not recover. The instruction given adequately covered the field of the requested instruction. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 108 P.2d 738.

[3] The second refused instruction was to the general effect that if defendant was free from negligence up to the moment when a collision was apparent, and he then quickly applied his brakes in an attempt to stop and avoid the collision, the sudden application of the brakes was not negligence. The court fully and fairly instructed on the doctrine of imminent peril. It was not error to refuse to give this repetitious instruction.

The main point urged on this appeal is that the trial court abused its discretion in refusing to grant a stay or continuance of the trial because of defendant's inability to attend by reason of his enlistment in the United States Navy. On this issue the evidence shows the following:

On December 12, 1941, the court set the cause for trial on January 26, 1942. On December 18, 1941, the deposition of the defendant was taken. On January 16, 23 and 26, 1942, motions were made on behalf of defendant requesting that the trial be stayed until after the end of the war. The original motion of January 16th was also for a limited continuance of the trial, with no specific time requested and with no showing made as to whether defendant would be available short of the end of the war. The original motion was supported by the affidavits of one of defendant's attorneys and of defendant's mother. On information and belief they averred that defendant had enlisted in the Navy. At the hearing of this motion evidence was taken. It was then disclosed that defendant's deposition had been taken on December 18, 1941, and that plaintiff's deposition had been taken on January 14, 1942. Plaintiff's attorney also disclosed in detail what he expected to prove at the trial. He stated that he intended to offer the signed statement of the defendant given to the deputy district attorney in which defendant admitted that he had been drinking, and also intended to offer the deposition of the defendant. An examination of this deposition shows that at that time defendant was fully interrogated by plaintiff's and his own counsel concerning this statement, and that he pointed out in detail where he thought the statement was in error.

[4] It was also disclosed at the hearing on the 16th that defendant was insured against liability for accidents growing out of the use and operation of his motor vehicle, and that the insurance company had undertaken the defense of the action. At this time plaintiff's counsel offered to stipulate, if counsel for defendant would state the substance of defendant's testimony, that defendant would so testify if called. The trial court denied the motion for a stay based upon the sole ground of military service on the ground that there was no proper showing that defendant was in fact in military service, and no evidence to establish that he would be unable to attend the trial. In view of the insufficient factual recitations in the affidavits then before the court, this ruling was correct, and no serious objection is made thereto. The motion for a limited continuance was not then passed upon.

On January 23, 1942, defendant's formal motion for a stay until the termination of the war based upon defendant's military service came on for hearing. The motion for a limited continuance was not renewed at this hearing. In addition to the prior affidavits, another of defendant's counsel submitted an affidavit in which it is averred that on January 21, 1942, the affiant interviewed the defendant in San Francisco; that defendant was then on guard duty on the San Francisco waterfront; that affiant also interviewed Commander Cochran who informed affiant that it would be impossible to relieve defendant from guard duty on January 26th. There was also introduced the affidavit of defendant. In this affidavit it is averred that affiant enlisted in the Navy on January 10, 1942; that he is stationed in San Francisco; and "that by reason of the foregoing, it will be impossible for him to attend the trial of the above entitled case, and he prays that the above entitled matter may be continued until such time as he is released from the Navy." Counsel for plaintiff introduced testimony that Commander Cochran had not refused to permit defendant to be produced as a witness but had suggested defendant's deposition be taken, for which he would consent to defendant taking time off; that defendant was normally off duty twelve hours at a time. The court denied the motion because, in its opinion, defendant's representation by the insurance company was adequate to protect his rights, and because "there is no showing here that he cannot attend."

On January 26, 1942, defendant's counsel moved again for a continuance and a stay upon the prior record. At this time it developed that plaintiff was still confined to the hospital as a result of the injuries received in the accident and would be unable to appear, and would testify through the medium of his deposition. The court denied both motions.

On this record appellant contends that the trial court, as a matter of law, was compelled to grant defendant's motions for a stay until after the termination of the war under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq., and that, in any event, either under that act or independently thereof, the trial court abused its discretion in refusing at least a limited continuance because of defendant's inability to be present on January 26, 1942.

These contentions will be considered in order.

The particular section of the Soldiers' and Sailors' Civil Relief Act of 1940 upon which defendant relies is § 521, 50 U.S.C.A. Appendix, § 521. It reads as follows: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." Under § 524 of the act the court may grant the stay "for the period of military service and three months thereafter or any part of such period."

[5] It is the theory of defendant that upon a showing that he was in military service and unable to attend on the day set, he was entitled to a stay until after the termination of the war, unless plaintiff could show that the fact of military service did not adversely affect defendant's ability to defend the action; that the burden rested on plaintiff to make such showing; that no such showing was made here. We are of the opinion, after considering all of the evidence offered by both sides, that the trial court did not abuse its discretion in denying the motions for a stay based upon the fact of defendant's military service.

[6-9] The Soldiers' and Sailors' Civil Relief Act of 1940 does not grant an absolute right to a stay whenever it is made to appear that one of the parties is in the military service. The act was passed to relieve those in the armed services from the strain of litigation during their period of service where the fact of their service would adversely affect their prosecution or a defense of a pending case. It was intended to prevent any advantage to the civilian litigant and disadvantage to the soldier or sailor litigant growing out of the fact that one of the litigants was in the military service. Section 521, here involved, was intended solely for the benefit of those in the armed services. The section is inapplicable unless it is made to appear that the rights of a person in service will be prejudiced by a proceeding against him. Royster v. Lederle, 6 Cir., 128 F.2d 197; Charles Tolmas, Inc., v. Streiffer, 199 La. 25, 5 So.2d 372; Lightner v. Boone, 222 N.C. 205, 22 S.E.2d 426. If it appears that the rights of one in the service would, or might, be adversely affected because of such service, the court is required to protect his interests (Jamaica Sav. Bank v. Bryan, 175 Misc. 978, 25 N.Y.S.2d 17; Id., 176 Misc. 215, 25 N.Y.S.2d 641), but unless such is the fact this section offers no protection. Pope v. United States Fidelity & Guaranty Co., 67 Ga. App. 560, 21 S.E.2d 289. The statute vests discretionary power in the trial court. Swiderski v. Moodenbaugh, D.C., 44 F. Supp. 687; Id., D.C., 45 F.Supp. 790. This last mentioned case held that in determining whether a personal injury case should be stayed under this section because defendant was in military service the fact that defendant was insured was a factor to be considered by the trial court in the exercise of its discretion.

[10] It is quite apparent that Congress has determined that it is not necessary in order to protect the rights of those in military service to grant to them the absolute right to a stay. The Congress determined that, in considering the rights of all concerned, they could all be best protected, including the rights of those in the service, by vesting a wide discretionary power in the trial courts of the nation. It was believed that the rights of those in service would be adequately protected by the trial judges, who, in each case, could determine whether the service man's rights would be adversely affected by the fact of his service. The Congress also determined that the rights of civilian litigants must also be considered. It is a harsh thing to tell a litigant that he must wait to enforce his cause of action until after the war. Witnesses or parties may die, and witnesses may disappear or forget the facts. However, in the national interest, wherever the rights of one in the military service will be adversely affected unless a stay is given, the court must grant a stay. That is one price civilians must pay in aiding the war effort. In any case, however, the trial judge is called upon to determine, in that particular case, which interest is of the greatest importance. Doubtful cases should be resolved in favor of the service man.

The United States Supreme Court has recently considered this problem at length.

Boone v. Lightner, June 7, 1943, 63 S.Ct. 1223, 87 L.Ed. 1587. An action was brought against Boone in the state courts of North Carolina to require him to account as trustee of a trust, to remove him as trustee, and to obtain a personal judgment against him in the amount of the deficiency in the trust fund caused by his illegal management. When suit was filed Boone was in the military service stationed in Washington, D. C. Boone answered, denying all material allegations of the complaint. On February 2, 1942, the cause came on for hearing. On that date his then counsel moved for a continuance until May 25, 1942, on the ground that he, the lawyer, was about to be called into military service and would not be able to try the case. This continuance was granted. In its order granting the continuance the court stated that the presence of Boone at the trial "is highly desirable." The court directed a copy of the order to be sent to the Adjutant General of the United States Army, in order to advise Boone's superior officers of the importance of the litigation. On the day of the trial Boone invoked § 521 of the Soldiers' and Sailors' Civil Relief Act of 1940, and demanded a stay until the termination of the war. Prior to this date Boone's deposition had been taken. Boone was not personally present, but was represented by counsel who made the motion. The motion was denied, and Boone's counsel withdrew from the case. The court ordered the trial to proceed in the absence of Boone and in the absence of any lawyer representing Boone. The jury rendered its verdict against Boone and judgment was entered that Boone had been guilty of serious misconduct in handling the trust fund, and that he was personally liable in an amount exceeding $11,000. Boone appealed to the Supreme Court of North Carolina, and that court affirmed. 222 N.C. 205, 22 S.E. 2d 426. The Supreme Court of United States, on application of Boone, granted certiorari. The language of that court, in affirming the North Carolina courts, is so pertinent that we quote at length from the decision [63 S.Ct. 1226, 87 L.Ed. 1587]:

"The positions urged by petitioner come to these: first, that defendant's military service in Washington rendered a continuance mandatory; second, if not mandatory that the burden of showing that he could attend or would not be prejudiced by his absence was not on him, but on those who would force the proceedings; third, that the Court did not make the finding required by the Act for denial of a stay; and last, that in any view of the law the trial judge abused his discretion in this case. * * *

"1. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says 'unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'

"The Act of 1940 was a substantial reenactment of that of 1918 * * *. The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act. While this Court had no occasion to speak on the subject, the Act was generally construed consistently with this policy.

"Reenacted against this background without reconsideration of the question beyond a statement in the Senate Committee Report that 'There are adequate safeguards incorporated in the bill to prevent any person from taking undue advantage' of its provisions, we are unable to ignore or sterilize the clause which plainly vests judicial discretion in the trial court.

"2. The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

"In the present case, whoever might have had the burden originally, the continuance was finally denied upon a record which disclosed the facts so far as either party saw fit to do so. The defendant and his counsel submitted affidavits and the depositions and accounts before the court revealed facts relevant to the issue.

"Whether, if the court knew only the existence of this complicated controversy and that the defendant was absent in military service, it could have cast upon the defendant the burden of showing that the litigation could not go ahead without prejudice to him, is not before us. The court made no such ruling. The defendant appeared, he pleaded his defense, he took depositions showing fully what had happened to the fund, and he supplied his own affidavit showing where he was and what he was doing. Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that 'all evidence * * * is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.' Cooper v. Dasher, 290 U.S. 106, 109, 54 S.Ct. 6, 78 L.Ed. 203. The trial court and the Supreme Court of North Carolina did just this. They did not deny his stay because he failed to meet their ideas of burden; they weighed the evidence he offered and found its conclusions discredited by its avoidance of supporting facts within his knowledge and not within that of his adversary. That is not a ruling on burden of proof. Finding that the courts below have proceeded upon no misapprehension of the law, we turn to their dealing with the facts of the particular case.

"3. * * * The Act does not expressly require findings. It is one intended to apply to courts not of record as well as those of record, and it requires only that the court be of opinion that ability to defend is not materially affected by military service. We accept the findings as sufficiently evidencing the opinion of the court to that effect.

"4. The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion.

"We think the opinion of the court that Boone's military service did not prevent him from being present and doing whatever could have been done by way of defense finds ample support in the evidence. Boone had been able to get away from Washington to go to New York for the taking of depositions on two separate occasions. He had long notice of the trial date and the court had placed in the files of his Department its order showing the desirability of his presence at that time. Boone, being a lawyer and presumably knowing the gravity of the accusations against him, might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance. Boone's affidavit, after reciting that he was assigned to the International Division, Headquarters, Services of Supply, Washington, D. C., says 'The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant. Prior to the declaration of War on Dec. 8, 1941, the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency.'

"Most lawyers trained in the equity tradition of trustee fidelity would regard a trial of this kind as a serious emergency. Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. We think the court had ample grounds for the opinion that Boone made no effort to attend to duties that should weigh heavily upon the honor of a lawyer-trustee.

"There was likewise support for the opinion that the failure to be represented by counsel did not result from Boone's military service. On February 2, 1942, the court granted his request for a continuance and set the case for trial on May 25, 1942. It was stated to the court that counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel. Nevertheless, when the trial date arrived, the fact that this counsel had gone into service on May 13, 1942, was urged as a reason for further postponement. No showing whatever was made as to any effort to obtain other counsel in the long interval allowed by the court for the purpose. This counsel was also stationed at Washington and said he 'would not assume to ask for leave at the present time, so soon after having reported for duty.'

"On the trial date defendant was nevertheless represented in court by local counsel. That counsel however was consulted only three or four days before the trial date and was employed for the sole purpose of making the motion for continuance, and when the court ruled on it he withdrew and declined to proceed further. The defendant's accounts presented to the trial judge showed disbursements since the beginning of the action and before trial for the following matters, among others, in connection with this case: On August 15, 1941, defendant's deposition was taken at Washington, D. C. This entailed a reporter's fee of $66.00 and a fee of $248.88 paid a Detroit attorney for appearing at the proceeding. On November 3, and 5, 1941, depositions were taken in New York City with the defendant present. These involved a court reporter's fee of $32.25, and fees in the amount of $375.00 for the Detroit attorney and New York counsel obtained to assist him. This item carried a notation that it did not 'include services rendered in the taking of depositions in other cases on same date.' From August 4, 1941, to January 26, 1942, Deal, the attorney who had represented defendant before withdrawing to accept a commission in Washington, received $218.00 for his services in representing defendant in the case. Two days after judgment, another lawyer from the firm of counsel who had withdrawn after making the motion of May 25 appeared and moved to set the verdict aside and took an appeal, later filing extensive assignments of error. Counsel who had withdrawn from the trial argued the appeal in the Supreme Court of North Carolina.

"At all times since the action began defendant has also been represented by counsel from Detroit, Michigan. His inability to appear on the trial date was explained on the ground that he was 'definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days.' No affidavit from this counsel was produced, and no explanation is made as to how it came that other 'cases' were given priority over this in view of the long notice of the trial date and its importance to the client.

"In this Court, Boone is represented by his Detroit counsel and by Deal, the lawyer who withdrew from the case to accept a commission in Washington. Besides these, there also appear four other lawyers, none of whom are included in the five who have represented him at previous stages in the case. * * *

"The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. Defendant in spite of his military service in Washington was continuing to administer the fund. The defendant was a member of the bar, and the charges struck at his honor as well as at his judgment. Instead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day. He was both present and represented by counsel when depositions were taken which establish his speculation with the trust funds in his personal margin account. We think the record amply supports the conclusion of the trial judge that the claim that military service would prejudice the conduct of his defense, was groundless, and that the absence of himself and all of his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy.

"The Soldiers' and Sailors' Civil Relief Act [of 1940] is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service.

Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use."

[11-13] If the rules thus stated be applied to the facts of the instant case, there can be no reasonable doubt that the trial court acted well within its discretionary power in refusing to grant defendant a stay. A reference to the affidavit filed by defendant discloses that he did not there take the position that his ability to defend the action would be adversely affected by his inability to be present at the trial. That contention has been made solely by defendant's counsel who admittedly appeared on behalf of an insurance company. It should also be noted that there was no affidavit of any superior officer of defendant that he would be unable to attend the trial on the 26th, or at any other time. In addition, the record shows that defendant was ably represented at the trial by counsel for the insurance company; that defendant was available for consultation with his attorneys prior to trial; that he had signed a statement taken by the deputy district attorney in which he fully described his recollection of the incidents prior to the accident; that his deposition had been taken; that in that deposition he had testified fully as to his recollection of the events leading up to the accident; that he had also pointed out therein those portions of the signed statement which he wished to challenge; that in both the signed statement and deposition he admitted taking several drinks prior to the accident, and admitted he had no clear recollection of what occurred for some time prior to and immediately after the accident. The trial court also knew that plaintiff could not personally appear but would testify through the medium of a deposition and that plaintiff had offered to stipulate as to the testimony that would be given by defendant. It also knew that no showing had been made at all, except by defendant's unsupported assertion, that defendant was not available. None of these factors, standing alone, is conclusive. But when all of them are considered together it seems quite clear that under the rules laid down in the Boone and the other cases cited, supra, the trial court acted well within its discretionary powers in refusing to find that defendant's military service adversely affected the ability of defendant to defend. The defendant's position amounts to the contention that military service and inability to attend per se require the granting of a stay. As was so clearly pointed out in the Boone case, supra, that is not the law. While it is true that normally a litigant in the military service is entitled to be present at the trial in order to defend or prosecute his action adequately, that right is not absolute. On the showing made the trial court was justified in believing that the insurance company was attempting to use the Soldiers' and Sailors' Civil Relief Act of 1940 as a protection for its rights, rather than as a protection for the insured. The Congress never intended that the provisions of this act should be used by insurance companies as a means of defeating a cause of action, which, in many cases, would be the result of years of postponement during which witnesses may have died, disappeared or forgotten the facts, in cases where no material benefit would be received by the defendant by the delay.

[14, 15] It is no answer to this conclusion to say that this judgment is against defendant personally and not against the insurance company. Under § 11580 of the Insurance Code, St.1935, p. 716, the judgment creditor may sue the insurance company on the judgment. See, Bias v. Ohio Farmers Indemnity Co., 28 Cal.App.2d 14, 81 P.2d 1057. Nor is it an answer to the above conclusion to say that the complaint asked for $15,600 which might have been in excess of the amount of insurance carried. The verdict was for $3,600, well within the limits of a minimum policy. Had the verdict been in excess of the limits of the policy, the trial court could then have granted a new trial. Under the act, the trial court possesses power to halt the case at any time whenever manifest injury to the person in military service appears. Swiderski v. Moodenbaugh, D. C., 44 F.Supp. 687; Id., D.C., 45 F.Supp. 790.

None of the cases cited by appellant compels or suggests a contrary conclusion. In Royster v. Lederle, 6 Cir., 128 F.2d 197, the trial court had granted the stay. The plaintiff sought by mandamus to set that ruling aside. The appellate court held that "we cannot say, as a matter of law, that Ruggiero's rights would not be affected by proceeding to the trial of the cause in his absence." Page 200 of 128 F.2d. The court did not hold that, had such a stay been refused, the order would be reversed, which is the problem here involved. It should be noted that in the cited case the appellate court required, as a condition to its refusal of mandate, that the insurance company post a bond in the amount of its policy to protect plaintiff in the collection of any judgment subsequently secured.

Craven v. Vought, 58 Montg.Co.Law Repr. 15, is a decision by a trial court in Pennsylvania. A stay was granted. In that case the insurance company made a showing that the defendant was "the only witness in his own defense; that his counsel has not been able, because of his absence with the army, to consult with him in the preparation of the case, and that his present whereabouts is unknown." Page 16 of 58 Montg.Co.Law Repr. The trial court, in the exercise of its discretion, granted the application for a stay on such a showing.

[16] Both cases held that the fact that the defendant was insured did not, as a matter of law, compel the denial of the application for a stay. We agree with these holdings. But, the existence of insurance is one factor that the trial courts should consider in exercising the discretion vested in them. Where, as in the instant case, it is a reasonable inference that the insurance company is attempting to use the Soldiers' and Sailors' Civil Relief Act of 1940 as a means of postponing and perhaps defeating liability, and that the defendant will not be materially benefited by a stay, the trial court is justified in refusing to thus injure the plaintiff for the sole advantage of the insurance company.

[17-19] Defendant also contends that either under the Soldiers' and Sailors' Civil Relief Act of 1940, or independently thereof, it was an abuse of discretion to deny his application for a limited continuance when it appeared that he would not be able to be present on Jan. 26, 1942. Insofar as this point is based on the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, what has already been said disposes of that contention. The showing that one in the military service is required to make under that act for a stay or limited continuance is much less than is required from a litigant requesting a limited continuance independently of that act. If the trial court did not abuse its discretion in denying the motion for a limited continuance under the Soldiers' and Sailors' Civil Relief Act of 1940, it certainly did not abuse its discretion in denying the application independent of that act. The rules applicable to the granting of continuances, amply supported by citations to the many cases, are set forth in 5 Cal.Jur. p. 968, § 5, as follows: "However, it is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed. It follows that an abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. Thus it has been held that the sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant an application for a continuance, made on his behalf; especially where the showing before the court fully justifies the conclusion that injustice will be as likely to follow from the granting of the continuance as from its refusal. Nor does the absence of a party always furnish ground for a continuance."

As has already been pointed out, the right of a litigant to be present to defend or prosecute an action is not absolute. The defendant failed to ask for a continuance for any definite period, and failed to disclose when he would be available. For reasons aready stated, the trial court was justified in believing that injury would result to the plaintiff, and that the defendant would be in no way materially benefited by a delay. That being so, it was not an abuse of discretion to deny the continuance.

The judgment is affirmed.

KNIGHT, J., concurs.

WARD, Justice (dissenting).

I dissent.

In effect, as applied to the facts of the case, the majority opinion, as I read it, holds (1) that a trial court may arbitrarily determine that an insured has no interest in the outcome of litigation arising out of a personal injury action instituted against him if insured against liability; (2) that a defendant in such action whose reputation for morality and sobriety is involved, who, in a deposition and a statement to a municipal or county officer, has made conflicting statements as to details, may not by reason of military service be granted a continuance of a trial for the purpose of explaining apparent discrepancies in such statements.

The complaint was filed twelve days after the accident, and the answer four weeks later, at which time the plaintiff served and filed notice of motion to set the cause for trial. On December 12, 1941, the court set the cause for trial on January 26, 1942. On December 18, 1941, the deposition of the defendant was taken. It appears that about this time the defendant anticipated the probability of a call to military service from his draft board. On January 16, 1942, defendant moved the court for an order staying proceedings upon the ground that he was then in the military service, furnishing supporting affidavits in that regard. This motion was denied. On the last mentioned date defendant also moved the court for a continuance of the case for trial, but this motion was not ruled upon at the time of denying the stay, but subsequently, on the day of trial, was formally denied.

On January 23, 1942, a regularly noticed motion for a stay of proceedings, based upon affidavits that the defendant was then in the United States Navy and at that time stationed in San Francisco, was heard. One of the affidavits was to the effect that defendant's commanding officer had been interviewed and had stated that it would be impossible to release Allan Johnson from duty on the date set for trial; another affidavit, by defendant, stated that he would be unable to attend, and prayed that the case be continued until such time as he is released from the navy. At the previous hearing it appeared that defendant carried insurance. At the conclusion of the second hearing the motion was denied. Among other reasons given, the court stated: "It is my view, inasmuch as the defendant is not at all personally interested in the outcome of the case, that the Court could not continue the matter under the Soldiers' and Sailors' Relief Act, or grant the motion on the ground of lack of witness—the inability of the witness to attend. I don't think I can grant the motion on that ground of the case, because there is no showing here that he cannot attend. I will have to deny the motion."

The motion was renewed on the morning of the first day of the trial, based upon the previous record. The court stated: "The motion for continuance and suspension of proceedings will be denied."

Appellant contends that the first ground given for the denial of the motion is based upon the fact that defendant was insured. Respondent does not contradict this statement.

Section 521 of the Soldiers' and Sailors' Civil Relief Act quoted in the majority opinion should be construed to effect its purpose, the protection of those in the armed service to the extent of permitting a postponement until the soldier or sailor, without restraint or restriction, is able to present his side of a contested material issue. However, the section is addressed to the reasonable discretion of the trial courts of the nation, to determine whether a litigant will be prejudiced by proceedings held in his absence, and each case should be determined upon the particular facts and surrounding circumstances. In the exercise of such discretion, if the trial court denies a postponement, and it subsequently appears that the litigant or his guarantor or indemnitor is prejudiced by reason of the absence of the parties, a new trial should be granted. In Richey & Gilbert Co. v. Northwestern Natural Gas Corp., Wash., 134 P.2d 444, 451, the court said: "The court in cases such as this one is obliged, at the outset, to visualize the trial and the preparation of it, with a view to determining the effect of the defendant's absence. It must be ready at any stage of the proceedings to change its decision and grant the stay if good reason therefor appears." For this reason, on a motion prior to trial the section should be liberally but reasonably construed in favor of the soldier or sailor to protect his interest. Jamaica Savings Bank v. Bryan, 175 Misc. 978, 25 N.Y.S.2d 17; Id., 176 Misc. 215, 25 N.Y.S.2d 641.

The section was not enacted particularly to protect insurance companies, though facts may arise to justify a continuance in favor of the insurance carrier upon the principle that a party in interest should not be forced to trial in the absence of a material witness (Craven v. Vought, 58 Montg.Co.Law Repr. 15, 4 Monroe L.R. 11, 55 York Leg.Rec. 173), or in the absence of a party to the action whose presence might materially affect the disposition of the case (Royster v. Lederle, 6 Cir., 128 F.2d 197), and, accordingly, whose absence in either event might be prejudicial to a determination of the material issues involved. It does not appear from the record that the amount of insurance was adequate to meet the sum prayed for in the complaint. The majority opinion assumes to the contrary, or, at least, surmises that the verdict was within the amount of the face of the policy. This assumption or surmise is without evidentiary support. Neither the court nor plaintiff demanded a bond of the insurance company that a verdict in a specified amount would be paid. Royster v. Lederle, supra. In addition, an insurance company has the privilege and right to demand cooperation from the insured. If the latter is a resident of the county of trial, it may be assumed that he would be of assistance in the selection of the jury, at least to the extent of indicating veniremen who might be prejudiced against him. A party's presence might have an effect upon the judgment or the amount thereof. Royster v. Lederle, supra.

If a proceeding may be postponed upon the application of an insurance carrier for sufficient reason, it should also be delayed if the insured has a material interest in the outcome, whether that interest be financial or personal. In Tulley v. Superior Court, 45 Cal.App.2d 24, pages 30, 31, 113 P.2d 477, 480, referring to section 510 et seq., this court said: "While it is true that the above-mentioned federal statute was passed subsequent to the commencement of the action in which petitioner is a defendant, it is an announcement of policy by the lawmaking body that normally should be the exclusive judge of policy, as to what it considers reasonable and necessary under such circumstances. Under that statute, or independent of that statute, the trial courts possess ample powers to protect the rights of those in the military service of the United States. It is inconceivable that, in a proper case, the trial court, upon a proper showing, would not grant a reasonable continuance to one engaged in military service to permit him to properly prepare his defense, and, if necessary, continue such case during the period of the defendant's foreign service. If the trial court should abuse its discretion in such a case there exist ample remedies to control such abuse." It is true that the decision by this court in that case referred to "foreign" service, but conditions might arise that would preclude the presence of a party at a trial even though he might be in the same county. As a matter of fact, if in foreign service the party would not be available.

Congress has directed a policy in relation to litigants in military service. The administration thereof rests in the discretion of the trial court. Such discretion should be used reasonably, with due regard to the rights of each side. Swiderski v. Moodenbaugh, D.C., 44 F.Supp. 687 It must be assumed that Congress gave mature consideration to the rights of those claiming damages in personal injury cases, and to the many contingencies that might arise, and the possible consequences that might result from delay in bringing causes to trial.

A defendant, though protected in the matter of monetary liability on a judgment, is still interested in refuting charges, if possible, against his reputation, or charges of intoxication. An intoxicated person in the operation of an automobile may become "active and alert or stupid and dull." Frisvold v. Leahy, 15 Cal.App.2d 752, 756, 60 P.2d 151, 153. Immediately after an accident statements may be made that under certain circumstances require explanation. Even a statement under oath may be contradicted or explained upon a trial. Royster v. Lederle, supra.

In addition to the motion for postponement under the Soldiers' and Sailors' Civil Relief Act of 1940, supra, as previously stated, a motion for a continuance was presented and denied. An application for such continuance is ordinarily left to the sound discretion of the trial court. If bad faith appears, or the form and substance of the application for continuance is legally inadequate, denial of motions for continuance has been upheld, but in many instances when the rights of a litigant have been jeopardized the reviewing court, in the interest of justice, has reversed the judgment. This motion, the first and only continuance requested, presented in proper form, could well have been granted in the interest of justice to give defendant, a material witness whose absence was reasonably explained, an opportunity to be present at the trial. Irrespective of the Soldiers' and Sailors' Civil Relief Act of 1940, such has been the determination of the reviewing

courts in this state. Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636; Carl v. Thomas, 116 Cal.App. 294, 2 P.2d 872; Pacific Gas, etc., Co. v. Taylor, 52 Cal.App. 307, 198 P. 651; Betts Spring Co. v. Jardine Co., 23 Cal.App. 705, 139 P. 657; Morehouse v. Morehouse, 136 Cal. 332, 68 P. 976; Swayne & Hoyt v. Wells-Russell & Co., 169 Cal. 204, 146 P. 686.

If not independent of the federal act, certainly in conjunction with it, a continuance should have been granted. Under the act a stay or continuance may be granted for any period less than the period of military service (sec. 524).

The majority opinion relies upon Boone v. Lightner, a very recent decision which does not appear officially at this writing to have been declared final. The majority opinion also cites Swiderski v. Moodenbaugh, D.C., 44 F.Supp. 687 and Id., D.C., 45 F.Supp. 790. On appeal in the Swiderski case, 45 F.Supp. 790, it was assumed that the parties to the action in respectively requesting and refusing a postponement were playing a game. This brought forth the following statement by the court (page 792 of 45 F.Supp.): "This court repudiates such a game and orders the cause set for immediate trial." If appellant in the present action had been playing a game he should have come under the rule in the Swiderski case. Such facts do not here appear. There was no agreement to be bound by the amount of insurance carried by defendant; the date for trial was a date subsequent to defendant's entry into military service, and there was no action taken by the insurance company to delay proceedings other than the application under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, and appellant was acting in good faith in making the ordinary motion for a continuance.

In the Boone case [63 S.Ct. 1223, 1225, 87 L.Ed. 1587] the same condition existed as in the Swiderski case. The petitioner was playing a game. He was trifling with the court. When the numerous quotations from the Boone case, found in the majority opinion, are considered, in view of other facts as set forth in the opinion of the Supreme Court of the United States, the conclusion reached is understandable.

Boone, a lawyer, and executor and trustee of his mother-in-law's estate, was charged with "losses caused by illegal management" of the fund. "He was then in military service of the United States as a Captain stationed in the office of the Under Secretary of War in Washington. * * * the same day the summons was served, he changed his 'domicile and legal residence' to Washington, D. C. * * * He pleaded at length facts to support his claim that he was no longer domiciled in North Carolina. * * * Boone moved for a continuance to the 25th of May, 1942, his counsel, Roy L. Deal, stating that he expected soon to be called into service and would be unable to try the case, and asking the continuance in order to give defendant ample time to employ other counsel. The request was granted, and that date peremptorily set for the trial. * * * Boone was not present, but counsel appeared for him to move for a further continuance under the Soldiers' and Sailors' Civil Relief Act [of 1940]. This motion was denied, counsel *who had presented the motion withdrew from the case,* and the trial proceeded. The verdict of the jury went against Boone; and judgment was entered that the trust was governed by the terms of the will, that Boone had been guilty of serious misconduct of the trust fund, and that he be held personally liable for the consequent loss to the trust fund of more than $11,000, and removed as trustee. * * * Boone had been able to get away from Washington to go to New York for the taking of depositions on two separate occasions. He had long notice of the trial date and the court had placed in the files of his Department its order showing the desirability of his presence at that time. Boone, being a lawyer and presumably knowing the gravity of the accusations against him, might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance. * * * Most lawyers trained in the equity tradition of trustee fidelity would regard a trial of this kind as a serious emergency. Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. * * * No showing whatever was made as to any effort to obtain other counsel in the long interval allowed by the court for the purpose. This counsel was also stationed at Washington and said he 'would not assume to ask for leave at the present time, so soon after having reported for duty.' On the trial date defendant was nevertheless represented in court by local counsel. * * * he withdrew and declined to proceed further. * * * Counsel who had withdrawn from the trial argued the appeal in the Supreme Court of North Carolina. At all times since the action began defendant has also been represented by counsel from Detroit, Michigan. His inability to appear on the trial date was explained on the ground that he was 'definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days.' No affidavit from this counsel was produced, and no explanation is made as to how it came that other 'cases' were given priority over this in view of the long notice of the trial date and its importance to the client. In this Court, Boone is represented by his Detroit counsel and by Deal, the lawyer who withdrew from the case to accept a commission in Washington. Besides these, there also appear four other lawyers, none of whom are included in the five who have represented him at previous stages in the case. * * * The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. Defendant in spite of his military service in Washington was continuing to administer the fund. The defendant was a member of the bar, and the charges struck at his honor as well as at his judgment. Instead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day. He was both present and represented by counsel when depositions were taken which establish his speculation with the trust funds in his personal margin account. We think the record amply supports the conclusion of the trial judge that the claim that military service would prejudice the conduct of his defense, was groundless, and that the absence of himself and all of his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy. * * * But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use." (Italics added)

Though it appeared that Boone was "playing a game," "trifling with the court," guilty of "litigious strategy," the opinion was not unanimous. In the dissenting opinion by Mr. Justice Black the following well-considered and appropriate statement was made: "I believe that the clause under consideration requires that an action against a person in military service must be stayed unless the trial judge concludes (a) that no personal judgment will result and that the action will in effect preserve the interests of all the parties for the duration of the war; or (b) that the defendant is only a formal party; or (c) that the defendant need not be present for any purpose, either before, during, or after the trial, and that he will be adequately represented and has no need to testify or participate in any way; or (d) that the defendant's military service does not preclude him from having ample opportunity to get ready for, and to take his necessary part in the litigation. * * * The Court emphasizes that Boone is a member of the bar. But for the duration of the war, he is primarily a soldier, with a job to do which Congress intended should overshadow personal interests, whether his, or those of others who seek a personal judgment against him. * * * He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers. The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case."

I am of the opinion that Mr. Justice Black is correct. Though Boone v. Lightner, supra, was not cited in argument by the litigants herein, the majority opinion quotes freely therefrom. It fails, however, to be guided by the repeated admonition of Mr. Justice Jackson that each case should be governed by the particular facts involved. In the majority opinion the holding with reference to the lawyer-captain charged with misappropriation of money is held applicable to a sailor who was unfortunately involved in an automobile accident. In the Boone case there was an apparent effort made that Boone should never be forced to testify. In the present case the court was informed by the attorney representing the defendant that "if Allen Johnson is available whenever this case shall be tried, it is my intention, of course, to produce him as a witness."

A litigant is entitled, if possible, to be present at a trial. In the present case the reputation of the defendant for morality and sobriety was at stake. A deposition made by him was introduced, but his absence precluded an opportunity to interpret statements contained therein or to explain the circumstances surrounding a statement made to the district attorney of the county shortly after the accident as to visits to certain places earlier in the evening.

The insurance company was prevented from conferring with the defendant relative to the use of challenges to prospective jurors. This was important in view of the fact that defendant was a resident of the county, and his reputation as a visitor to certain houses indicated in the record as houses of ill-fame was an evidentiary matter. There is some evidence that he did not actually enter the particular places, and also evidence by a physician, called in by the police, who examined defendant immediately after the accident that he was not intoxicated. No charge of intoxication while driving or otherwise was placed against defendant. This likewise is important in view of the conclusion set forth in the majority opinion that the accident "was due to the liquor he had consumed." The opinion does not hold that defendant was intoxicated, although that was one of the main contentions of plaintiff. The defense should have been afforded the right to present the defendant as a witness and thus permit the jury to determine from the character of his testimony and the manner in which he might testify the merits of the contentions of the respective parties. The presence of the defendant no doubt would have materially affected the disposition of the case. Royster v. Lederle, supra.

It was an abuse of discretion to deny a continuance until it was demonstrated that defendant purposely enlisted to avoid the trial, or that he could have appeared notwithstanding his duty in military service.

In my opinion the judgment should be reversed.

Rehearing denied; WARD, J., dissenting.

Hearing denied; SCHAUER, J., dissenting.

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59 Cal.App.2d 506

KELLER v. ARDEN FARMS, Inc., et al.

Civ. 14099.

District Court of Appeal, Second District, Division 2, California.

June 29, 1943.

Rehearing Denied July 19, 1943.

Hearing Denied Aug. 26, 1943.

1. Negligence ⟾138(4)

To justify an instruction on doctrine of "last clear chance", it must appear that plaintiff was negligent and as result thereof was in position of danger from which he could not escape by ordinary care, whether because of physical impossibility or total unawareness of danger, that defendant knew of plaintiff's situation and had last clear chance to avoid accident by exercising ordinary care and failed to do so to injury of plaintiff in accident proximately resulting from such failure.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Automobiles ⟾227(1)

Where plaintiff while looking out side of automobile drove onto wrong side of highway and collided with defendant's truck, and defendant did not know that plaintiff was not looking where he was going, doctrine of "last clear chance" was inapplicable.

3. Appeal and error ⟾1068(1)

Where verdict was for defendant and evidence did not justify verdict for plaintiff under doctrine of last clear chance, the giving of instructions on last clear chance was harmless error.

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Fred M. Keller, an incompetent, by and through the guardian of his person and his estate, Mrs. Fred M. Keller, against Arden Farms, Inc., and others to recover for injuries sustained when plaintiff's automobile collided with a milk truck owned by corporate defendant. Judgment for defendants, and plaintiff appeals.

Affirmed.

Frank H. Love and Frank E. Carleton, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher by Philip C. Sterry, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for injuries which he suffered when his Lincoln Zephyr automobile collided with a milk truck owned by defendant Arden Farms Company and driven by defendant Lewis. Defendant Brant was "helper" on the truck for defendant Lewis. The jury returned a verdict in favor of defendants and from the resulting judgment plaintiff prosecutes this appeal.

It is conceded that plaintiff was guilty of negligence in the operation of his own automobile and that his negligence contributed to his injuries. Plaintiff contends, however, that defendants are liable under the doctrine of last clear chance. The trial court instructed the jury on the rules pertaining to this doctrine and it is now claimed that the instructions on this subject were prejudicially erroneous. Defendant, without conceding that the instructions were erroneous, contends that there was no justification for giving any instruction on the doctrine of last clear chance and that any errors that may be found in the instructions need not be given consideration.

The accident occurred at about 8:00 a. m. in the morning on July 25, 1940, on a winding road 36 feet wide in Griffith Park in the city of Los Angeles. Defendant Lewis testified that he first observed plaintiff's approaching automobile when it was 300 yards distant, at which time it was being operated on the wrong side of the road, rounding a curve. He observed plaintiff's car when it was about 100 yards distant, at which time it was on its own side of the road, where it continued up to a point about 50 feet away from the truck. It then suddenly and without warning swerved toward the center of the road and struck the side of the truck back of the cab. He testified that plaintiff's automobile was being driven at approximately 35 miles per hour and the truck approximately 20 miles per hour. When plaintiff's car started to swerve toward the truck, Lewis tried to pull over to the side of the road and at the same time applied his brakes, the truck being almost at a standstill at the time of the collision. Defendant Lewis further testified that he watched the course of the car and did not look at the driver; that he did not know until after the collision whether the driver of plaintiff's car was a man or a woman. Defendant Brant testified that he saw plaintiff's automobile when it was about 700 feet away, at which time it was on the wrong side of the road; that it travelled on the wrong side for about 100 feet and then went back to its own side of the road and continued on its own side of the road until it was approximately 50 feet from the truck, at which time it pulled over onto the truck. Defendant Brant further testified that he was looking at the car and did not observe the driver of the car.

Plaintiff relies upon the testimony of Gretsell McRae, the only other witness who saw the collision. She testified that she was driving her car about 75 feet behind defendants' truck and in the same direction as the truck. She was travelling down hill, waiting for a chance to pass the truck. She testified: "I should judge the Zephyr loomed up under the tree about 200 feet when it started angling over toward the truck, coming ahead, over directly this way. I judge that was about 200 or 250 feet from where I was. I don't know how fast the Lincoln was going and have no opinion." She further testified that plaintiff was looking "out over the golf course up to the time he plowed into the side of the truck. * * * he was looking out of the opposite side of the car from where the steering wheel is". She further testified that "the truck kept straight on, without changing its course, neither turning to the right nor left."

[1] The elements necessary to justify the court in instructing the jury on the doctrine of last clear chance are well stated in the frequently cited case of Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915, 917: "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." There must be substantial evidence before the court to establish all of these elements or the doctrine is not applicable.

[2] Two theories have been suggested as justification for giving instructions on the last clear chance doctrine, both of which are mentioned in the Girdner case. One theory is that under the circumstances set forth in the rule the conduct of defendant becomes so "wilful and wanton" that he should be held liable. Under the other theory plaintiff's original negligence becomes remote and defendant's failure to avoid the accident becomes the proximate cause of the injury. Under either theory it cannot be held that the doctrine is applicable in the present case. Unquestionably it would be idle to argue that the truck driver's conduct was wanton. There is no substantial evidence to establish that the truck driver saw plaintiff in a position of peril at a time when he could avoid the injury by the exercise of ordinary care. The two defendants testified that although plaintiff had at some distance down the curving road travelled on the wrong side of the road, he had returned to the proper side of the road and continued thereon until he suddenly swerved onto the truck. They had not observed anything dangerous about the situation. It is true that Mrs. McRae testified that she saw plaintiff's car when it was at a distance of 125 to 175 feet from the truck and that plaintiff was then looking to one side and continued to look to one side, but the fact that this witness noticed the direction that plaintiff was looking does not furnish evidence that defendant Lewis was aware that defendant was not keeping his eyes upon the road. Most drivers observe the cars that are approaching from the opposite direction but do not pay particular attention to the drivers, who can generally be seen only through the windshields. Both defendants testified that they did not know that plaintiff was looking away from the road. There is nothing in the testimony of Mrs. McRae to contradict the statements of the two men who were on the truck that plaintiff returned to his own side of the road before making the swerve into the truck. Clearly, it cannot be held that the conduct of plaintiff became the remote cause and the conduct of defendant Lewis became the proximate cause of the collision. In Johnson v. Southwestern Eng. Co., 41 Cal.App.2d 623, 107 P.2d 417, the perilous predicament of the plaintiff was due to the fact that he had fallen asleep when he drove his truck into the intersection of two roads. It was held that the doctrine of last clear chance was inapplicable, since the defendant had not observed that the plaintiff had fallen asleep and therefore did not have knowledge of his perilous situation.

[3] Since the evidence did not justify a verdict in favor of plaintiff under the doctrine of last clear chance, the court erred in giving any instructions to the jury on this subject. The errors in giving such instructions were not prejudicial.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

Hearing denied; CARTER, J., dissenting.

59 Cal.App.2d 528

PETERSEN et ux. v. MURPHY et al.

Civ. No. 6856.

District Court of Appeal, Third District, California.

June 29, 1943.

Rehearing Denied July 28, 1943.

1. Trial 🔑**391**

Unless waived, full findings by trial court are required on all material issues raised by the pleadings and evidence in case.

2. New trial 🔑**64**

Where trial court renders judgment without making findings upon all material issues of fact, decision is against law, and constitutes ground for granting a new trial, provided it appears that there was evidence introduced as to such issue and evidence was sufficient to sustain a finding in favor of complaining party if omitted findings might have the effect of countervailing or destroying effect of other findings.

3. Trial 🔑**404(1)**

Trial court's findings are to receive such a construction as will uphold rather than defeat its judgment thereon, and are to be read together and liberally construed in support of the judgment.

4. Appeal and error 🔑**1071(6)**

If findings are made by trial court upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error.

5. Trial ⚷395(1)

Trial court's finding that all of the allegations of a pleading are true or are untrue is sufficient.

6. Trial ⚷397(2)

Trial court need not make specific findings as to each of several material issues where the findings, taken as a whole, clearly show that they include trial court's conclusion upon the material issues.

7. Trial ⚷395(1)

If trial court's findings necessarily negative allegations of defendants' answer as to which specific findings were not made, the findings are sufficient.

8. Trial ⚷397(6)

Trial court's general finding of ownership of disputed land in plaintiffs at all times and finding that defendants had no interest in the premises sufficiently negatived defendants' affirmative defenses of adverse possession, statute of limitations, estoppel and laches, without making specific findings thereon.

9. Appeal and error ⚷1071(6)

Trial court's failure to find on an issue is not ground for reversal unless it appears that there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellant.

10. Appeal and error ⚷1071(6)

Where trial court's findings on an issue, if made, would necessarily have been against appellant, appellant cannot complain.

11. Appeal and error ⚷757(3)

Where appellants failed to point out in their brief evidence to sustain issues upon which appellants claimed that trial court failed to make findings, District Court of Appeal would assume that there was no such evidence, and, in absence thereof, trial court's failure to make findings could not be held reversible error. Code Civ.Proc. §§ 953 et seq., 953c.

◆

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by Wm. F. Petersen and Lois V. Petersen, his wife, against Clarence E. Murphy and another to determine exact location and boundaries of a mining claim which had been excepted from a patent to land held by plaintiffs. From a judgment in favor of plaintiffs, the defendants appeal.

Affirmed.

Jos. H. Huberty, of San Andreas, for appellants.

A. N. Perovich, of Lodi, and Snyder & Snyder, of Jackson, for respondents.

ADAMS, Presiding Justice.

This action was brought by plaintiffs to determine the exact location and boundaries of a mining claim which had been excepted from a United States patent to the S.E.¼ of the N.W.¼ and the N.E.¼ of the S.W.¼ of Section 3, T. 6 N., R. 12 E., M. D. B. & M. Plaintiffs had acquired the patented land and defendants the mining claim. It appears that a segregation survey had been made by the United States in 1881, but that the field notes of same had been lost in the San Francisco fire of 1906. The area claimed by defendants to constitute the mining claim as excepted from the patent covered a part of what plaintiffs claimed was the segregated area, but included a portion in dispute, upon which disputed portion defendants had erected certain improvements consisting of a dwelling house, a water tank, etc., used in connection with their mining operations.

Plaintiffs' complaint is in two counts. The first count is in the usual form of an action to quiet title to the S.E.¼ of the N.W.¼ and the N.E.¼ of the S.W.¼ of Section 3, T. 6 N., R. 12 E., M. D. B. & M., excepting therefrom a specifically described tract containing about nine acres representing what plaintiffs claimed to be a correct description of the segregated area. The second count alleges a trespass by defendants upon plaintiffs' land and the extraction of ore therefrom to plaintiffs' damage in a specified sum.

Defendants answered denying plaintiffs' claim of ownership and alleged defendants' ownership of the mining claim, giving a specific description of same in accordance with their own ideas as to its location and boundaries. They also alleged that they, by their predecessors, had taken possession of said quartz mining claim as described by them, and that ever since July 25, 1929, they had been in the actual, open, visible, notorious, exclusive, continuous, uninterrupted, quiet and peaceable possession of "said land", "under a claim of right, holding and claiming to own the same adversely to plaintiff, and all other persons," and that they had "paid all taxes levied on and/or assessed against" same for a period of five years and more immediately preceding the filing of plaintiffs' complaint. They denied generally the allegations of plaintiffs' second cause of action. As separate defenses they pleaded the statute of limitations, their construction upon the land as described by them of the improvements above mentioned, and the carrying on by them of extensive mining operations thereon, all with the knowledge of plaintiffs and their predecessors in interest throughout a period of eleven years, and that plaintiffs and their predecessors had full knowledge of defendants' possession and improvements, made no claim therefor and acquiesced in all things done by defendants thereon. They also alleged laches on the part of plaintiffs and their predecessors in that they had not commenced any proceedings within the eleven years, though they had knowledge of all of the foregoing facts.

At the conclusion of the trial the court made findings to the effect that about October 1, 1883, the United States government had issued a patent to the S.E.¼ of the N.W.¼ and the N.E.¼ of the S.W.¼ of said Section 3, T. 6 N., R. 12 E., M. D. B. & M., excluding therefrom the so-called Manzanita Quartz Claim and adjoining area; and describing said excluded area as same was described in plaintiffs' complaint. It also found "that at all the times referred to in plaintiffs' complaint, plaintiffs were, and now are, the owners and possessed and entitled to the possession of the above described premises, excepting the segregated area last above described, and that the defendants have not, nor has either of them, any right, title, or interest whatever, of, in, to, or upon the said premises so conveyed by the United States Government to said Alexander L. Harding, as above described"; also "that all of the allegations alleged in the first cause of action pleaded in plaintiffs' complaint herein, as amended, are true and correct, and that all of the denials thereof, and all of the allegations of the defendants contrary thereto, in their answer in said proceeding are untrue." As to plaintiffs' second cause of action it found that defendants had "wilfully, wrongfully, and unlawfully, and against the will of plaintiffs," entered upon plaintiffs' ground and mined ore therefrom, but that the trespass was without malice and the cost of extraction exceeded the values derived, and that plaintiffs had, therefore, suffered no damage. It found that defendants were the owners of the segregated area "as above described" and that "any and all allegations contained in said cross-complaint inconsistent with or contrary to the latter finding of fact, are not true."

It also found that "through mistake" defendants had erected improvements upon plaintiffs' premises and that said improvements were so constructed upon plaintiffs' said premises without any knowledge, deception, concealment or fraud on the part of the said plaintiffs, but that it would be equitable to permit defendants to remove the said improvements from the plaintiffs' said premises; and by the judgment which followed defendants were given six months within which to remove the said improvements.

Defendants have appealed, contending that the trial court committed reversible error in failing to find on the affirmative defenses pleaded by them, to wit: adverse possession, statute of limitations, estoppel and laches. They assert in their brief that on all of these defenses evidence was offered and received and that the evidence leads to the conclusion that appellants were the sole possessors of their improvements and the lands upon which they were located, that they made that their home for eleven years continuously preceding plaintiffs' action and were never molested in their enjoyment, that they alone carried on mining operations and work thereon, undisturbed, through said period, that they asserted ownership under a claim of right adverse to plaintiffs, but plaintiffs never claimed, and in fact disavowed in court, any claims to the improvements, that appellants paid taxes on their claim continuously from 1931 to 1941, that plaintiffs have never been in possession of the "Manzanita Claim" or any part thereof at any time within eleven years; that plaintiffs' predecessor knew of the construction of appellants' improvements, their expenditure of time, money and labor thereon, and made no objection thereto nor any claim thereto; and that plaintiffs and their predecessors slept on their rights, if any, for eleven years.

[1, 2] It is well established that unless waived full findings are required on all material issues raised by the pleadings and evidence in a case (24 Cal. Jur. 935-936); that where a court renders a judgment

without making findings upon all material issues of fact, the decision is against law, and constitutes ground for granting a new trial provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the complaining party if the omitted findings might have the effect of countervailing or destroying the effect of the other findings. 24 Cal.Jur. 940-941; Powell v. Johnson, 50 Cal.App.2d 680, 683, 123 P.2d 875; Wilcox v. West, 45 Cal.App.2d 267, 114 P.2d 39.

[3, 4] But it is equally well established that the findings of a court are to receive such a construction as will uphold rather than defeat its judgment thereon (Breeze v. Brooks, 97 Cal. 72, 77, 31 P. 742, 22 L.R.A. 257), and are to be read and considered together and liberally construed in support of the judgment (Menghetti v. Dillon, 10 Cal.2d 470, 472, 75 P.2d 596; Cornell v. Hollywood Turf Club, 32 Cal. App.2d 204, 208, 89 P.2d 449); and that if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. 24 Cal. Jur. 947; Merrill v. Gordon & Harrison, 208 Cal. 1, 6, 279 P. 996.

We shall consider first whether the findings were sufficient to constitute findings upon all the material issues in the case. As hereinbefore pointed out, defendants alleged ownership of the land as described by them, and adverse possession; and set up, as special defenses, the statute of limitations, estoppel and laches. The court found that plaintiffs were and at all times alleged in their complaint had been and were the owners, possessed, and entitled to the possession of the premises as described in their complaint (which included the disputed area), and that defendants have no right, title or interest whatever in or to said premises. Also that all of the allegations alleged in plaintiffs' first cause of action were true, and that "all of the denials thereof, and all of the allegations of defendants contrary thereto, in their answer in said proceeding are untrue." Also it found that defendants were the owners of the segregated area as described in the findings and in plaintiffs' complaint (which omitted the contested area) and that "any and all allegations contained in said cross-complaint inconsistent with or contrary to the latter finding of fact, are not true."

[5] It has been held in numerous cases that a finding that all of the allegations of a pleading are true or are untrue is sufficient. Hackler v. Tubach, 129 Cal.App. 680, 684, 19 P.2d 295; Fritz v. Mills, 170 Cal. 449, 150 P. 375; MacMurtry v. Fraties, 84 Cal.App. 401, 258 P. 120; Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 58 A.L.R. 1176; Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Stevens v. Stevens, 215 Cal. 702, 705, 12 P.2d 432; Carr v. International Indemnity Co., 58 Cal.App. 614, 617, 209 P. 83.

[6] Also, it is not necessary to make specific findings as to each of several material issues where the findings, taken as a whole, or construed together, clearly show that they include the court's conclusion upon the material issues. Bowers v. Union Trust Co., 117 Cal.App. 259, 264, 265, 3 P.2d 614.

[7] If the findings made necessarily negative the allegations of defendants' answer as to which specific findings are not made, the findings are sufficient. In Remillard Brick Co. v. Remillard-Dandini Co., 51 Cal.App.2d 744, 125 P.2d 548, in an action on a promissory note, the defenses of payment and failure of consideration were interposed. The court found a certain amount paid, leaving a specified balance due, and further found that "none of the allegations of defendant's answer except as herein set forth and incorporated are true." On appeal the sufficiency of the findings was attacked, but the court said (51 Cal.App.2d at page 749, 125 P.2d at page 551): "On the issue of payment, the trial court found the amount paid and the amount remaining owing and unpaid on each note. On the issue of failure of consideration, the general finding above quoted was a finding against the allegation of defendant's answer creating that issue." Also see Winsette v. Winsette, 47 Cal.App. 2d 308, 117 P.2d 897; Eastman v. Piper, 68 Cal.App. 554, 559, 229 P. 1002; Winder v. Winder, 18 Cal.2d 123, 114 P.2d 347.

[8] Thus it seems that special facts need not be detailed in the findings if a general finding necessarily embodies an implied finding on such special facts. Here the general finding of ownership in plaintiffs at all times, and the finding that defendants have no right, title or interest in the premises, negative defendants' claim of title by adverse possession, and it is further negatived by the finding that all of the allegations of plaintiffs' first cause

of action are true and that all of the allegations of defendants' answer contrary thereto are untrue. These findings likewise negative the allegations of defendants' special defenses.

In Haigler v. Donnelly, 18 Cal.2d 674, 676, 117 P.2d 331, the court said that there was no error in the failure of the trial court to make an express finding upon an issue if it was implicit in the findings made, and that there is no necessity to negate contradictory allegations. And in New Blue Point Mining Co. v. Weissbein, 198 Cal. 261, 244 P. 325, 45 A.L.R. 781, the court said that the affirmative findings of the trial court on certain issues by necessary implication carried with them a negative finding of the truth of facts alleged in opposition thereto. And in Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291, a finding the defendant's negligence was the sole proximate cause of injuries sustained in an accident was said to imply a finding that plaintiff was not guilty of contributory negligence.

[9, 10] However, if we were to assume that the findings as made do not cover all material issues raised by the pleadings, failure to find on an issue is not ground for reversal unless it appears that there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellant (24 Cal.Jur. 940, 941; Powell v. Johnson, 50 Cal.App.2d 680, 683, 123 P.2d 875); and where a finding, if made, would necessarily have been against appellant, he cannot complain of the lack of such finding. Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226, 238; Johnson v. Peck, 90 Utah 544, 63 P.2d 251, 254; Consolidated Irr. Dist. v. Crawshaw, 130 Cal.App. 455, 462, 20 P.2d 119; Brooks v. Bailey, 40 Cal. App.2d 310, 316, 104 P.2d 854; 24 Cal.Jur. 944.

[11] Appellants assert in their brief that the evidence conclusively establishes appellants' affirmative defenses to the exclusion of any contrary findings, but they do not set forth said evidence but on the contrary say that it "would be a waste of time and space to review the entire record" to prove that the record leads to such conclusions. Such being their position, they cannot expect this court to waste either time or space in an endeavor to find and set forth evidence to sustain the issues upon which appellants claim the court failed to make findings. And since counsel for appellants have not found it worth while to point out such evidence we shall assume that there is none such; and in the absence thereof a failure of the trial court to make findings thereon cannot be held to be reversible error.

Section 953c of the Code of Civil Procedure provides that where, as here, an appeal is taken by the alternative method provided by Section 953 et seq. of said code, in filing briefs in said appeal the parties must print in their brief, or in a supplement thereto, such portions of the record as they desire to call to the attention of the court. In Keele v. Clouser, 92 Cal. App. 526, 533, 268 P. 682, 685, the court said: "This court is not required to search the typewritten record in order to discover possible grounds for a reversal. If the appellant fails to print in his brief or supplement sufficient of the record to justify a reversal of the judgment, it will be affirmed on the ground that the record fails to show error. [In re] Estate of Berry, 195 Cal. 354, 358, 233 P. 330; Steineck v. Coleman, 72 Cal.App. 244, 236 P. 962." Also see Jeffords v. Young, 197 Cal. 224, 229, 239 P. 1054; Dahlberg v. Dahlberg, 202 Cal. 295, 298, 260 P. 290; Wilshire Oil Co. v. Star Petroleum Co., 93 Cal.App. 437, 441, 269 P. 722; Turell v. Anderson, 16 Cal.App.2d 445, 451, 60 P.2d 906.

Appellants have entirely failed to comply with this rule. Also, though proposed findings were duly served upon defendants, it does not appear that they proposed any different or additional findings, or that they requested any change or revision of same on motion for a new trial.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

UNIVERSAL CONSOL. OIL CO. v. BYRAM, County Tax Collector.

LONG BEACH HARBOR OIL CO. v. SAME.

Civ. 13680, 13681.

District Court of Appeal, Second District, Division 3, California.

June 25, 1943.

Hearing Granted Aug. 23, 1943.

1. Taxation 🔑500, 611(6)

In actions to enjoin collection of taxes and to have court revalue oil leases for taxation purposes, evidence sustained finding that county board of equalization did not decide taxpayers' applications on the merits but intentionally failed to consider evidence.

2. Taxation 🔑486

Where taxpayers filed applications with county board of equalization for reduction of valuation placed by assessor on certain oil leases, the taxpayers were entitled to a judicial determination, from a consideration of evidence, regarding true value of the leaseholds.

3. Taxation 🔑490

Determination of value of property by county board of equalization in passing on applications for reduction of valuations fixed by assessor is binding on court unless adjudication by board is so willfully erroneous and arbitrary as to work a constructive fraud on taxpayers.

4. Constitutional law 🔑284(1)
Taxation 🔑490

Where county board of equalization in considering taxpayers' applications for reduction of property valuation fixed by assessor gave no consideration to evidence and rendered no decision on facts in issue, there was a denial of "due process of law", so that court was free to try question of valuation de novo.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Taxation 🔑500, 611(6)

In taxpayers' actions to enjoin collection of taxes and to have court revalue oil leases for taxation purposes, evidence sustained court's determination fixing values of leaseholds.

6. Taxation 🔑500, 611(8)

In taxpayers' actions to enjoin collection of taxes and to have court revalue oil leases for taxation purposes where evidence was conflicting regarding value of leaseholds, findings as to value were conclusive on appeal.

Appeals from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Actions by Universal Consolidated Oil Company and by Long Beach Harbor Oil Company against H. L. Byram, County Tax Collector of the County of Los Angeles, State of California, to enjoin the collection of taxes and to have court revalue oil leases for taxation purposes. The actions were consolidated for trial. From the judgments, defendant appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for appellant.

Faries & McDowell and W. Sumner Holbrook, Jr., all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiffs Universal Consolidated Oil Company and Long Beach Harbor Oil Co. filed applications with the Los Angeles County Board of Equalization for reduction of valuations placed by the assessor upon certain of their oil leases in the Long Beach Harbor-Wilmington field; their applications were denied and they brought the present actions to enjoin collection of the taxes and to have the court revalue the leases for taxation purposes. The actions were consolidated for trial, separate judgments were entered in favor of plaintiffs and defendant county has appealed therefrom. The appeals are presented upon one record and present identical questions.

Universal has a three-acre lease which the assessor valued at $417,740, and a six-acre lease which was valued at $359,500; Long Beach Harbor Oil Co. has a two-acre lease which was assessed at $305,400. The values fixed by the judgment were, respectively, $222,000, $62,000, and $175,000.

The briefs discuss at length two of the grounds urged for reversal, first, that the court erred in trying de novo the questions which were before the board for decision, and, second, the claimed insufficiency of the evidence either at the hearing before the board or upon the trial to show illegality.

[1] The question of plaintiffs' right to a trial de novo and the one as to the sufficiency of the evidence to show circumstances under which denial of the applications would be constructively fraudulent have been set at rest by findings to the effect that the board did not decide plaintiffs' applications upon the merits but intentionally failed and refused to consider the evidence given in support of plaintiffs' applications, and in disregard thereof expressly, intentionally, deliberately and wilfully withheld decision of the questions of fact in issue. The basis of these findings was that the board acted under the erroneous belief that plaintiffs' applications did not make an issue of alleged overvaluations of the leases but presented only a question of law which the court would have to decide. The findings that the board gave no consideration to the evidence and rendered no decision thereon, in our opinion, have support in the evidence. When the applications came on for hearing, testimony was taken before Supervisors Jessup, Hauge, and McDonough, and the matter was taken under advisement. It was brought up at a later meeting, when the above named and also Supervisors Ford and Smith were present, neither of whom had attended the hearing nor heard the testimony. Two other applications were before the board at that time, namely, those of Signal Oil & Gas Company, No. 268, and Long Beach Oil Development Company, No. 269. At this meeting the following proceedings were had:

"Chairman Jessup: Signal Oil & Gas Company No. 268 and Long Beach Oil Development Company, No. 269.

"Mr. McDonough: This is a possessory interest?

"Mr. Ford: I was not in on this.

"Mr. Smith: 1-2 and 5.

"Mr. McDonough: This is in the same situation as Signal.

"Mr. Smith: Yes.

"Mr. McDonough: They are both alike.

"Mr. Smith: Signal Oil & Gas Company and the Universal Oil Company and Long Beach Oil Company.

"Mr. McDonough: There is a legal question involved here.

"Mr. Smith: I think they appeared only to protect their rights in court and made very little showing and I think we should deny it.

"Mr. McDonough: Well, I still think we should have an opinion of the County Counsel attached to the application for the advice of the Board and also in the event it is pursued in court.

"Mr. Smith: It is in court right now.

"Mr. McDonough: Let's set it aside for a moment.

"Mr. Smith: I made a statement during the hearing.

* * * * * *

"Chairman Jessup: Now, on the Signal Oil & Gas Company, No. 268, Long Beach Oil Development Company No. 269, Universal Oil Company No. 1020, and Long Beach Harbor Oil Company No. 1021.

"Mr. McDonough: Mr. Boller is here.

"Mr. Boller: Yes.

"Mr. McDonough: Now, these oil applications that we heard, they indicated that the applications show a contractor's lease with the land owners for the purpose of drilling of wells.

"Mr. Boller: Yes, on Signal Oil & Gas and Long Beach Oil Development Company.

"Mr. Smith: Universal and Long Beach Harbor Oil Company were similar.

"Mr. Boller: I think the two were the only ones Mr. Holmes handled.

"Mr. McDonough: Holmes appeared for—

"Mr. Boller: For Signal Oil & Gas Company and the Long Beach Oil Development Company.

"Mr. Smith: Didn't you make a statement at the time of the hearing that they were here appearing in regard to protecting their rights.

"Mr. Boller: That was as to the Signal Oil & Gas and the Long Beach Oil Development Company only.

"Mr. Smith: The other two would be the same.

"Mr. Boller: There is no question but what that is so on the two cases Mr. Holmes presented.

"Mr. Smith: I move that the Long Beach Oil Development Company—

"Mr. McDonough: Wait a minute, I want to ask Mr. Boller would it help the case any if it was referred to the County Counsel.

"Mr. Boller: No.

"Mr. Smith: Move that it be denied.

"Mr. Boller: On the Long Beach Oil Development Company the application was for cancellation and was heard in the same hearing and is to be acted upon by the Board of Supervisors.

"Mr. McDonough: That is another application on a case coming to us.

"Mr. Boller: You have answered on that.

"Mr. Smith: I move that the Signal Oil & Gas Company be denied.

"Chairman Jessup: So ordered.

"Mr. Smith: I move that the Long Beach Harbor Oil Company be denied and Universal Oil Company No. 1020 be denied.

"Chairman Jessup: So ordered.

"Mr. Smith: That these four be denied.

"Chairman Jessup: So ordered.

"Mr. McDonough: On these matters it is a legal question to be determined by the Court rather than a matter of equalization.

"Mr. Boller: It is essentially so in the Signal Oil & Gas Company and the Long Beach Oil Development Company cases. It seems to me the others were factual in their showing.

"Mr. Smith: It is the same thing, they have a lease and are being assessed on their interests. They have a contract and are being assessed as though it were a lease. They are protecting their interest and in case the Long Beach Oil Development Company and the other one should win in court, these people are in the same position.

"Mr. Boller: Their agreement is not as carefully drawn up with the thought of not being taxable as a lease.

"Mr. Smith: Yes, the resumé they attach is exactly the same.

"Mr. Boller: I didn't look at them.

"Mr. McDonough: The basis is the determination of a legal question rather than an appeal on a question of equalization.

"Mr. Boller: It is so as to Signal and the Long Beach Oil Development Company."

From the foregoing partial transcript of the hearing, which was in evidence at the trial, it appears that two members of the board stated their understanding to be that they were passing upon four applications which raised only a question of law and no questions of valuation. In spite of the advice given by a deputy county counsel that plaintiffs' cases were factual, they persisted in the belief that all four were alike and that if the claimants Signal Oil & Gas Company and Long Beach Oil Development Company should prevail in court upon a point of law which they raised, plaintiffs also would prevail upon the same ground, which appears to have been that under the particular form of contract they held they should not have been assessed at all. Plaintiffs had made no such contention. At this meeting Supervisor Ford did not participate. Supervisors Smith and McDonough expressed their views as we have stated, and Supervisors Jessup and Hauge remained silent throughout the discussion. No reference was made to the evidence that had been taken on plaintiffs' applications nor to the factual questions involved. As we construe the findings they mean that the trial judge deemed the silence of those members who said nothing in denial of the statements of Supervisors Smith and McDonough as an acquiescence therein and that the board as a whole acted under a mistake of fact as to the nature of the proceeding depending upon plaintiffs' applications and as to the matters which it was called upon to decide.

In view of the extensive evidence which three of the members had heard, a reasonable explanation of the mistake would be that the members of the board present at the second meeting did not associate plaintiffs' applications then brought up for action with the ones upon which the evidence had been taken. Plaintiffs' counsel were not notified that the applications would be considered at this meeting, and they were not present. The confusion in the minds of the members was so definite that the attempted explanation by the deputy county counsel appears to have made no impression upon them. But whatever may have been the cause of the mistake, the record, when it speaks affirmatively, shows that the board acted under a serious mistake of fact.

[2, 3] Plaintiffs were entitled to a judicial determination, from a consideration of the evidence as to the true value of their leaseholds. Bandini Estate Co. v. Los Angeles, 1938, 28 Cal.App.2d 224, 82 P.2d 185; County of Los Angeles v. Ransohoff, 1937, 24 Cal.App.2d 238, 74 P.2d 828; Southern Pac. Land Co. v. San Diego Co., 1920, 183

Cal. 543, 191 P. 931; Blinn Lumber Co. v. County of Los Angeles, 1932, 216 Cal. 474, 482, 14 P.2d 512, 84 A.L.R. 1304; Birch v. Orange County, 1921, 186 Cal. 736, 200 P. 647. It is not to be questioned that had such a determination been made it would have been binding upon the court unless the adjudication by the board was shown to have been so wilfully erroneous and arbitrary as to work a constructive fraud upon plaintiffs. But here there was no adjudication as to the facts in issue and no consideration of the evidence or the merits of the applications, although the testimony offered by plaintiffs at the hearing, if believed reliable, would have justified a reduction of the assessments. The decision of the board was that it had nothing to decide. The consequences of this failure to act were just as disastrous to plaintiffs' cases as would have been the board's refusal to take jurisdiction of the proceeding or to accord plaintiffs a hearing.

Appellants' contention that there can be no trial de novo to review a decision of a board of equalization upon a re-examination of assessments fixed by the assessor is reasoned from the fact that it is the action of the board that is under review, and that the motives of the members and the validity of their acts must be judged from a consideration of what was before them and which alone could have furnished a basis for their decision. But this rule can have no application where there was no adjudication or attempted adjudication by the board of the one issue that plaintiffs raised, namely, as to the taxable value of their properties. Plaintiffs introduced at the trial new theories and supporting evidence to prove error in the methods followed by the assessor. We are not intimating that this was a proper procedure in the attempt to prove constructive fraud. But we are not considering the question of constructive fraud with relation to any decision made by the board upon the evidence before it or with relation to the motives of the members of the board. Neither are we considering a mistake on the part of the board in the decision of questions of fact nor intimating that we could do so. The board simply failed to function and its failure to render a decision left the whole proceeding as incomplete as if the applications had been denied without a hearing or without receiving evidence offered by the applicants.

[4] As it was established that the board gave no consideration to the evidence and rendered no decision upon the facts in issue, it must follow that there was a denial of due process of law. See cases cited supra. In that event, or from the mere fact that there had been no adjudication by the board as to valuations, the court was free to try the question of valuation de novo, as it did.

[5, 6] It would serve no purpose to discuss the extensive and technical evidence given before the board and the voluminous evidence at the trial. There were opposing theories and methods of valuation used by the assessor's engineer who testified upon each occasion, and plaintiffs' expert witnesses. Testimony was given at the trial by plaintiffs' witness Williams, admittedly competent to give his opinion as to values, and his valuations as to each of the leaseholds was considerably lower than the amounts found by the court to be the true values. The court was fully warranted in accepting them in preference to the ones expressed by the witnesses for appellant. The findings as to values are therefore conclusive on appeal.

We find no error in the record which would call for a reversal of either judgment.

The judgments are affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.

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59 Cal.App.2d 407

KENT v. LAMPMAN et al.

Civ. 14049.

District Court of Appeal, Second District, Division 1, California.

June 26, 1943.

1. Bills and notes 🔑134

Where note and agreement, whereby corporate maker agreed to pay payee a specified bonus, were executed at the same time, as between the original parties, note and bonus agreement were construed together as part of a single transaction, but payee's agreement to pay one-half the "bonus" to her attorney who was a maker was no part of the transaction, where neither the corporate maker nor makers other than the attorney were parties to payee's agreement.

2. Bills and notes 🔑129(1)

Where collaterally secured note provided that upon makers' failure to respond forthwith to payee's call for additional security obligation should become due, provision relative to additional security was not so ambiguous as to be void but payee had right to call for additional security and was not required to specify the character thereof, and where call for such security was not complied with, the note forthwith became due.

3. Bills and notes 🔑129(3)

Where blank for maturity date of note was left unfilled, note was a "demand note". Civ.Code, § 3088.

See Words and Phrases, Permanent Edition, for all other definitions of "Demand Note".

4. Bills and notes 🔑444

Under statute providing that makers engage to pay note according to its tenor, corporate maker's agreement to pay payee a specified bonus did not modify makers' obligation to pay contemporaneously executed note and action on note was not "premature" on ground that bonus agreement established a "condition precedent" upon which payment of note depended. Civ.Code, § 3141.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent" and "Premature Action".

5. Bills and notes 🔑444

Where collaterally secured note did not refer to mortgage security and there was no intention by the parties to make a mortgage, collateral security did not constitute note a "mortgage" on personalty which must be foreclosed.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

6. Usury 🔑83

Corporate maker's agreement to pay to payee a specified bonus on the first 560 tons of ore to be shipped from its mines did not render note usurious where corporation had previously assigned future proceeds from its operations and did not receive money therefrom.

7. Mines and minerals 🔑106

Where note, agreement whereby corporate maker agreed to pay payee a specified bonus on first 560 tons of ore shipped from its mines, and payee's agreement to pay one-half of bonus to her attorney who was defaulting maker of note, were contemporaneously executed, payees' agreement to pay such bonus to her attorney did not destroy obligation of note on ground that payee and attorney who was an officer of corporate maker had conspired to make a secret profit.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Ione C. Kent against I. W. Lampman and others on a note. From an adverse judgment, named defendant and another appeal.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Henry P. Goodwin, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Three individuals and a corporation, as joint makers, made, executed and delivered to plaintiff a promissory note for $6,000. In preparing the note a mimeographed form was used, and the blank for a maturity date was not filled in, so that that portion of the note read: "—after date for value received". The note also recited that collateral security was deposited for the payment thereof, with the following provision: "That Ione C. Kent has the right to call for such additional security as she may deem proper, and on failure to respond forthwith to such call, this obligation shall immediately thereupon become due and payable;". Notice of demand for additional security was served upon the makers of the note and not complied with, whereupon complaint was filed in the Superior Court to enforce the obligation.

Default of one of the individual defendants was entered; the action was dismissed without prejudice as to another individual defendant. The trial court found in favor of plaintiff and rendered judgment for the principal sum of the note, together with attorney's fees and interest against the corporation defendant and two of the individual defendants, one of whom had answered and one of whom had defaulted.

Upon appeal from this judgment by one of the individual defendants and the corporation, five defenses are presented:

First: The provision above quoted in the note relative to calling for additional security is so ambiguous and uncertain as to make it void, and that in any event, the plaintiff in her demand for additional security did not specify what security was required, thus making the demand void and of no force and effect.

Second: Action was prematurely filed because the note did not contain a due date, and at the time of its execution an agreement was entered into between plaintiff and the makers which established a condition precedent upon which payment depended; and, in any event, the collateral security constituted a mortgage on personal property which may be foreclosed in only one way.

Third: Neither the conditions precedent upon which the maturity of the note depended had come to pass, nor had a reasonable length of time elapsed within which such conditions could have been performed, so that the plaintiff might declare the note to be due.

Fourth: An agreement by the defendant corporation to pay a bonus to the plaintiff rendered the whole transaction usurious.

Fifth: At the time the note was made plaintiff and defaulting defendant conspired to make a secret profit out of the transaction.

To understand these contentions, it is necessary to set forth in some detail the dealings between the several parties. The two defendants, one of whom defaulted and one of whom was dismissed, were members of the State Bar. They maintained a law office with a common reception room. The plaintiff, a widow, called at this law office and propounded questions to one of the lawyers about legal matters. The lawyer was unable to give her satisfactory answers, no charge was made for his services, and that matter concluded.

Two or three weeks later one of the lawyers called the widow on the telephone and invited her to come back to the law offices. When she called in response to this invitation a proposition was put before her by the two lawyers to loan the corporate defendant, a Nevada mining corporation, $6,000, for which she was to receive the promissory note here in question, executed by the corporation and signed by the individuals already named. All of the individual makers of the note were officers of the corporation. The ore to be mined was to be scraped with a bulldozer out of an open pit in Nevada. The corporation not only had no assets to support a credit of $6,000, but had already assigned future proceeds from its operations, so that at the time suit was commenced it had never received any money whatever therefrom, and the market for its product had disappeared.

The plaintiff turned over to the defendants cashiers' checks for $6,000, whereupon the defendants delivered to her the promissory note, and an agreement executed on behalf of the corporation to pay her a bonus of $10 per ton on the first 560 tons of ore to be shipped from the mine of the corporate defendant. This, despite the prior assignment of the ore. Finally, the plaintiff and one of the attorneys executed what might be termed a side agreement whereby the plaintiff was to pay one-half of the "bonus" to him. All of these agreements were prepared by the attorneys or their stenographers, and presented to the plaintiff at the same time, and on the same day she had been summoned to the law office. From the record it cannot be determined whether the last agreement was an attorney's fee for services by the defendant lawyer to the plaintiff, or whether it was executed by the lawyer for his own private benefit and without the knowledge of the corporation of which he was an officer.

[1] This being a controversy between the original parties, the note and the bonus agreement are to be construed together as part of a single transaction. Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293. Obviously the agreement between the defendant lawyer and the plaintiff is no part of the transaction. Neither the corporation nor any defendant other than the attorney who executed it were parties to it.

[2, 3] Applying this rule, it becomes apparent that there is no ambiguity in the language set forth in the promissory note. The payee had the right to call for additional security; the call was made and not complied with; and thereupon, in accordance with the terms of the note, it forthwith became due and payable. The payee was not required to specify the character of the additional security. It was the obligation of the makers of the note to furnish additional security, which they wholly failed to do. And if the agreement relative to collateral security were

ambiguous, the blank for maturity date having been left unfilled, it was a demand note. Civ.Code, § 3088.

[4, 5] There is no merit in the second and third defenses that the action was prematurely filed for the reason as stated that the bonus agreement constituted a condition precedent before suit could be brought. It is elementary law that the makers of a promissory note engage to pay it according to the tenor of the instrument. Civ.Code, § 3141. The trial court properly found that the bonus agreement did not modify the obligation to pay the note. There was no reference to any mortgage security and no intention evident by any of the parties to make any mortgage.

[6, 7] The defense of usury is just as inapplicable. There is no usury evident in the transaction. And the agreement between the lawyer defendant and the plaintiff did not destroy the obligation of the note.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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59 Cal.App.2d 565

SHIPWAY v. MONISE.

Civ. No. 2892.

District Court of Appeal, Fourth District, California.

July 6, 1943.

Hearing Denied Sept. 1, 1943.

1. Automobiles 🔑**217(3)**

The right of motorist to claim right of way over a pedestrian crossing highway other than at an intersection or in marked crosswalk is not absolute, and pedestrian is not absolutely prohibited from so crossing. Vehicle Code, § 562, St.1935, p. 188.

2. Automobiles 🔑**245(72)**

Where pedestrian crossing highway other than at intersection or in walk marked crosswalk was struck by automobile and there was evidence that pedestrian looked but either did not see approaching automobile, or saw it and misjudged either its speed or distance, question whether pedestrian was contributorily negligent is for jury. Vehicle Code, § 562, St.1935, p. 188.

3. Automobiles 🔑**217(3)**

In action for injuries sustained by pedestrian struck by automobile while crossing highway between intersections outside of a crosswalk, instruction that pedestrian was not only obliged to exercise due care in use of highway but was also obliged to yield right of way to motorist, was improper as placing a greater burden upon pedestrian that that imposed upon him by law. Vehicle Code, § 562, St.1935, p. 188.

4. Automobiles 🔑**217(3)**

While the duty to yield the right of way imposed upon a pedestrian by statute relating to crossing a roadway between intersections outside of a crosswalk may call for a higher degree of care while crossing between intersections, the real question in such case is whether the required care has been exercised, and not merely whether the right of way has been actually yielded. Vehicle Code, § 562, St.1935, p. 188.

5. Appeal and error 🔑**1064(1)**

Instruction that motorist's right of way was absolute over pedestrian crossing highway between intersections outside of a crosswalk was prejudicial to pedestrian. Vehicle Code, § 562, St.1935, p. 188.

6. Automobiles 🔑**246(58)**

In action for injuries sustained by pedestrian struck by automobile while crossing highway between intersections outside of a crosswalk, record established that no instruction should have been given applying "last clear chance" doctrine in favor of pedestrian. Vehicle Code, § 562, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Arthur H. Shipway against John C. Monise for injuries sustained in an automobile accident. From a judgment for defendant, plaintiff appeals.

Reversed and remanded.

A. T. Procopio and Irvin J. Kahn, both of San Diego, and Henry F. Walker, of Los Angeles, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries. Shortly after midnight on October 5, 1941, the plaintiff and another pedestrian, while crossing Pacific Highway in San Diego, were struck by an automobile driven by the defendant. Pacific runs north and south and is a four-lane highway. The plaintiff had parked on the west side of Pacific and was walking across that street towards the east when he was struck by defendant's car, which had been traveling north in the westerly of the two lanes for north-bound traffic. There was some question as to whether the plaintiff was at the time within an unmarked crosswalk, but most of the evidence would seem to indicate that he was crossing Pacific at a point about 60 feet north of an intersection.

The plaintiff testified that before attempting to cross he looked to the north and saw two or three south-bound cars coming; that he waited until they went by and then proceeded to cross; that as he neared the center of Pacific he looked to the south for any north-bound traffic; that he saw two cars approaching, one in each lane; that he stopped to allow these cars to pass; that when he stopped the nearest north-bound car was 200 or 250 feet to the south; that the place where he stopped was in the northerly crosswalk, about two feet west of the center of Pacific; and that just before the car in the westerly of the two lanes reached him it swerved across the center line and struck him before he could get out of the way.

The defendant testified that he was traveling north about two or three feet easterly from the center line; that his car at no time crossed over the center line of Pacific; that he did not see the plaintiff and first became conscious of having had an accident when he heard a "thud" at the front of his car; that there were several cars approaching from the north, one of which had unusually strong lights; and that while he was straining his eyes and trying to watch "this thud happened." Another witness testified that shortly after the accident he asked the defendant if he had seen the pedestrians before he struck them and that the defendant replied that "they loomed up in front of him about ten feet ahead."

A jury returned a verdict in favor of the defendant and the plaintiff has appealed from the judgment on the ground that the court erred in giving and refusing certain instructions.

One of the most important questions of fact presented at the trial was as to whether the appellant was guilty of negligence in failing to comply with the rules of law governing the manner in which he might cross a street between intersections, outside of a crosswalk. The giving of proper instructions applicable to that issue was, therefore, important and whether the jury was properly instructed in this regard is the main question raised on this appeal.

[1, 2] Section 562 of the Vehicle Code, St.1935, p. 188, provides that while so crossing a roadway a pedestrian shall yield the right of way to passing vehicles, but that this rule shall not relieve the driver of a vehicle from the duty of exercising due care for the safety of the pedestrian. In a number of cases in this state the meaning of this section has been passed upon. In Genola v. Barnett, 14 Cal.2d 217, 93 P.2d 105, it was held, in effect, that the right of way thus given to the driver of a car by this section is not an absolute one, that the section is not a prohibition against crossing between intersections, and that even where a pedestrian fails to so yield the right of way he may recover where it appears that the vehicle in question was being improperly operated. In Brannock v. Bromley, 30 Cal.App.2d 516, 86 P.2d 1062, 1067, the court stated that this duty of a pedestrian to yield the right of way may call for a higher degree of care than would be necessary for one crossing at a regular crosswalk, but that "the question as to whether or not such care was exercised in a given case is one for the jury, unless he is so careless that it can be said he is negligent as a matter of law." In Verner v. Skov, 20 Cal.App.2d 232, 67 P.2d 123, it was held that this statutory provision does not give the driver of the car an absolute right of way without regard to the surrounding circumstances and that whether a reasonably prudent person would have crossed at the particular time and place depends upon a number of things, such as the distance and speed of the approaching car, and was a question for the jury. In Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384, 387, the court said: "The right of the automobile driver to claim the right

of way over a pedestrian crossing a highway other than at an intersection, or in a marked crosswalk, is not, therefore, an absolute one, nor is the pedestrian absolutely prohibited from so crossing. * * * Where, as in the present case, there is evidence that the injured person looked, but either did not see the approaching automobile, or saw it and misjudged either its speed or distance, the question whether, under the particular circumstances then existing, he was guilty of contributory negligence is one of fact."

The respondent relies on Chase v. Thomas, 7 Cal.App.2d 440, 46 P.2d 200; Vitali v. Straight, 21 Cal.App.2d 253, 68 P.2d 746, and Weissman v. Seehusen, 55 Cal.App.2d 391, 131 P.2d 10, as holding, in effect, that under section 562 an absolute right of way is given to the driver of the vehicle and that such a pedestrian must yield the right of way. Some of the language used in these cases is somewhat inconsistent with the rules above referred to, but that language was used in discussing factual situations and not in connection with instructions given, and those were all cases where contributory negligence appeared as a matter of law or very clearly appeared as a matter of fact. These cases are not controlling here.

In this case, after giving several instructions to the effect that the driver of the automobile was bound to use ordinary care in the operation thereof and that the plaintiff was bound to use ordinary care in crossing the street, and in looking carefully in the direction from which the approach of vehicles might be anticipated, the court read the provisions of section 562 of the Vehicle Code and then instructed the jury that if it should find that the plaintiff conducted himself at that time and place in violation of that section such conduct constituted negligence, as a matter of law, and that if such negligence was a proximate cause of the injuries the verdict must be for the defendant. It may be noted, in passing, that while the court thus told the jury that a violation of this section by the plaintiff would constitute contributory negligence as a matter of law, it neither commented on the second part of that section, which somewhat modifies the effect of the first part, nor explained the rights and duties of a pedestrian under such circumstances as those rights and duties have been interpreted and clarified in the cases above cited.

[3] Immediately after the instruction above referred to the court gave one reading as follows: "You are further instructed that if you should find that plaintiff in this case, at the time of the accident, was crossing Pacific Avenue at a point other than within a marked cross-walk or within an unmarked cross-walk at an intersection, as provided in Section 562 of the Vehicle Code, the plaintiff would have been obliged not only to yield the right of way to the automobile of the defendant, but also at all times to exercise due care in the use of the highway; and if you should further find that the plaintiff made no effort to do either, and that his failure in this regard contributed proximately to the accident, your verdict must be for the defendant." In this instruction the jury was told that the plaintiff was not only obliged to exercise due care in the use of the highway but was also obliged to yield the right of way to the driver of the automobile. This is hardly a correct statement of the law and places a greater burden upon the plaintiff than that imposed upon him by the law. While it was his duty to exercise due care in crossing the highway, under the existing circumstances, if he did exercise such care he was entitled to proceed and was not obliged to yield the right of way in any event. Under the preponderance of the evidence, so far as shown by the record, the jury could hardly have helped finding that the appellant did not, in fact, yield the right of way to the respondent. This instruction came very close to telling the jury that this fact alone would prevent a recovery on his part.

After the jury had been sent out it returned into court and asked for further instructions "Relative to pedestrians' rights and responsibilities in crossing the highway in the middle of the block." The court then said:

"If you should find that the plaintiff was crossing Pacific Highway at a point other than the marked or unmarked crosswalk, then that pedestrian must yield the right of way to a motor vehicle on the highway. The motor vehicle has the right of way. It is his duty to yield to the vehicle which has the right of way.

"If you should find that the plaintiff was crossing at a crosswalk which is created by the prolongation of the curb and property lines across the street, then the pedestrian has the right of way and the automobile must yield to the pedestrian. Anyone using a highway has a right to expect that everyone else using the highway shall obey the law, but one must not rely upon that expectation to the extent that he does not take reasonable care not to do an injury to another.

"Now, that is about as far as I can go on these instructions."

[4, 5] While the duty to yield the right of way, imposed on a pedestrian by section 562, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised, and not merely whether or not the right of way has been actually yielded. These instructions, as a whole, emphasized the duty of the appellant to yield the right of way and failed to clearly inform the jury that that duty was not absolute and that the real question of fact in that connection was whether the appellant had exercised reasonable care under the circumstances there and then existing. This defect in the instructions was greatly accentuated in the final instruction, after the jury had returned and asked for further light on that particular matter. The jury was then told in precise language, and in reply to a definite question, that the vehicle had the right of way and the pedestrian must yield thereto. To thus instruct the jury that the appellant was "obliged" to yield the right of way, that he "must" yield it, and that it is his "duty" to yield it was, in effect, to instruct the jury that the driver's right to the right of way was absolute. In spite of technical niceties it can hardly be doubted that a jury would so understand, especially in view of the language used in response to its inquiry with respect to that very matter, about which the previous instructions had left it in doubt. Under these circumstances, it cannot reasonably be held that the giving of the final instruction in this form was not prejudicial to the appellant.

In some manner the jury should have been told that the right of the respondent to the right of way was not an absolute one, and that it should consider and decide whether or not the appellant acted with reasonable care under the conditions as they existed, including the matter of whether or not, as a reasonable man and in view of those conditions, he was justified in believing that he could safely proceed without interfering with the other's right of way.

[6] The appellant also attacks a number of other instructions given by the court. While some errors appear therein they could hardly be held sufficiently prejudicial to justify a reversal, and it is unnecessary to discuss them as they have now been pointed out and may easily be corrected upon a new trial. The appellant further contends that the court erred in refusing to give an instruction offered by him applying the doctrine of last clear chance. Not only was this instruction erroneous, in the form in which it was offered, but after reading the record we are of the opinion that no instruction of that nature should have been given under the circumstances here appearing.

The judgment is reversed and the cause remanded for a new trial.

MARKS and GRIFFIN, JJ., concur.

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59 Cal.App.2d 536

EISENMENGER v. EISENMENGER et al.

Civ. No. 12403.

District Court of Appeal, First District, Division 1, California.

June 30, 1943.

Hearing Denied Aug. 26, 1943.

1. Trusts 🔑110

In action for declaration that defendants held land in trust for plaintiff, evidence that plaintiff was to receive land if he made certain payments which were only made in part sustained finding that agreement was never consummated and sustained judgment against plaintiff.

2. Trusts 🔑107

Where plaintiff based claim to land on contract requiring defendants to transfer land to plaintiff upon plaintiff's performance of certain conditions, plaintiff had burden to show terms of contract and his performance thereof.

3. Limitation of actions 🔑103(1)

Statute of limitations commences to run on action to enforce a trust from date of repudiation of trust by trustee.

4. Limitation of actions ⚷103(1)

Where evidence indicated that any trust created in favor of plaintiff was repudiated by trustee almost ten years before action to enforce trust was instituted, action was barred by statute of limitations.

5. Trusts ⚷138

Where defendant repudiated any trust in land in favor of plaintiff more than six years before plaintiff instituted action to declare such trust and, through agency of defendant's brother, paid taxes and was in open and actual adverse possession for more than five years prior to bringing of such action, defendant had title by "adverse possession".

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

◆

Appeal from Superior Court, Napa County; Arthur Coats, Judge.

Action by Henry Eisenmenger against John Eisenmenger and William Eisenmenger for a judicial determination that defendants hold title to a certain ranch in trust for plaintiff, wherein John Eisenmenger cross complained. Judgment for defendant John Eisenmenger, and plaintiff appeals.

Affirmed.

E. B. Mering, of San Francisco, for appellant.

King & King, of Napa, for respondents.

PETERS, Presiding Justice.

The plaintiff, Henry Eisenmenger, and the defendants, John and William Eisenmenger, are brothers. The action was brought by Henry to have it determined that defendants hold title in trust for him to a 76 acre ranch in Napa County. William, who resides in Alaska, defaulted. The complaint alleges that John originally owned the property; that prior to October 14, 1930, John deeded the property to William to secure a $100 loan; that on October 14, 1930, it was agreed between Henry and John that "in consideration of said Henry Eisenmenger having lived for several years upon said property and having during all of said time taken care of their mother and stepfather, and also in consideration of Henry Eisenmenger having paid to said John Eisenmenger the sum of ——— and also in consideration of the promise of said Henry Eisenmenger that he would continue in the future to take care of said persons as he had done in the past that said John Eisenmenger would convey all of said property to said Henry Eisenmenger, in consideration of the matters above set forth, and also the promise of said Henry Eisenmenger to pay the funeral expenses of said parents." The alleged agreement is attached to the complaint as an exhibit. The complaint also alleged that Henry prepared deeds to be executed by William and forwarded the same to him together with an offer to execute a mortgage in favor of William to secure John's debt for which William then held the deeds as security; that William failed and refused to execute the deeds; that defendants have been in possession since that date and have removed certain buildings from the premises. Plaintiff avers full performance on his part of the terms of the alleged agreement between him and John. He prays for a decree that defendants hold the property in trust for him, and for damages for the use and occupation.

As disclosed by plaintiff's complaint, it is his theory that by the agreement of 1930 between him and John, William was to receive a mortgage from Henry in lieu of holding the deeds as security for John's debt to William. William was not a party to the agreement, and, it is alleged, refused to convey to Henry. It will be noted that, as pleaded, the conveyance was to be made in the future in return for certain considerations to be furnished by Henry, some of which were past and some future considerations.

John filed an answer and cross complaint. He averred that John paid William the amount owing to him and that on July 21, 1931, William conveyed the property to John. This deed was not recorded until after this action was commenced. John also averred that Henry failed to perform the agreement; that he failed to support the mother and stepfather; refused to pay the burial expenses of the mother, except for the sum of $20; failed to pay the doctor bills of the mother, except for $20; failed to pay the taxes; and that he, John, fully performed. He also pleaded the statute of limitations, and title by adverse possession, alleging possession and payment of taxes for the requisite period.

The trial court found that plaintiff had no interest in the property; that the agreement alleged in the complaint "was never consummated by any of the parties thereto and that no trust involving said property was ever created in favor of the plaintiff herein"; that plaintiff's cause of action was barred by the statute of limitations; and that, in any event, defendant had title by adverse possession.

Aside from certain technical contentions which are without merit, plaintiff's appeal is predicated upon the contention that the findings are unsupported.

The alleged agreement of October 14, 1930, is pleaded as an exhibit to the complaint. It is in the form of a letter addressed to William, in Alaska, and was admittedly signed by John. In that letter John requests William to execute the deeds which Henry had sent to William that morning, and states that Henry will give William a note and mortgage for the amount William had advanced to John. The letter reads in part: "I am in the office of C. M. Dawson, the attorney, handling the property situation, together with Henry, mother and my stepfather, and we have come to an agreement whereby Henry is to take over my interest in the property according to an agreement we had a year ago, Henry having paid the money to me as agreed and if you will sign the deeds of conveyance which Henry has mailed to you this morning it will fully straighten out the family differences. * * *

"We have come to an agreement relating to taking care of the old folks and I have agreed to give mother $10.00 a month and Henry will take care of the old folks for the balance of their lives, paying all expenses during their lives and funeral costs."

Henry signed a postscript to the letter stating: "This is a satisfactory arrangement with me and full agreed upon by my brother John and I, and I will see that you get the mortgage as soon as the matter is straightened out. As soon as possible I will pay the amount due you on the mortgage."

[1] It is an admitted fact that William never executed the deeds to Henry. It is also admitted that Henry never paid William the debt owed by John. The fact that William deeded the property to John on July 21, 1931, supports an inference that John paid this debt. The evidence offered by plaintiff on the other issues involved was most unsatisfactory and incomplete. On the issue of whether prior and subsequent to 1930 Henry had supported his mother and stepfather, the evidence is in conflict. There is evidence that he did not do so, although there is considerable evidence the other way. Such conflicts were for the trial court. There is evidence that John paid the last illness expenses for the mother, and that John and other brothers paid her funeral expenses. Henry testified he paid these bills in part but admitted he did not pay them in toto. It is obvious, therefore, that the trial court was justified in finding that the agreement of October 14, 1930, was never consummated —i.e., never performed by plaintiff.

As already pointed out, the complaint is squarely based on the letter of October 14, 1930. That letter refers to some agreement having been made between John and Henry the preceding year whereby Henry was to take over John's interest in the property. Henry testified that the 1929 agreement was in writing; that he had placed it in an old trunk; that it had been stolen from the trunk; and that he had a witness in the courtroom who saw it stolen. That witness was never produced. No satisfactory evidence was given as to the contents of this earlier agreement. It was apparently the theory of Henry that, prior to 1929, he had advanced $1,500 to help pay the expenses of the old folks, and that this was an obligation of John's. Apparently, although this is not entirely clear, this is the sum referred to in the letter of October 14, 1930, as having been paid by Henry. The complaint, in setting forth this transaction, leaves this sum blank. The record is entirely silent as to whether this was the total sum to be paid by Henry, or whether the 1929 agreement contained other covenants to be performed by Henry. The very fact that the 1930 agreement was entered into implies that the 1929 agreement was abrogated. This inference is supported by the fact that in the 1930 transaction Henry assumed certain executory obligations. If the 1929 agreement was complete, the property was his without further obligation on his part. This was apparently the theory adopted by Henry on the trial. At that time, apparently in an attempt to excuse his failure to perform some of the executory obligations of the 1930 agreement, Henry took the position that he was relying on the 1929 agreement. During his examination, the court asked Henry: "So you do not claim this agreement [that of October 14, 1930] as the agreement whereby you ought to have the property because you claim you already bought it before? A. I already bought it, but that [the 1930 agreement] just shows I did buy it a year ago. It says, 'According to an agreement we had a year ago.' It is still on there. That makes it '29."

[2] While plaintiff's testimony, which was supported by that of several witnesses, was that prior and subsequent to 1930 he had assumed almost the sole burden of supporting the mother and stepfather, and that, until 1931 or 1932, he had operated the ranch and at his own expense constructed several buildings thereon, the evidence is not in such a state that it requires a holding that, as a matter of law, a binding agreement, whether of 1929 or 1930, remained in effect. The burden rested on the plaintiff to show the terms of the contract forming the basis of his claim, and to show that that agreement, insofar as it was executory, had been performed by him. The agreement was executory as to John insofar as it required a future transfer by John or William to Henry. Unless plaintiff fully performed his part of the agreement he is in no position to demand a transfer. The terms of the 1929 agreement were not shown. Hence, it cannot be held that under that agreement there was an executed consideration. The complaint alleges, and the 1930 agreement recites, that, as part of the consideration for the transfer, Henry was to take care of the mother and stepfather for the balance of their lives and was to pay their funeral expenses. The evidence is in conflict on whether he performed these executory obligations.

Moreover, the agreement of 1930 contemplated a deed from William to Henry. In view of what has already been stated, it is clear that the evidence is too uncertain to support a finding, much less compel one, that a binding obligation to transfer the property continued when the transaction was not consummated as contemplated. Furthermore, there is no evidence that Henry ever paid William, which would indicate either that the agreement was abrogated when William failed to cooperate, or that if it continued in effect between Henry and John, that Henry failed to perform.

[3, 4] The trial court also found that plaintiff's action was barred by the statute of limitations. This finding is also supported. If a trust was created in 1930, and if John thus held the property subject to an enforceable claim of Henry, the statute would commence to run against enforcement of such claim from the date of repudiation by John. The evidence shows that the trust agreement, if any existed, was repudiated by John shortly after 1930. The mother died in May, 1931. Shortly thereafter, Henry was ordered off the premises by the Harts who were acting as the agents for John. In 1934—six years before the present action was commenced—Henry, in a prior action, sued to enforce the trust because of an alleged repudiation by John. The parties here stipulated that the judgment of nonsuit in that case was not res judicata, but the fact that an action was then commenced is some evidence that there had been a repudiation of the trust, if any existed, prior to 1934.

[5] The court also found that, in any event, John had title by adverse possession, finding, in this connection, that John had been in actual, adverse and exclusive possession of the property for more than five years next preceding the action and had paid the taxes thereon. The land is located in a remote portion of Napa County. John purchased it in 1923 and admittedly Henry operated it until 1931. John at no time lived on the property. He was a motorman in San Francisco until 1937 when he was sentenced to McNeil Island Federal Prison for a narcotic offense. He served twenty-seven months, and since his release has resided near the property in question. The evidence shows that Chris Hart (a brother of the two litigants, although he uses a different name) and his wife own a ranch adjoining the ranch here involved. Since sometime in 1931 or 1932 the Harts, except for a short period when John leased the premises to a tenant, have been in possession of the ranch as agents of John. John paid the taxes up to 1934 or 1935 and since that time the taxes have been paid by the Harts. John has given the Harts his note secured by a deed of trust on the property for all sums expended by them on his behalf. Thus, although John was not in personal possession, he has been in open and actual and adverse possession of the property through the agency of the Harts for more than five years preceding the action. Taxes having been paid, and a repudiation of the trust having occurred more than six years before the filing of the action, John now has title by adverse possession.

The judgment is that John owns the property free of any claim of Henry.

From what has been said, the trial court's holding was justified either on the theory that the agreement upon which plaintiff claims was never consummated, or that such agreement was repudiated by John who has since secured title by adverse possession.

The judgment is affirmed.

KNIGHT and WARD, JJ., concur.

59 Cal.App.2d 337

ELLENBERGER v. CITY OF OAKLAND et al.

Civ. 12338.

District Court of Appeal, First District, Division 1, California.

June 25, 1943.

1. Evidence ⚷91

Burden of proof is on party presenting affirmative of issue. Code Civ.Proc. § 1981.

2. Evidence ⚷98

Where there is no evidence on an issue, finding should be against party who has burden of proof. Code Civ.Proc. § 1981.

3. Mandamus ⚷168(2)

Where, in proceeding on petition of policeman's widow to compel payment of pension, there was no evidence showing a causative connection between policeman's fall and death of policeman seven years thereafter, burden of proof did not shift to respondents.

4. Mandamus ⚷168(4), 187(9)

In proceeding on petition of policeman's widow to compel payment of pension, neither trial court nor reviewing court was permitted to surmise that respondent board of trustees of respondent city's police relief and pension fund was attempting to deprive petitioner illegally of a pension.

5. Mandamus ⚷168(4)

In action by policeman's widow to compel payment of pension, evidence as a matter of law did not require finding that policeman's fall, seven years prior to death, caused stroke which policeman suffered after fall and which resulted in death.

6. Continuance ⚷47

In support of a motion for continuance, it is incumbent on a party to be pre- where witnesses are not subpoenaed, to pared to prove its affirmative allegations or show sufficient excuse for failure to subpoena witnesses. Code Civ.Proc. §§ 1869, 1981.

7. Continuance ⚷47

Failure of a party to produce necessary evidence on a motion for continuance places the trier of facts in a position where evidence which party does introduce should be viewed with distrust. Code Civ.Proc. § 2061, subds. 6, 7.

8. Continuance ⚷26(3)

In proceeding on petition of policeman's widow to compel payment of pension, where petitioner's affirmative allegations as to sequence of causation from date of accident to date of death, seven years thereafter, which was the main question in the case, required expert evidence, and record did not disclose that petitioner's counsel made any preparation to call expert witnesses, refusal of continuance until counsel could obtain attendance of physician to prove matters that were not satisfactory to the court was not error. Code Civ.Proc. §§ 1869, 1981, 2061, subds. 6, 7.

9. Mandamus ⚷187(9)

In proceeding on petition of policeman's widow to compel payment of pension, where one question was whether policeman's fall, seven years before death, had caused a stroke or had been caused thereby, and there was evidence, aside from policeman's own statements, that policeman had fallen, exclusion of testimony of another policeman that immediately after the fall deceased had stated that deceased had slipped and fallen was, if error, without prejudice to petitioner.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Petition by Annie Ellenberger against the City of Oakland, a municipal corporation, and others, for a writ of mandate. From an adverse judgment petitioner appeals.

Affirmed.

A. D. Ericksen, of Oakland, and Johnson & Harmon and William H. Henderson, all of San Francisco, for appellant.

F. Bert Fernhoff, City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

WARD, Justice.

This appeal is taken from an order denying appellant's petition for a writ of mandate to compel the Board of Trustees of the Police Relief and Pension Fund of the City of Oakland to grant her a pension amounting to one-half of the salary of her deceased husband as a policeman of the municipality.

The amended petition alleges that prior to January 6, 1932, George Ellenberger was in perfect health; that on that date "while in performance of his duty as such policeman, said George Ellenberger, while stepping on the running board, slipped between the patrol wagon and another car, twisted his neck and struck his head against the side of the patrol wagon; that immediately thereafter said George Ellenberger felt a severe pain in the neck and later nausea and dizziness and he lost consciousness; that he suffered a cerebral hemorrhage, injury to muscles and nerves of the head and neck, cerebral lesion and shock"; that subsequent to the accident Ellenberger showed a steady deterioration in health which, as alleged, was traceable to the injuries suffered in 1932.

There is no dispute that a stroke in 1939 caused death, or that there was a decline in Ellenberger's health from 1932 to 1939; also there is evidence that he suffered a fall in 1932 during the performance of his police duties, but whether this fall brought about a stroke or whether a stroke caused the fall, or whether the first attack contributed to the second, are the particular questions which were presented to the trial court.

[1-5] Appellant presents the first contention in the following form: "There is no substantial evidence supporting the court's findings that George Ellenberger did not fall on January 6, 1932, and strike his head while in the performance of his duties as policeman causing injuries directly resulting in his death on July 28, 1939." It is immaterial whether there is substantial evidence to support such a finding, though the evidence indicates justification for such a conclusion. The rule is that the burden of proof is upon the party presenting the affirmative of the issue. Code Civ.Proc. § 1981; Montgomery v. Board of Administration, etc., 34 Cal.App.2d 514, 93 P.2d 1046, 94 P.2d 610. If there is no evidence upon an issue, the finding should be against the party who has the burden of proof. This case does not even present a situation where if a prima facie case is presented, the burden of proof shifts to the opposing litigant. There is an entire absence of evidence as the record now stands, showing a causative connection between the occurrence of 1932 and the demise of Ellenberger in 1939; a conclusion to that effect must rest on nothing but conjecture. Neither the trial nor a reviewing court is permitted to surmise that there has been an attempt on the part of the board to illegally deprive the widow of a deceased officer of a pension. Omitting for the moment certain medical reports which will be considered later, the evidence as a matter of law does not require a finding that the fall of 1932 caused any stroke which the deceased may have suffered. In this respect the case is to be distinguished from Naughton v. Retirement Board of S. F., 43 Cal.App.2d 254, 110 P.2d 714, and Brant v. Retirement Board of S. F., 57 Cal.App.2d 721, 135 P.2d 396. In both these cases this court held that the uncontradicted evidence showed the receipt of an injury in the course of the employment and a causal relation between such injury and the death.

Up to this point the appeal has been viewed solely upon the record as it stands. The difficulty, if any, in the present appeal arises from the fact that certain medical reports were offered in evidence, to which objections were sustained, and that these were not all marked as exhibits, although two were so marked. Subsequently the trial court stated: "These reports may be considered for what they are worth." Assuming the possibility that the trial court intended to mark them as exhibits, and since the transcript is prefaced with the statement that the "exhibits [medical reports] were added to reporter's transcript by stipulation of respective counsel on settlement of transcript," in the interest of justice we have considered them.

Most of the reports indicate Ellenberger's physical decline from 1932 to the date of his death in 1939. The only statement, or part thereof, called to our attention in support of a theory that the 1932 accident, spell, stroke or fall was responsible for the affliction in 1939, appears in a report of a Dr. Warren B. Allen, who examined Ellenberger in 1932 and 1939, which is as follows: "It will probably be necessary to assume that the patient had a slight head injury on January 6, 1932, with little or no concussion, but which was followed by an edema of the brain which accounted for his delayed vomiting and unconsciousness. The microscopic findings in the cerebral spinal fluid would indicate a previous mild inflammatory disease of the meninges suggesting a chronic arachnoiditis (see lab. report) pre-existing and activated by the trauma." The report of Dr. Allen further stated that he did not feel that the injury sustained in 1932 "contributes or is responsible for his present disability" and "is not in any way industrial." Considering all of the hospital and medical reports as part of the record, there is no evidence that the condition which resulted in death was connected with the "fall" sustained in 1932. The reports are all based upon a statement by Ellenberger that he was stepping from an ambulance to a patrol wagon when he slipped "striking his head and straining his neck." This evidence, if admissible, does not require a finding as a matter of law that the fall caused a stroke suffered then, nor a subsequent one.

[6-8] When it appeared that the court intended to render judgment for respondent, and that it did not deem the medical reports, if admissible, sufficiently substantial to warrant any other decision, petitioner's counsel asked for a continuance "until we can get a doctor * * * to prove these facts that are not satisfactory to the court." Counsel for petitioner did not state the name of the doctor they wished to call, nor the particular, or any, point petitioner hoped to prove. Petitioner's counsel knew or should have known the contents of the medical reports. The sequence of causation from the date of the first trouble in 1932—the main question in the case—required expert evidence. The record does not disclose that any preparation was made to call any of such witnesses, whose testimony would be necessary to prove petitioner's theory. It is incumbent upon a party to be prepared to prove affirmative allegations (Code Civ. Proc., §§ 1869, 1981) or to make a sufficient showing why witnesses were not subpoenaed. Failure to produce necessary evidence places the trier of the facts in a position where the evidence introduced should be viewed with distrust. Code Civ. Proc., § 2061, subds. 6, 7.

[9] The third assignment of error is that the court erred in ruling inadmissible the testimony of a police officer that immediately after his fall in 1932 Ellenberger stated that he slipped and fell. Assuming that the statement was part of the res gestae, and there is authority for such assumption (Showalter v. Western Pac. R. Co., 16 Cal.2d 460, 106 P.2d 895), it does not appear that petitioner was prejudiced by the ruling. There is evidence that Ellenberger had fallen between the two cars to the floor of a garage, and this is borne out by the condition of his uniform, which was covered with dirt and grease. In addition the hospital reports, which were considered by the court, referred to Ellenberger as having "slipped, striking his head and straining his neck." The trial court found in accordance with appellant's position that decedent "slipped * * * twisted his neck and struck his head against the side of the patrol wagon." A statement by the police officer, had it been admitted, would not have determined whether a stroke caused the fall or the fall caused the stroke.

Appellant objects to certain findings as contradictory. Any inconsistency is unimportant. An examination of the findings discloses without conflict that decedent died as a result of natural causes.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

59 Cal.App.2d 248

MARKALL v. PETERSON.

Civ. No. 6791.

District Court of Appeal, Third District, California.

June 17, 1943.

1. Sales 🔑479(2, 9)

Where conditional seller of machinery elected to retake machinery as authorized by contract which provided that in such case all buyer's rights would cease, and buyer refused to permit seller to take possession of machinery, seller could maintain action in claim and delivery against the buyer, and on destruction of the machinery by fire during pendency of the action seller could recover value thereof.

2. Replevin 🔑130

Neither plaintiff in replevin who has given bond and taken property nor defendant who by giving bond has retained or repossessed himself of the property, is relieved of liability therefor under his bond by the loss or destruction of the property while in his possession pending the action.

3. Replevin 🔑130

Where conditional buyer after institution of action in claim and delivery to recover conditionally sold machinery bonded against delivery, buyer was not relieved from liability under the bond by destruction of the machinery by fire while it was in his possession pending the action.

4. Sales 🔑479(8)

In conditional seller's action in claim and delivery to recover conditionally sold machinery which was destroyed by fire pending the action, finding of value of machinery at time of sale and prior to its destruction was sufficiently comprehensive to include its value at time of wrongful detention by buyer after demand for payment or delivery of machinery, and therefore judgment for seller was not invalid for lack of finding on question of value.

5. Sales 🔑479(7)

In action in claim and delivery to recover conditionally sold machinery or value thereof, wherein buyer filed cross-complaint based on alleged fraud, evidence sustained finding that conditional sales contract was not induced by fraud on part of seller concerning condition of the machinery.

6. Appeal and error 🔑1011(1)

It is not within province of reviewing court to consider testimony in conflict with findings of trial court, which are sustained by evidence.

◆

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by M. Markall, doing business as Markall Machinery Company, against M. R. Peterson to recover possession of Diesel engine and generator or the value thereof, wherein the defendant filed a cross-complaint. From an adverse judgment, the defendant appeals.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

H. Ward Sheldon, Nevada City, and John W. Dinkelspiel, of San Francisco, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action for the recovery of the possession of a Diesel engine and generator or for the value thereof alleged to be $2,500. Defendant answered and filed a cross-complaint, alleging fraud on the part of plaintiff and praying for damages in the sum of $11,000. After trial by the court sitting without a jury, findings in favor of plaintiff were made and judgment for the amount of his demand, plus attorney's fees and costs, followed. The evidence which amply sustains the findings of the trial court shows that on November 28, 1939, plaintiff agreed to sell and defendant agreed to buy a Fairbanks-Morse Diesel engine, generator and excitor, at an agreed price of $2,500. On that date defendant paid down $500 and received therefor a receipt which recited that the seller had received $500, that when completed balance of $2,000 was to be paid $750 in cash and $1,250 on contract of 12 months from date of delivery, "Engine and Generator to be working order upon acceptance by M. R. Peterson." On December 16, 1939, defendant paid plaintiff the additional sum of $750 and on said date the parties executed a formal written conditional sale contract which provided that the balance of the purchase price ($1,250) should be paid in twelve equal monthly installments, that the equipment therein described was "used", that it was to be installed at the Giant King Mine in Nevada County. It also provided:

"The undersigned hereby acknowledges and accepts delivery at * * * the property listed in the within contract pursuant to its terms."

"The purchaser acknowledges that said property covered by this contract is in good order and condition when delivered and accepts the same without warranty of mechanical or other condition."

"It is expressly agreed that any claim for defects or defective parts shall be no defense for non-payment of any sums due under this contract, but that all such sums shall become due and payable in accordance with this agreement and shall be immediately paid when due."

"It is understood that the seller or his assignee shall not be bound by any agreement or representation not contained in this agreement, which purchaser hereby admits he has read and understands."

Said equipment was delivered at said mine on December 16th, at which time it had not been tested, but delivery was made at the instance of defendant and against the advice of plaintiff. Upon its installation it was discovered that it was not in working order and plaintiff thereupon arranged to have same repaired, and for the purposes of such repair defendant delivered said equipment at the Fairbanks-Morse plant in San Francisco on January 15, 1940. There extensive repairs were made and the machine placed in good working condition at a total cost of $1,182.02, which sum was paid by plaintiff. On February 12th defendant accepted said equipment at San Francisco and returned the same to the mine, but he made no effort to use it and he did not pay any of the installments provided to be paid. The contract provided that title to the property should remain in the seller until all payments were made, and that should purchaser fail to make any of said payments the seller might take immediate possession of the property and declare the purchaser in default, in which event all of the rights and equities of the purchaser in and to said property should immediately cease. About March 9, 1940, plaintiff wrote defendant demanding that he pay the balance of the purchase price for the equipment; and shortly thereafter he went to the mine where he again demanded payment or that he be permitted to take the property, but defendant failed and refused to do either. On May 16th, while said equipment was still in the possession of defendant, same was destroyed by fire. The court found that "the reasonable market value of the said equipment at the time of said sale, and prior to its destruction by fire, was $2,500.00."

Appellant makes no complaint that the evidence does not support the findings, but he does contend that at most the limit of his liability was the balance ($1,250) due on the original purchase price of the equipment, and that the court erred in awarding plaintiff $2,500 as the value thereof; that the court failed to make a finding as to the time of the value of the equipment and that, therefore, the judgment is without support; that in the contract of November 28th plaintiff warranted the engine and generator to be in working order upon its acceptance, that on December 16th, when the second contract was signed, plaintiff told appellant the unit was complete and in working order, that defendant relied upon this representation, but that the equipment was not in such condition, and, therefore, said contract was induced by the deceit and misrepresentation of plaintiff; also that as the equipment was to be put in working order before acceptance, by appellant, and, accordingly, he was not in default in his payments.

In support of his first point appellant cites section 3302 of the Civil Code which provides that: "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." Respondent replies by saying that this is not an action for damages nor a suit for the balance of the purchase price; that upon appellant's breach of the conditional sale agreement respondent could and did elect to declare appellant's interest in the equipment forfeited under the terms of the agreement; and that the fact that appellant could initially have obtained title by paying only the $1,250 due upon the contract is consequently beside the point.

[1-3] Respondent's contention appears to be sound. The evidence shows that prior to instituting this action plaintiff demanded payment of the balance due or delivery of the equipment, both of which defendant refused. By the terms of the conditional sale contract of December 16th appellant agreed that in case of his default plaintiff might retake the property, whereupon all of appellant's rights therein would cease. Plaintiff so elected and appellant's rights did cease, and on appellant's refusal to permit plaintiff to take possession this ac-

tion in claim and delivery was a proper remedy for plaintiff to pursue to obtain such possession; and when, by virtue of the destruction of the property, its delivery became impossible, plaintiff was entitled to recover the value thereof. Los Angeles Furniture Co. v. Hansen, 46 Cal.App. 5, 188 P. 292; Meister & Sons Co. v. Harrison, 56 Cal.App. 679, 206 P. 106; McConnell v. Redd, 86 Cal.App. 785, 789, 261 P. 506. After the institution of this action defendant bonded against delivery, and, as was said in Drinkhouse v. Van Ness, 202 Cal. 359, 376, 260 P. 869, 875, "The decided weight of authority appears to be to the effect that neither a plaintiff in replevin who has given a bond and taken property, nor a defendant who, by giving bond, has retained or repossessed himself of the property, is relieved of liability therefor under his bond by its loss or destruction while in his possession pending the action."

We find no merit in appellant's contention that the judgment is without support by reason of the insufficiency of the court's finding as to the time when the property was of the value of $2,500.

Appellant cites Nelson v. Yonge, 73 Cal. App. 704, 710, 239 P. 67, 69, wherein it is said that in some jurisdictions, including California, where delivery cannot be had, the value should be that which the property had at the time of the trial. But the court there also said: "These decisions proceed upon the theory that, the money being but a substitute for the property, the amount of the alternative money judgment should be fixed by ascertaining it as of the date nearest to the time when the property would be delivered." Here it could no longer be delivered, and it had no value at the time of the trial.

[4] In Drinkhouse v. Van Ness, supra, the value at the time of the wrongful detention of a horse was said to constitute the proper measure where the horse had died before the trial; but we find in neither that case nor in Nelson v. Yonge any statement that if the exact date of the valuation was not found the judgment would not be sustained. Here the demand was made on March 9, 1940. At the trial plaintiff was asked what was the reasonable value of this equipment at the time he demanded redelivery of it, and he answered: "It was still worth the twenty-five hundred dollars that I sold it to him for." No other witness testified to its value and it is apparent that if a finding of its value "at the time of its wrongful detention" had been made, no different value would have been found. The suit was filed April 5 and the property was destroyed May 16, 1940. There is no evidence that the value of the property fluctuated or that it had any other value than $2,500; and the court's finding that its value at the time of the sale and prior to its destruction by fire was $2,500 was sufficiently comprehensive to include its value at the time of the wrongful detention.

[5] We also find no merit in appellant's argument that the contract signed December 16th was induced by fraud and deceit on the part of plaintiff. The court found that it was not true that at the time of the execution of said contract of December 16, 1939, or at any other time, plaintiff informed defendant that he had the said engine and generator in "A-1" condition; that it was not true that plaintiff had warranted the condition of said equipment and that it was not true that plaintiff failed to deliver to defendant any part of the equipment provided to be sold by the contract of December 16th; and that all of the allegations of defendant's cross-complaint inconsistent therewith were untrue. While it does appear that the original receipt signed by plaintiff on November 28, 1939, provided that the engine and generator were to be in working order upon acceptance by appellant, the evidence fully sustains the finding of the trial court that when delivery was taken by appellant in December 1939, the equipment had not been tested and that delivery was made at the insistence of defendant and against the advice of plaintiff. The latter testified to this effect and stated that appellant insisted upon taking the engine to the mine at that time as he was afraid that later delivery might become impossible because of snow. Plaintiff's employee, Mr. Hill, who had assembled the engine and generator, corroborated plaintiff's testimony, stating that he, too, had objected to appellant's taking the equipment to the mine until they had had time to test it; and that appellant was not told that it was ready for delivery. It was at that time that appellant signed the contract of December 16th in which he accepted delivery "without warranty of mechanical or other condition," agreed that any claim for defect should be no defense for nonpayment of sums to become due, and that the seller should not be bound by

any agreement or representation not contained in that written agreement.

We find no evidence of any fraudulent acts on the part of plaintiff. When, after its original delivery at the mine, the engine failed to work, plaintiff expended large sums for repairs; and when the equipment was again returned to defendant in February, 1940, it was, according to the testimony of the repairmen from the Fairbanks-Morse Company where the repairs were made, then completed and ready to run. Appellant admits that after this he made no effort to start the machinery or to operate it and that he made no request for help to get it started, and that in spite of these facts he refused to permit plaintiff to retake possession and likewise refused his demand for payment of the balance due

[6] While appellant in his briefs refers to testimony in conflict with the findings of the trial court, it is not within our province to consider same. There being evidence to sustain the findings and judgment, said judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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59 Cal.App.2d 325

MUTUAL BUILDING & LOAN ASS'N OF PASADENA v. WIBORG et al.

Civ. 14114.

District Court of Appeal, Second District, Division 2, California.

June 24, 1943.

Hearing Denied Aug. 19, 1943.

1. Mortgages 🔑113

Where deed of trust securing note reserves joint power in trustor and beneficiary to make a substitution of trustee, if trustor declines to join with beneficiary in making substitution, there is no method by which to effect a substitution on petition of beneficiary alone or otherwise.

2. Mortgages 🔑113

Where trust deed securing note did not provide for substitution of trustee after merger of designated corporate trustee with a kindred corporation, all rights of designated trustee in property held in trust pass without interruption to the mergee corporation, under the Bank Act. Civ. Code, §§ 361, 2287, 2289; Gen.Laws 1937, Act 652, § 31b.

3. Mortgages 🔑113

Where absorption of corporate trustee, designated by trust deed securing note, by mergee corporation resulted in automatic succession of trusteeship to mergee corporation, the merger did not result in a "vacancy" in the trusteeship and did not vest power in court to appoint a substitute trustee. Civ.Code, §§ 361, 2287, 2289, 2934a; Gen.Laws 1937, Act 652, §§ 31a, 31b.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacancy".

4. Mortgages 🔑113

The laws governing corporations regarding rights of dissolving and of merging entered into contract between trustor and beneficiary designating a corporation as trustee. Civ.Code, §§ 361, 2287, 2289; Gen.Laws 1937, Act 652, § 31b.

5. Mortgages 🔑113

Where trust deed securing note reserved joint power in trustor and beneficiary to make substitution of trustee, trustor and beneficiary did not thereby authorize appointment of new trustee in event of merger of the designated corporate trustee with another corporation.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding by Mutual Building & Loan Association of Pasadena against Helen V. Wiborg and another for the appointment of a substitute trustee under a deed of trust. From a judgment of dismissal, the petitioner appeals.

Affirmed.

Hahn & Hahn, of Pasadena, for appellant.

O'Melveny & Myers, Louis W. Myers, and Pierce Works, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for determination is whether the superior court has jurisdiction to appoint a substitute trustee under a deed of trust which reserves a joint power in the trustor and the cestui que trust to make a substitution, where they have not agreed upon a substitution after the corporate trustee has merged with a kindred corporation which inherited all the assets, powers and trusts of the designated trustee.

Title Guarantee & Trust Co., hereafter referred to as Title Guarantee, was named as trustee in a deed of trust by respondent Wiborg, which instrument was given to secure payment of a promissory note payable to appellant. In its petition to the superior court under sections 2287 and 2289, Civil Code, appellant recited the present circumstances of the indebtedness and that on December 19, 1942, pursuant to section 31b of the Bank Act, Gen.Laws 1937, Act 652, as well as under the provisions of section 361 of the Civil Code, Title Guarantee became and is now merged in respondent Title Insurance & Trust Company hereinafter designated Title Insurance; that the separate, corporate existence of Title Guarantee then and there ceased; that it surrendered its license to do a bank or trust business or any other business, that Title Insurance claims that by operation of law as a result of the merger, it became the trustee. The petition recited further that pursuant to the provision of paragraph B–7 of the deed of trust it had demanded respondent Wiborg to join with petitioner in the nomination and appointment of a substitute trustee in the place of the Title Guarantee; that she had refused to do so; that by reason of the foregoing facts, there is a vacancy as to the trusteeship under the deed of trust; that the deed of trust does not provide a practical method of appointment of a substitute trustee; that by reason of a merger of Title Guarantee with respondent Title Insurance, by operation of law, Title Insurance became and now is the trustee under the deed of trust.

The respondents demurred to the petition on the ground that the court has no jurisdiction or power to grant the relief prayed. Following an order sustaining the demurrer, petitioner having declined to amend, a judgment of dismissal followed.

The deed of trust contains the following provision:

"B. It is mutually agreed that:

"7. Trustor, or if said property shall have been transferred, the then record owner, together with Beneficiary, may from time to time, by instrument in writing, substitute a successor or successors to any Trustee named herein or acting hereunder, which instrument, executed and acknowledged by each and recorded in the office of the recorder of the county or counties where said property is situated, shall be conclusive proof of proper substitution of such successor Trustee. * * * The procedure herein provided for substitution of Trustees shall be exclusive of all other provisions for substitution, statutory or otherwise."

[1] Appellant insists that by virtue of the quoted paragraph that Title Insurance is not substituted as trustee; that despite section 31b of the Bank Act the court has the power, under sections 2287, 2289 of the Civil Code to act solely upon the request of the beneficiary under the deed of trust and substitute a new trustee under the doctrine that one who creates a trust may provide a method for filling vacancies and for the appointment of substitute trustees. 26 Ruling Case Law 1278; 65 C.J. 575. It then proceeds to attempt to show that paragraph B–7 is the exclusive procedure for effecting the appointment of a substitute trustee. Since the deed of trust provides that a substitute trustee may be named by the trustor "together with beneficiary" by a writing recorded in the office of the County Recorder, it follows that if the trustor declines to join with the beneficiary, in making a substitution there is no method by which to effect a substitution upon the petition of the beneficiary alone or otherwise.

There is no vacancy of the trusteeship. By virtue of the merger, the separate corporate existence of Title Guarantee suffered the fate of all merged corporations, to wit, they become a part of the muscle and the blood stream of the mergee corporation, transfusing into the mergee all its rights and privileges. By such act all rights and interests in and to all property are without further action or deed vested in the mergee which shall hold, enjoy and enforce the same in its own right "as fully as the same was possessed, enjoyed and held" by the substituted trustee. The mergee corporation, by operation of law and without further transfer, shall "in all courts and places be deemed and held to have, and shall become subrogated and shall succeed, to all such rights * * * agreements, court and private trusts * * * and shall execute and perform all such * * * trusts in the same manner as though it had itself originally assumed the relation of trust or incurred the obligation or liability * * *." Subd. 5, section 31b of the Bank Act.

[2, 3] By virtue of such provision, there was an automatic succession of the trusteeship to Title Insurance. All rights of Title Guarantee in the property held in trust passed without interruption to Title Insurance. Language could not be more emphatic than that used by the legislature in continuing the trusteeship of a trustee in the event of a merger of the named corporate trustee with another corporation. In re Estate of Barreiro, 125 Cal.App. 153, 167, 13 P.2d 1017; In re Estate of Barnett, 97 Cal.App. 138, 275 P. 453; Mercantile Trust Co. v. San Joaquin Agricultural Corp., 89 Cal.App. 558, 265 P. 583. It follows that there could have been no vacancy merely because of the consolidation. And without a vacancy, there would be no power in the court to appoint a substitute trustee.

Although the distinct corporate entity of Title Guarantee passed out of existence or became extinct upon the completion of the act of consolidation, its corporate activities did not cease but were continued and carried on through the new channel. Mercantile Trust Co. v. San Joaquin Agricultural Corp., supra. While the Title Guarantee merger with Title Insurance caused it to lose its identity as to its separate existence, yet it became an integral part of Title Insurance, and carried with it all of its rights, powers, liabilities, and assets "except the indicia and attributes of a corporate body, distinct from that into which it is merged." McElwain Co. v. Primavera, 180 App.Div. 288, 167 N.Y.S. 815, 819. The consolidation did not create an entirely new entity but "merely directs the blood of the old corporation into the veins of the new, the old living in the new." In re Estate of Barreiro, supra [125 Cal.App. 153, 13 P.2d 1026].

Neither the reserved power of appointment by the parties nor appellant's wish to have the court exercise its power of appointment created a vacancy. Nothing could have created a vacancy except the resignation or removal of the trustee in the absence of an agreement on the part of the trustor and the beneficiary to agree upon a substitution. Upon their failure so to agree the present trustee remains in office and the superior court has no jurisdiction under Sections 2287 and 2289, Civil Code, to make a substitution.

While paragraph B–7 makes its own procedure for substitution exclusive of all others, such is not available in the absence of a concord of the cestui que trust and the trustor. The necessity of their joinder in order to make a substitution renders inapplicable section 2934a. That section authorizes a substitution by the beneficiaries only. But where by automatic succession resulting from a merger, the designated trustee is absorbed by the corporate mergee, there is no power in the court to divest the successor-trustee of its office and asset at the caprice of the cestui que trust. There is nothing in the deed of trust that would imply a desire on the part of the beneficiary and the trustor either to declare a vacancy in event of a merger or to supplant the mergee following the consolidation. An intention to do so would have been declared as emphatically as was the reservation in the deed of trust of the joint power to substitute. This was not done. However, a power was reserved and it is not inconsistent with the scheme provided by Sec. 31a of the Bank Act, Statutes 1913, page 152, Deering's General Laws of 1937, Act 652. Such power remains unimpaired for the parties to appoint a substitute trustee after the merger of the Title Guarantee with the Title Insurance. Mercantile Trust Co. v. San Joaquin Agricultural Corp., supra. The provision of Section 31a making the succession to the trusteeship automatic distinctly denies to the superior court the power to make an appointment until the dissolution or merger of the Title Insurance or until its resignation or removal. Before or after such occurrence a substitution can be made only by the joint act of the cestui que trust and the trustor.

[4, 5] Moreover, appellant knew at all times the meaning of laws governing corporations, of their rights of dissolving and of merging. Such law entered into the contract between Mrs. Wiborg and appellant. By their contract they both by implication assented to the right of Title Guarantee to consolidate. Also, because they reserved power to substitute a trustee, they knew they did not thereby authorize the appointment of a new trustee in the event of the merger of their trustee with another corporation. Mercantile Trust Co. v. San Joaquin Agricultural Corp., supra.

Appellant argues that the trustor in making the trust adopted "the full scheme for substitution of trustees prescribed in that act" (citing In re Estate of Barnett, 97 Cal.App. 138, 275 P. 453); that upon a consolidation a substitution could not occur "until such time as a trustee is substituted by the exclusive method provided in the deed of trust." But we have shown above that the superior court may not dislodge such substitute trustee and appoint another. Should there be no removal or resignation of Title Insurance or a substitution by the joint act of appellant and Mrs. Wiborg, the court is powerless to act and the exclusive procedure of B–7 of the deed of trust is unavailing.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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59 Cal.App.2d 549

TAKAKO INAI et al. v. EDE et al.

Civ. 6858.

District Court of Appeal, Third District, California.

June 30, 1943.

Rehearing Denied July 30, 1943.

Order Denying Rehearing Vacated July 22, 1943.

Hearing Denied Aug. 26, 1943.

1. Automobiles 🔑245(62)

Where motorist parked his automobile so that rear of automobile extended more than three feet onto paved portion of highway in violation of statute, and pedestrians were struck by parked automobile when another automobile skidded across highway and struck parked automobile, whether negligent parking by parked motorist was "continuing negligence" and a "proximate cause" of pedestrians' injuries was for jury. Vehicle Code, St.1935, p. 93.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Negligence" and "Proximate Cause".

2. Automobiles 🔑245(72)

Even if pedestrians' right to recover from motorist who parked his automobile in violation of statute for injuries sustained when another automobile skidded across highway and struck parked automobile, which in turn struck pedestrians, depended upon showing pedestrians were properly on the highway and therefore of a class for whose benefit the statute was enacted, conflicting evidence presented question for jury on issue of pedestrians' contributory negligence. Vehicle Code, St. 1935, p. 93.

3. Negligence 🔑122(1)

The violation of statute which proximately contributes to injuries is presumptively an act of negligence unless act or omission is excusable under circumstances.

4. Negligence 🔑136(9, 26, 31)

Whether violation of statute proximately contributed to accident and whether violation was excusable or justifiable are "questions of fact", except where court is impelled to say that from facts reasonable men can draw but one inference pointing to negligence of plaintiff contributing to injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Trial 🔑295(1)

Proof that inaccuracy or omission or phraseology in particular instructions appears to have been cured by entire charge and that jury was fairly and impartially instructed as to the law is sufficient to defeat any claim of error predicated upon defects in particular instructions.

6. Appeal and error 🔑1032(3)

To justify a reversal for defects in particular instructions, it must appear from a consideration of all the evidence that error in such respect resulted in miscarriage of justice.

7. Trial 🔑260(1)

Refusal to give proposed instructions was not error, where record disclosed other instructions were given on same subject which, read as a whole, fairly stated same principle of law in general as proposed instructions.

8. Appeal and error 🔑1066

Even if instruction pertaining to section of Motor Vehicle Code not at issue were improperly given, error was harmless where in light of evidence produced it did not appear that appellant was prejudiced.

9. Appeal and error 🔑1068(5)

Refusal to given defendant's requested instruction pertaining to question of passion and prejudice was not reversible error, in absence of showing that jury's award had been grossly excessive and so clearly the result of prejudice or passion as to be manifestly unfair and unjust.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Action by Takako Inai and Suzanne Inai and Kazuo Inai, by their guardian ad litem, Takako Inai, against Charles Ede and others and Takeo Takeuchi for personal injuries sustained by the plaintiffs. From a judgment for plaintiffs against the defendant Takeo Takeuchi alone, the defendant Takeo Takeuchi alone appeals.

Affirmed.

See, also, 42 Cal.App.2d 521, 109 P.2d 400.

Charles V. Barfield and John J. Healy, Jr., both of San Francisco, for appellant.

Johnson & Curtright, of Sacramento, for defendants Ede.

Robt. H. Schwab, of Sacramento, for respondent.

PEEK, Justice.

This is an appeal by defendant Takeuchi from a judgment against him alone. By its verdict the jury awarded damages to the plaintiffs for personal injuries suffered as the result of a collision between a car operated by the defendant Ede and the parked car of appellant.

On March 20, 1938, respondents, together with their families and several friends, journeyed to the high Sierras for a day in the snow. They parked their cars on Highway No. 40 approximately two or three miles south of the town of Emigrant Gap. The highway at that point runs in a general northerly and southerly direction. On this particular day the only available space for parking was a strip along the easterly side of the highway. A snow bank several feet in height and extending to the edge of the paved portion made it impossible to park on the west side. The appellant, looking for a space to park his car, but finding none, drove past this area to a point where he was compelled to turn back because of orders not to proceed further without chains. While driving slowly back along the line of parked cars he observed a space on his left which he stated was probably the length of a car and one-half, and sufficient for him to park his car. He headed his car into the bank leaving the rear extending onto the paved portion of the highway and made no effort to maneuver it into a line parallel with the other cars parked along the highway. The briefs of both parties infer that the right hand door of the car was left open, the width of which, as stated in appellant's brief, was 49 inches. The distance which the rear of his car extended onto the paved portion was placed by witnesses from three to four or more feet. Some witnesses placed it parallel to the road and others at an angle so that the rear extended farther onto the pavement than did the front. The highway at that particular point was 20 feet in width with the easterly shoulder extending approximately four feet from the edge of the pavement to a snow bank, and sloping southerly on a five per cent down grade. The highway at the time was slushy.

Shortly after appellant parked, two of the respondents who were walking north and two who were walking south met at a point approximately opposite the open right door of appellant's car. While so stopped, the respondent, Suzanne's mother, bent over to fix one of Suzanne's galoshes. At this moment defendant Ede's car, which had gone out of control when the driver endeavored to avoid hitting a small boy who had darted across the highway, skidded a distance of approximately 90 feet, striking the right rear fender and door of appellant's car, which in turn struck the respondents and caused the injuries as alleged in their complaint.

Appellant contends that his car could at most be considered only as a remote condition and not the proximate cause of the accident; that even under these circumstances a violation of the parking law could not be actionable negligence in that respondents had voluntarily assumed positions next to the car, with the inference that by so doing they were not pedestrians. Further error is assigned in the giving and refusing to give certain instructions.

[1] The appellant argues that the efficient and proximate cause of the accident was the skidding of the Ede car. It is quite true that had not the Ede car gone out of control it probably would not have struck appellant's car. Nevertheless, as in the case of Pastene v. Adams, 49 Cal. 87, the negligent piling of the lumber in the street did not cause the truck to be driven against it, thereby toppling over and in-

juring the plaintiff, but the court in that instance held that piling lumber in such a fashion was concurring negligence in that it concurred with the negligence of the driver of the truck; and the judgment against the defendant was sustained. This court cannot say that the situation here presented is at all different than that in the Pastene case. In the present case the alleged negligent parking by appellant was a question of fact and was found by the jury to be a continuing negligence and a violation of the Motor Vehicle Code, St. 1935, p. 93, and therefore was a concurring negligence with that of the defendant Ede.

In substantiation of his contention appellant cites the case of Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 12 P. 2d 664, stating that there the defendant contractor obstructed the sidewalk; but he fails to mention that such obstruction was lawful. As the late Presiding Justice Pullen said in regard to the Klarquist case, when the instant case (Inai v. Ede, 42 Cal. App.2d 521, 526, 109 P.2d 400, 403) was before this court on appeal from an order sustaining defendant Takeuchi's demurrer without leave to amend: "There a contractor was lawfully building a sidewalk, and because of barriers around the work plaintiff was compelled to walk into the street, where he was struck by a negligently operated car. There the contractor was constructing a necessary public work, under the authority of a municipality —and the contractor was therefore not bound to have anticipated the reckless act of a third person. There plaintiffs attempted to invoke the rule applicable to concurrent and negligent causes of injury, under which, liability of the defendant contractor would arise from the fact it should have anticipated the negligence of the driver in leaving his regular course, but the court said '* * * their argument fails to convince us that liability of one legally constructing a necessary public way, under the authority of a municipality, who cannot be said to have anticipated the reckless act of a third party, should be predicated upon or measured by the same rules'. If, however, after completing its work of laying the sidewalk, the contracting company had then negligently placed a pile of gravel in the street alongside the sidewalk and had negligently permitted it to remain there unguarded, and a truck had, by reason thereof, been thrown from its course and struck a pedestrian, undoubtedly the company would have been liable, or at least put upon its defense."

It is obvious that the Klarquist case is not in point.

Fennessey v. Pacific G. & E. Co., 20 Cal. 2d 141, 124 P.2d 51, 54, is a case very similar to the one before us wherein the defendant, in violation of a statute parked a truck between the safety zone and curb, leaving insufficient space for traffic to pass between. Plaintiff was hit by a bus when she was standing in the pedestrian lane. On appeal it was contended that the bus driver broke the chain of causation but the court affirmed judgment for plaintiff, stating: "Whether the parking of appellants' repair truck between the safety zone and the curb had anything to do with the swerve or turn of the jitney bus on to the first or second street car tracks, as the result of which the accident occurred, or whether the jitney driver could have averted such accident, notwithstanding that he violated the ordinance prohibiting driving to the left of a safety zone, were purely questions of fact to be determined by the jury. If the jury believed the evidence in support of respondents' theory that the parking of appellant company's car was a proximate cause of the accident, we are unable to interfere. * * * 'where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury.'"

[2-4] Appellant makes a further point in his supplemental brief, particularly contending that this court in a previous appeal from a judgment in favor of the defendant Takeuchi, after his demurrer was sustained without leave to amend (42 Cal. App.2d 521, 109 P.2d 400), based its decision on the sole premise that the respondents were pedestrians properly on the highway and therefore of a class for whose benefit Section 582 of the Motor Vehicle Code, St.1935, p. 190, was enacted. We do not so interpret that decision. Because a person stops to fasten a shoe lace is he none the less a pedestrian, and if not, then what is he? However, assuming for the moment that the contention of appellant is correct it would serve no purpose other than as a basis upon which to base an issue of contributory negligence and under the conflicting evidence again is a question

of fact for the jury. This same question was directly in issue in the case of Scalf v. Eicher, 11 Cal.App.2d 44, 54, 53 P.2d 368, 373, wherein the court said: "The violation of a statute or ordinance which proximately contributes to the injuries is presumptively an act of negligence unless the act or omission was justifiable or excusable under the circumstances. * * * Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where 'the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.'"

As stated in the Scalf case, supra, the question of causation is one of fact depending upon the circumstances of each particular case and is ordinarily for the jury to determine. Whether such fact exists is often difficult to determine, but where reasonable men can differ as to its existence or non-existence it is a question for the jury to determine under appropriate instructions. This the jury has done. Under the circumstances as herein presented we cannot say as a matter of law that the present case comes within the exception previously noted.

[5] Appellant's final complaint is directed at certain instructions which were given and certain others which were not given. Where, as in this case, innumerable instructions were proposed by all of the parties it is an ever present possibility that some particular instruction will fail to contain either a complete or accurate statement of the law. It is but one of the many difficulties where several parties are involved in the same trial. It therefore becomes increasingly necessary to examine the entire charge in the light of fair and reasonable construction, without straining at any particular portion of the language. Then if in the light of such scrutiny it may be reasonably said that the particular inaccuracy or omission or phraseology appears to have been cured by the entire charge and that the jury was fairly and impartially instructed as to the law, it is sufficient to defeat any claim of error predicated upon defects in particular instructions. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 P. 976.

[6] To justify a reversal under the constitution it must appear from a consideration of all the evidence that an error in this respect resulted in the miscarriage of justice. 2 Cal.Jur. 1026.

[7-9] The first two instructions complained of relate to the question of proximate cause and the concurring negligence of both defendants. If said instructions had been the only ones proposed on those questions yet were rejected, then appellant's complaint would have merit. However, an examination of the record discloses others were proposed and were given on the same subject which, read as a whole, fairly state that principle of law in general. The third question raised by appellant relates to an instruction proposed by the defendant Ede and given by the court. In substance it pertained to a section of the Motor Vehicle Code not at issue and concerning which there is no apparent mention in the record. Assuming such instruction to have been error, yet in the light of the abundant evidence which was produced it is difficult to see how appellant was prejudiced thereby, and at most it could be considered as harmless error. Appellant's further complaint is directed at an instruction requested by him pertaining to the question of passion and prejudice, which was rejected by the trial court. It would seem reasonable that such complaint would only be valid if the award of the jury had been grossly excessive and so clearly the result of prejudice or passion as to be manifestly unfair and unjust. Yet nowhere in appellant's brief is such point raised. Appellant's only support of this contention is contained in his brief wherein he states: "The case, involving as it did, rather serious injuries to a little girl * * * the jury, unless specifically instructed and admonished by the trial court, might well permit their natural sympathies to influence them." But no showing is made that the jurors' sympathies were aroused and as a result they were influenced thereby. If appellant's statement be valid then it might as well be argued by plaintiffs that because she was Japanese the judgment was grossly inadequate. It is not necessary to speculate in this regard for the record discloses that satisfactory and sufficiently explanatory instructions on the question of damages were given by the court. Under all of the evidence the damages would appear to be reasonable.

Appellant's final complaint as regards the instructions is but a reargument of his theory of the case. He again cites the case of Klarquist v. Chamberlain & Proctor, supra.

Respondents reply that the answer to appellant's contention is again to be found in the previous decision in this case (Inai v. Ede, supra) wherein this court, in emphasizing the distinguishing features of the two cases, stated: "An obstruction lawfully placed upon a highway is subject to an entirely different rule than an unlawful obstruction, as we have here."

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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59 Cal.App.2d 468

FARRINGTON v. A. TEICHERT & SON, Inc., et al.

No. 12407.

District Court of Appeal, First District, Division 1, California.

June 29, 1943.

1. Trover and conversion 🔑22

Where owner of personalty assents to or ratifies the taking, use or disposition of the personalty, there can be no "conversion" thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

2. Money received 🔑19(4)
Trover and conversion 🔑22

Where contractor for three months had been removing gravel from pit located partially on owner's land, and owner expressed desire that contractor take gravel from land at a reasonable price, measure of damages for removal of gravel was properly based on "quantum meruit" rather than measure governing in cases of "tortious conversion."

See Words and Phrases, Permanent Edition, for all other definitions of "Quantum Meruit" and "Tortious Conversion".

3. Evidence 🔑213(1)

It is not permissible to show that party to litigation has offered to compromise cause, and rule excludes not only offer of compromise but also all negotiations with relation to compromise.

4. Trover and conversion 🔑36

Where it was understood between owner of land on which gravel pit was partially located and contractor that contractor might continue to remove rock, sand and gravel from the land, paying reasonable value thereof and of rock, sand and gravel previously moved, evidence of such understanding was admissible as defeating owner's right to hold contractor as a converter.

5. Money received 🔑19(4)

Where contractor, after removing rock, sand and gravel from pit located partially on plaintiff's land, had sold, not merely the rock, sand and gravel so removed, but so-called concrete yards, which included cement, weighing proportion and delivery, plaintiff was entitled to recover, not the full price received by defendant, but only the reasonable value of the rock, sand and gravel in place.

6. Evidence 🔑317(6)

In action by owner of land on which gravel pit was partially located, against contractor for conversion of rock, sand and gravel removed from the land, where there was no proof that contractor's acts were malicious, testimony of contractor's former driver that driver had been told by one of contractor's foremen that contractor had sold the material for a higher price than the price testified to by contractor's superintendent was properly excluded as "hearsay".

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

7. Interest 🔑19(1)

Where it was shown that defendant's removal of rock, sand and gravel from pit located partially on plaintiff's land was not a conversion, and amount due plaintiff from defendant was unliquidated until time of judgment, trial court properly refused to allow interest prior to entry of judgment. Civ.Code, § 3336.

8. Interest 🔑19(1)

An unliquidated claim does not bear interest.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action by Benjamin F. Farrington against A. Teichert & Son, Inc., and others to recover for the alleged conversion of rock, sand and gravel removed from plaintiff's land. From a judgment against the named defendant in an unsatisfactory amount, plaintiff appeals.

Affirmed.

Ogden, Crocker & Steelman, of Los Angeles, for appellant.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, Walter R. Evans, of Bridgeport, for respondent.

KNIGHT, Justice.

Plaintiff brought this action against the defendant A. Teichert & Son, Inc., the City of Los Angeles, and the Department of Water and Power of said city, to recover damages for the alleged conversion of rock, sand and gravel removed from plaintiff's land. The city did not appear; and the demurrer of the Department of Water and Power was sustained without leave to amend; thereupon judgment was entered in its favor. The action against the defendant A. Teichert & Son, Inc., was tried before the court sitting without a jury, and the court held that the taking of the material was not tortious, but was with plaintiff's consent, acquiescence, ratification, approval and confirmation; and that accordingly plaintiff was entitled upon a quantum meruit to receive the reasonable market value of the rock, sand and gravel removed, which the court found to be 3½ cents a cubic yard for 39,701 cubic yards, and gave judgment for $1,389.54. Plaintiff appeals from the judgment so rendered. The measure of damages in actions for tort such as conversion or trespass is greater than the measure of damages allowed upon a quantum meruit arising out of a contractual relationship, express or implied, and the principal question involved on this appeal is whether the trial court's conclusion that there was no conversion is supported by the evidence.

The essential facts stated in chronological sequence are these: In March, 1940, respondent, a contracting firm, was negotiating with the city of Los Angeles for a contract to construct a conduit from Leevining Creek to Grant Lake Reservoir in Mono county, and in this connection the superintendent of the firm visited the site of the proposed construction and discussed the same with the city's engineers. In the course of this examination, since rock, sand and gravel were required in the proposed construction, respondent and the city's engineers examined the gravel pits from which the city's specifications proposed that such rock, sand and gravel should be obtained. The City owned a great deal of the land in and around that locality; the gravel pits were shown on a blueprint attached to the contract specifications; and at the time of the inspection the city's resident engineer verified the pits being inspected as the ones shown upon the blueprint, and advised respondent that all of the land belonged to the city and that all of the gravel therefrom was free. Subsequently respondent was awarded a contract for the construction. Preliminary work was started in May, principally by the construction of respondent's plants for screening and processing rock, sand and gravel. All of these structures and a substantial portion of respondent's gravel pit were in fact on the city's land. In June there was a small operation from the gravel pit, and in July operations therefrom commenced in quantity. But in June, before respondent had started any substantial production from the gravel pit, appellant observed the location of the pit and plants, and thought the pit might be on his property. He continued to visit the site of the pit some seven or eight times, examining the pit, checking locations and noting respondent's operations and removal of rock, sand and gravel, but did not during that time indicate to respondent that the gravel pit might be partially upon his land. On September 11th he notified the city of Los Angeles that the respondent was on his land; but the first conversation of any sort between appellant and respondent occurred on September 16, 1940, at which time appellant called at respondent's office and told the superintendent that he considered that a portion of the gravel pit was on his land. There was some discussion on the point, during which they scaled a map produced by appellant in an effort to locate boundary lines. The whole area involved is uncultivated and without fences or other improvements. The property here involved is a part of a "sagebrush plateau" without fences or anything to indicate where the line was, and this was the first indication to respondent that they were on anything but property belonging to the city of Los Angeles. The superintendent testified that he told appellant that if there were any question that respondent was on his land, they would have the lines surveyed, and if the gravel pit were on appellant's property they would remove therefrom; that appellant said no, that he would rather sell the gravel, or get something out of it, so they discussed the "going" price on similar material. Appellant testified that he went into respondent's office for the purpose of making a settlement on the gravel that was removed, and after going over the map and discussing price, appellant requested a meeting with Mr. Teichert, so that they could arrive at a settlement. At no time, however, throughout the course of this conversation did appellant direct or even suggest that respondent cease excavating from the gravel pit in question; and appellant conceded that it was satisfactory with him and that he understood that to the extent that any material should be removed from his land respondent should pay him the reasonable value. Subsequently several meetings were held in an effort to agree upon a reasonable price for the material. Appellant, the superintendent and Teichert were present, and the price of the material was discussed, but at none of these discussions was there anything said about respondent removing from appellant's land. Quite to the contrary the evidence shows that appellant was satisfied with the arrangement and that his understanding was that he should receive the reasonable value for the material. In this connection the evidence shows that appellant thought $6,000 was a reasonable price, and respondent offered $2,000; thereupon at Teichert's suggestion a letter was drafted making a demand for $6,000, and Teichert stated he would try to get $3,000 for appellant from the city of Los Angeles. However, appellant finally decided he should consult an attorney before he signed the demand—this was on October 15, 1940; and on November 4, 1940, he filed his complaint herein for conversion, alleging that 150,000 yards of rock, sand and gravel had been unlawfully converted, which he alleged was of the value of $75,000, for which amount he asked judgment, together with $25,000 exemplary damages.

Mainly from these facts the trial court found that it was not true that respondent had unlawfully converted the rock, sand and gravel; that it was not true that respondent removed the rock, sand and gravel without right, title or license; that the removal of the rock, sand and gravel was ratified, approved, confirmed and consented to, and acquiesced in by appellant; that appellant is estopped from claiming that respondent converted the rock, sand and gravel, or any part thereof, and has, by his conduct, ratification, approval, confirmation, acquiescence and consent become entitled to and agreed to receive therefor the reasonable market value of said rock, sand and gravel in place on his said lands; and that he represented to respondent that the removal of said rock, sand and gravel was agreeable and satisfactory to him.

[1, 2] It is apparent that the facts above narrated fully sustain the trial court's findings. Summarized they may be stated as follows: Appellant admits that he first saw respondent's operations in June, before they had begun in any quantity, and again seven or eight times prior to September, and that during this time he watched the operations and checked his title, but that notwithstanding this fact he did not discuss the situation with respondent or call it to respondent's attention until September 16, 1940. When he did actually discuss the matter with respondent and advised respondent that he considered respondent was upon his land, he did not ask respondent to desist or get off the land, but on the contrary expressly stated that he had no such desire, and that it was satisfactory to him that respondent remain, and that he desired respondent to continue to take rock, sand and gravel at a reasonable price, since he desired to "sell it and get something out of it." At the meeting of September 16, 1940, and at all subsequent meetings, respondent indicated that the values it had in mind were substantially those finally found by the trial court; yet appellant was content that respondent should continue operations. At none of the conversations between appellant and respondent throughout the entire time that respondent was upon appellant's land did appellant ever indicate that he was dissatisfied with receiving the reasonable value of the material being taken, or ever request respondent to desist. On the contrary, he encouraged respondent to take material upon the understanding that it was satisfactory to him, and that such would be compensated for upon the basis of its reasonable value. At no time did appellant ever do anything to avoid the consequences or minimize respondent's taking; instead he encouraged and abetted that taking. Thus it would seem that not only was there implied consent and acquiescence to respondent's acts but express

ratification and approval thereof; and the law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property. 24 Cal.Jur. p. 1024; 65 Cor.Jur. p. 14, § 5. Therefore there is no merit in appellant's contention that the trial court applied an improper measure in fixing the reasonable value of the material taken. The measure appellant contends should have been adopted is the one governing in cases of tortious conversion; but the trial court found and the evidence shows there was no tortious conversion. In fact appellant does not deny that the measure applied by the trial court was proper for quantum meruit; and this is such a case.

[3, 4] Appellant treats the September negotiations as an offer of compromise which failed by reason of the fact that a reasonable value was not agreed on. He cites Boyes v. Evans, 14 Cal.App.2d 472, at page 479, 58 P.2d 922, at page 926, where the court says: "It is a well-established rule of law that it is not permissible to show that a party to litigation has offered to compromise the cause. The rule not only excludes the offer to compromise, but also all negotiations with relation thereto. 22 C.J. 308, sec. 347." But such rule has no application here, for since the evidence shows that it was understood between appellant and respondent that respondent might continue to remove material, paying the reasonable value thereof and of that previously removed, notwithstanding they had been unable to reach an agreement as to such value, appellant could not hold respondent for a measure of damages based on conversion when it became necessary to sue to fix the reasonable value. Evidence of such understanding would clearly be admissible as defeating the right of appellant to hold respondent as a converter. That it was understood that respondent should continue to remove material is admitted by plaintiff in his concession that he cannot claim on a tort basis for material removed after the September conferences.

[5, 6] Respondent's superintendent testified that 2,400 "concrete yards" were sold by respondent to the Macco Company for $2 a yard, and that about a third of the rock, sand and gravel which went into this batch came from appellant's land. Appellant contends, therefore, that the trial court should have given appellant judgment for these 800 yards at the rate of $2 a yard, or for an additional $1,600, stating that "The selling price of an article is recoverable in an action for conversion, since no man can profit by his own wrong." The evidence further shows, however, that the 2,400 yards so sold was not just rock, sand and gravel, but was "concrete yards * * * with the cement, weighing proportion and everything," including delivery, so that "the only thing that would be necessary to have to add is water to make it concrete." Obviously, therefore, appellant was not entitled to recover the full price received by respondent, but only the value of the quantity of rock, sand and gravel taken from his land; and since there was no conversion, all he was entitled to recover therefor was the reasonable value of the rock, sand and gravel in place, which the court found to be 3½ cents a yard, and he was given judgment for the quantity so taken at that price. In this connection appellant further argues that the trial court erred in excluding the proffered testimony of one Munger, who worked for respondent as a driver for two months, to the effect that he was told by one of respondent's foremen that the respondent had sold said sand, rock and gravel to the Macco Company for $2.50 a yard, which appellant contends would have shown a higher price than that testified to by respondent's superintendent, and would have shown that all the sand, rock and gravel sold to said company came from the land of the appellant. The conversation was properly excluded on the ground that it was hearsay insofar as respondent was concerned; that it had not been shown to be in the course of duty; and that it was incompetent, and without foundation, upon the question of damages, for the reason that since there was a total failure of any proof that respondent's acts were malicious in fact, such testimony, even if otherwise competent, was totally irrelevant and inadmissible upon any proper theory of damages, either for innocent conversion or upon a quantum meruit.

[7, 8] Appellant's final point is that the trial court erred in not allowing interest prior to the entry of judgment, citing section 3336 of the Civil Code. That section, however, as shown by its heading and context, applies only in cases of conversion; whereas here, upon a quantum meruit for the reasonable value of the material received by respondent, the amount was unliquidated until the time of judgment; and

an unbroken line of authorities holds that an unliquidated claim does not bear interest. See Parkford v. Union Drilling, etc., Co., 118 Cal.App. 538, 5 P.2d 440.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

59 Cal.App.2d 447

MOON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. No. A-14031.

District Court of Appeal, Second District, Division 3, California.

June 28, 1943.

1. Courts 🔑207(5)

Where prohibition proceeding to prevent enforcement of superior court's order, modifying interlocutory divorce judgment by changing minor child's custody from wife to husband, was transferred by District Court of Appeal to Supreme Court and retransferred thereby to District Court of Appeal after respondents raised point that such court should not consider matter because appeal from such order was properly taken to Supreme Court, rule of comity that District Court of Appeal should not entertain petition for writ affecting pending proceeding appealable directly to Supreme Court was inapplicable.

2. Divorce 🔑312

A divorced wife's appeal to Supreme Court from superior court's order modifying interlocutory divorce judgment by changing minor child's custody from wife to husband effected stay of proceedings to enforce such order, subject to superior court's power, in its discretion, to require undertaking from appellant to make stay operative. Code Civ.Proc. § 949.

3. Divorce 🔑312

If superior court, contrary to statutory stay of proceedings to enforce its order modifying interlocutory divorce judgment by changing minor child's custody from wife to husband pending wife's appeal therefrom to Supreme Court, undertakes to enforce such order pending appeal, Supreme Court may grant writ of supersedeas to prevent such enforcement.

4. Divorce 🔑312

The superior court's order, directing divorced wife to deliver spouses' minor child to husband by specified time, after hearing on question of continuing such court's stay of proceedings to enforce its previous order changing child's custody from wife to husband pending wife's appeal therefrom to Supreme Court was an act by superior court to enforce such order pending appeal and afforded ground for Supreme Court's issuance of supersedeas to prevent such enforcement.

5. Prohibition 🔑3(1)

A writ of prohibition will not be issued where there is plain, speedy and adequate remedy in ordinary course of law. Code Civ.Proc. § 1103.

6. Prohibition 🔑3(2)

An appeal, at least in case wherein writ of supersedeas may be obtained to prevent doing of acts against which writ of prohibition is sought, such as enforcement of order awarding custody of divorced parents' minor child to husband, is a plain, speedy and adequate remedy in ordinary course of law, so as to preclude issuance of writ of prohibition. Code Civ.Proc. § 1103.

7. Prohibition 🔑28

In prohibition proceeding to prevent enforcement of superior court's order, awarding custody of divorced parents' minor child to husband, pending wife's appeal to Supreme Court from such order, questions whether superior court's order, requiring petitioner to give undertaking, was contrary to alternative writ already issued, and whether order staying enforcement of custody order, without requiring undertaking, constituted determination that no undertaking was necessary and, if so, whether court could change such determination, will not be considered, as all such matters can be decided on proper application by petitioner for writ of supersedeas. Code Civ.Proc. § 949.

◆

Original proceeding by Naomi Moon for a writ of prohibition to prevent further proceedings for enforcement of an order of the Superior Court in and for the County of Los Angeles, modifying an interlocutory judgment, granting relator a divorce from Charles Moon and awarding their minor child's custody to relator, by awarding such custody to respondent Charles Moon, and an order directing relator to deliver the child to respondent Moon by a specified time.

Alternative writ discharged, and peremptory writ denied.

Arthur A. Jones, of Los Angeles, for petitioner.

Clarence Hansen, of Los Angeles, for respondents.

SHAW, Justice pro tem.

This is a proceeding in prohibition. It appears from the petition that in an action for divorce between the petitioner herein, Naomi Moon, and her husband, Charles Moon, the court made its interlocutory judgment of divorce, in which it awarded the custody of the minor child of the parties to said Naomi Moon, who was the plaintiff in that action. Thereafter, on December 18, 1942, upon the application of Charles Moon, the court made an order in the divorce action changing the custody of the child and awarding it to Charles Moon. On January 5, 1943, Naomi Moon took an appeal from the last mentioned order, and that appeal is still pending. On January 6, 1943, the same court made an ex parte order purporting to stay the enforcement, pending said appeal, of the order of December 18, 1942, changing the custody of the child. Later the court ordered Naomi Moon to appear on January 19, 1943, at a hearing for the purpose of considering whether this stay should be continued in force pending the appeal, and at the conclusion of that hearing on January 19th the court ordered her to deliver the child to Charles Moon by 5 p. m. of that day. The writ of prohibition is asked here to prevent further proceedings for the enforcement of the last mentioned order as well as that of December 18.

[1] The respondents here contend that this court should not entertain or consider the matter because the appeal from the order of December 18, 1942 was not taken to this court but to the Supreme Court, where, under the Constitution, jurisdiction of such an appeal was vested, citing Foster v. Superior Court (1935) 4 Cal.App.2d 466, 41 P.2d 187, and Gunder v. Superior Court (1929) 100 Cal.App. 334, 279 P. 822. Those cases do declare that a District Court of Appeal should not entertain a petition for a writ affecting a pending proceeding which is appealable directly to the Supreme Court, and there are other cases to the same effect. Waidley v. Superior Court (1942) 51 Cal. App.2d 690, 125 P.2d 507 and cases cited. This rule appears to be one of comity rather than of jurisdiction; and any effect that it might have here is dispelled by the fact that since the point was raised this proceeding has been transferred to the Supreme Court and retransferred to this court by the Supreme Court. Smith v. Tristam (1933) 130 Cal.App. 750, 751, 20 P.2d 770.

[2-4] Manifestly, what the petitioner seeks here is a stay of proceedings on the orders of December 18 and January 19 until her appeal from the order of December 18 has been determined. Her appeal of its own force effected a stay of proceedings to enforce the order of December 18, subject to the power of the trial court, in its discretion, to require an undertaking from appellant to make the stay operative. Code Civ. Proc. § 949; Smith v. Smith (1941) 18 Cal. 2d 462, 465, 116 P.2d 3; Foster v. Foster (1936) 5 Cal.2d 669, 672, 55 P.2d 1175; Vosburg v. Vosburg (1902) 137 Cal. 493, 495, 70 P. 473. If the trial court should, contrary to this statutory stay, undertake to enforce its order while the appeal is pending, the court in which the appeal is pending may, in the course of the proceedings on the appeal, grant a writ of supersedeas to prevent such enforcement. Smith v. Smith, supra; Southern Pac. Co. v. Superior Court (1914) 167 Cal. 250, 252, 139 P. 69; Hubbard v. University Bank (1898) 120 Cal. 632, 52 P. 1070. The order of January 19 appears to be such an act by the trial court and would afford a ground for the issuance of a supersedeas. Smith v. Smith, supra.

[5, 6] The writ of prohibition will not be issued where there is a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. § 1103; McAneny v. Superior Court (1906) 150 Cal. 6, 9, 87 P. 1020; Glasser v. Municipal Court (1938) 27 Cal.App.2d 455, 81 P.2d 260; Highland Securities Co. v. Superior Court (1931) 119 Cal.App. 107, 116, 6 P.2d 116; Lightner Mining Co. v. Superior Court (1910) 14 Cal.App. 642, 649, 112 P. 909. An appeal, at least in a case where a writ of supersedeas may be obtained to prevent the doing of the acts against which the writ of prohi-

bition is sought, is such a remedy. McAneny v. Superior Court, supra; Highland Securities Co. v. Superior Court, supra; Glasser v. Municipal Court, supra; Lightner Mining Co. v. Superior Court, supra.

[7] A supplemental petition has been filed herein, alleging that on January 25, 1943, the trial court, purporting to act under section 949, Code of Civil Procedure, made a further order requiring the petitioner here to give an undertaking in the sum of $100, and that said order is contrary to the alternative writ already issued in the present proceeding. Questions may also arise whether the order of January 6 staying enforcement of the order of December 18, without requiring any undertaking, constituted a determination that no undertaking was necessary, and if so, whether the trial court could change its determination in this respect. See Hubbard v. University Bank, supra, 120 Cal. 632, 52 P. 1070. All of these matters can be decided upon a proper application for a writ of supersedeas, and hence we do not undertake to consider them now.

The alternative writ of prohibition is discharged and the peremptory writ is denied.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

59 Cal.App.2d 442

GOSLING et al. v. NICHOLS et al.

Civ. No. 14106.

District Court of Appeal, Second District, Division 2, California.

June 28, 1943.

1. Death 🔑30

A right of action for wrongful death is a "tort action" which does not survive death of wrongdoer. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Tort Action".

2. Abatement and revival 🔑58

A tort action abates on death of wrongdoer at any time before action is ready for rendition of final judgment, in absence of statute expressly providing that the cause of action shall survive.

3. Abatement and revival 🔑54

The gravamen of cause of action for breach of implied warranty that food is fit for human consumption is the personal injury which results and the action is one sounding in tort and is not "ex contractu", as regards abatement.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Contractu".

4. Death 🔑30

An action for wrongful death based on alleged negligence of defendant in serving unwholesome food to decedent at defendant's place of business was a "tort action" which abated on death of defendant which occurred prior to trial. Code Civ.Proc. § 377.

5. Death 🔑30

A cause of action for breach of implied warranty that food sold by defendant at his place of business was wholesome, which allegedly resulted in death of patron, was a cause of action sounding in tort which abated on defendant's death prior to trial. Code Civ.Proc. § 377.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Mrs. Joseph Gosling and another against A. La Verne Nichols, an individual, and A. La Verne Nichols, doing business under the fictitious firm name and style of Rancho Public Golf Club, for wrongful death, based on alleged negligence and breach of implied warranty of wholesomeness of food sold to the decedent. Upon the defendant's death prior to trial, Winifred Nichols, as administratrix, was substituted as defendant on plaintiffs' motion. From judgment of dismissal, the plaintiffs appeal.

Affirmed.

Betts & Garrison, of Los Angeles, for appellants.

Sidney A. Moss, of Los Angeles, for respondent.

Donald E. Ruppé and C. W. Bowers, both of Los Angeles, for defendants.

McCOMB, Justice.

From a judgment of dismissal predicated upon the ground that the present action abated on the death of defendant's intestate, plaintiffs appeal. The action was instituted to recover damages for the wrongful death of Joseph Gosling.

These are the essential facts:

On December 10, 1941, plaintiffs, as the sole heirs at law of Joseph Gosling, deceased, filed an action against A. La Verne Nichols, pursuant to the provisions of section 377 of the Code of Civil Procedure, to recover damages for the wrongful death of Mr. Gosling.

The complaint contained two causes of action: (1) for negligence, and (2) for breach of an implied warranty that food sold to Mr. Gosling was wholesome.

The two causes of action are predicated upon allegations in the complaint that on or about May 6, 1939, Mr. Nichols was operating a public golf club known as the Rancho Public Golf Club, and in connection with such golf club he engaged in the business of selling and furnishing food and meals to the general public. That on or about the aforementioned date Mr. Gosling purchased from Mr. Nichols food which was tainted, unwholesome, and unfit for human consumption, and that as a proximate result of eating such food Mr. Gosling contracted an illness from which he died December 15, 1940.

Mr. Nichols was duly served with the complaint and filed an answer thereto. However, before the action was tried he died on June 5, 1942. Thereafter pursuant to a motion of the plaintiffs, defendant Winifred Nichols, as administratrix of the estate of A. La Verne Nichols, was substituted as defendant in the present action in the place and stead of her intestate.

On February 25, 1942, pursuant to a motion of defendant, a judgment of dismissal of the present action was entered and filed upon the ground that the action abated with the death of Mr. Nichols.

This is the sole question necessary for us to determine:

Did the causes of action alleged in the complaint abate with the death of Mr. Nichols?

This question must be answered in the affirmative and is governed by the following pertinent rules:

[1] (1) A right of action for death by wrongful act pursuant to the provisions of section 377 of the Code of Civil Procedure is a tort action which does not survive the death of the wrongdoer. Sayles v. Peters, 11 Cal.App.2d 401, 403, 54 P.2d 94; National Auto Insurance Co. v. Cunningham, 41 Cal.App.2d 828, 831, 107 P.2d 643; see also Clark v. Goodman, 170 Cal. 527, 531, 150 P. 357, L.R.A.1916A, 1142.

[2] (2) A tort action abates upon the death of the wrongdoer at any time before the action is ready for rendition of a final judgment, in the absence of a statute expressly providing that the cause of action shall survive, Clark v. Goodwin, 170 Cal. 527, 529, 150 P. 357, L.R.A.1916A, 1142; Rideaux v. Torgrimson, 39 Cal.App.2d 273, 275, 102 P.2d 1104; see also 1 C.J.S.(1936), Abatement and Revival, p. 173, § 126, and

[3] (3) The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action "sounds in tort". The cause of action is not ex contractu. Singley v. Bigelow, 108 Cal.App. 436, 445, 291 P. 899; Speer v. Brown, 26 Cal.App.2d 283, 294, 79 P.2d 179; Harkins v. Provenzo, 116 Misc. 61, 189 N.Y.S. 258, 259, et seq; Bernstein v. Queens County Jockey Club, 222 App. Div. 191, 225 N.Y.S. 449, et seq.

[4] Applying the foregoing rules to the facts in the instant case it is apparent that under rule 1, supra, plaintiffs' cause of action for negligence was a tort action and abated upon the death of the wrongdoer (Mr. Nichols), since his death occurred prior to the time the action was ready for the rendition of a final judgment, and there was no applicable statute modifying the common law rule that a tort action abates with the death of the wrongdoer, rule 2, supra.

[5] Likewise, under rule 3, supra, plaintiffs' cause of action for breach of an implied warranty that the food sold by Mr. Nichols was wholesome, was a cause of action "sounding in tort", which under rule 2, supra, abated with Mr. Nichols' death.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

59 Cal.App.2d 458

VINER v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. (RUSH, Intervener).

Civ. 12017.

District Court of Appeal, First District, Division 1, California.

June 29, 1943.

Rehearing Denied July 29, 1943.

Hearing Denied Aug. 26, 1943.

1. Action ⚷6

An action for declaratory relief may be maintained against a municipal corporation or other subdivision of the state.

2. Municipal corporations ⚷217(5)

Where position of head janitor was in a separate class in civil service of city and county of San Francisco before 1930 reclassification, reclassification did not deprive foreman janitor in the grade next below head janitor of right to promotion without examination under rule authorizing such promotions in grade within a class in violation of charter amendment providing that any new classification should not adversely affect classification or duties of any person holding a position when amendment was adopted.

3. Municipal corporations ⚷217(5)

Promotion from position of foreman janitor to head janitor in civil service of city and county of San Francisco was by promotional examination under charter and rules in effect before adoption of new charter in 1932, and hence one holding position of foreman janitor before 1932 had not acquired right to promotion without examination which must be preserved under charter provision continuing in force any civil service rights acquired under the old charter.

4. Municipal corporations ⚷216(2)

Rules adopted by civil service commission under rule-making power conferred by charter of city and county of San Francisco, and not in conflict with such charter, have the same force and effect as the charter.

5. Municipal corporations ⚷216(2)

Civil service commission of city and county of San Francisco cannot by general resolution provide a basis of advancement for those who have been in civil service under old charter different from that of promotional examination and ascertained merit where practicable, as provided by charter adopted in 1932.

6. Municipal corporations ⚷217(5)

A foreman janitor in civil service of city and county of San Francisco was not entitled to promotion without examination to fill vacancy in position of head janitor, though he had occupied position of foreman janitor under the old charter in effect before 1932.

7. Municipal corporations ⚷217(5)

In action for declaratory relief, foreman janitor holding second position on eligible list for head janitor could challenge right of recent appointee to such position on ground that, although position formerly occupied by appointee as janitor had been reclassified as that of foreman janitor, duties of position were not those prescribed for a foreman janitor, and hence appointee was not eligible to take promotional examination for position of head janitor.

8. Appeal and error ⚷1056(1)

In action for declaratory relief, exclusion of evidence offered by foreman janitor holding second position on eligible list for head janitor that recent appointee to head janitor position was not eligible to take promotional examination for the position because, although position occupied by him had been reclassified as that of head janitor, his duties were not those prescribed for that position, was prejudicial error.

9. Action ⚷6

In action for declaratory relief determining that recent appointee to position of head janitor was not eligible to take promotional examination for that position because, although position formerly occupied by him as janitor had been reclassified as foreman janitor, his duties were not those prescribed for a foreman janitor, pleadings and proof offered thereunder sufficiently presented question of civil service commission's abuse of discretion in reclassifying the position of janitor formerly held by appointee.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Henry Viner against the Civil Service Commission of the City and County of San Francisco and others for declaratory relief to determine plaintiff's right to promotion from foreman janitor to head janitor in the civil service of the City and County of San Francisco, wherein Russell V. Rush intervened. From an adverse judgment, plaintiff appeals.

Judgment affirmed in part, and in part reversed for a trial on the merits.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco (L. R. Bunney, of San Francisco, of counsel), for respondents defendants.

Thomas V. Maloney, Jr., of San Francisco, for intervener respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment against him in an action for declaratory relief by which he seeks to determine his right to promotion from foreman janitor to head janitor in the civil service system of the City and County of San Francisco. The plaintiff and two others took a promotional examination given on April 7, 1939, to establish an eligible list for the position of head janitor. Plaintiff placed third. Intervener Rush passed first, and was assigned to the position when it became vacant on June 1, 1939, with the retirement of the incumbent. Plaintiff contends that under the charter of the City and County of San Francisco in effect until January 8, 1932, and rules adopted by the defendant commission pursuant thereto, he was entitled to promotion without taking an examination, and that this right was continued by § 142 of the new charter, which provides that: "The civil service rights, acquired by persons under the provisions of the charter superseded by this charter, shall continue under this charter." The other participants in the examination did not become foreman janitors until after the new charter went into effect.

Plaintiff further contends that intervener Rush was not entitled to take the examination, for the reason that it was open only to foremen janitors, and Rush, in the analysis of plaintiff, was not a foreman janitor. Morris, the other man who took the examination, did not intervene, and is not a party to these proceedings. The trial court decided against plaintiff on both contentions.

[1] Plaintiff brought the present suit on July 19, 1939. The commission concedes that he is not estopped to urge his right to the position without examination because he took the examination without protest. The right to bring an action for declaratory relief against a municipal corporation or other subdivision of the state is upheld in Hoyt v. Board of Civil Service Commissioners, 21 Cal.2d 399, 132 P.2d 804.

Plaintiff was first employed by the city and county in 1902. In 1905 he and other janitors in the employ of the city and county under the Department of Public Works took a civil service examination. Plaintiff was listed as number nine on the list made up from that examination. He testified that all who took the test received a grade of 100%. The basis for the order of listing does not appear. In 1907, or prior thereto, plaintiff was assigned by the Department of Public Works to act as assistant head janitor. Bellett, who was number one on the list, acted as head janitor. It was Bellett's retirement in 1939 which opened the position of head janitor. Of the persons who took the janitorial examination in 1905, plaintiff and Bellett were the only ones in the employ of the city and county at the date of the 1939 examination.

Prior to 1930 the position of head janitor was not separately classified by the defendant commission in its listed classification of positions. In the classification as it appears in the 1916 edition of "Charter Provisions, Rules and Classification," issued by the commission, there is the single classification "Janitors" for all types of janitorial work. (P. 65.) In the 1924 edition the classification appears "Janitors (includes head janitor and window washers)." (P. 82.) In November, 1930, a new classification was adopted with a Janitorial Subdivision listing six classes, as follows: C 102 Janitress; C 104 Janitor; C 106 Sub-Foreman Janitor; C 108 Foreman Janitor; C 110 Head Janitor; C 112 Supervisor of School Janitors. A Window Cleaning Subdivision included two classes in the new classification: C 202 Window Cleaner and C 204 Sub-Foreman Window Cleaner.

On November 8, 1933, the commission adopted a resolution to determine the status of employees appointed under the old classification who were working under the new classification. Bellett was declared entitled to hold the position of head janitor under the new classification, and plaintiff to hold a position of the class C 108 Foreman Janitor. No other employee was listed as occupying a foreman janitor position. The duties of that position as set forth in the classification of November 17, 1930, are as follows: "Assists a Head Janitor in supervising a large group of Janitors or directs a large group of Janitors such as those at the Hall of Justice; looks after supplies; may keep time of subordinates." Plaintiff had been performing duties of this type for many years and continued to do so at all times after the reclassification.

Intervener Rush, who, by his complaint in intervention, placed in issue his right to hold the position of head janitor, was first employed as a janitor by the city and county on June 1, 1927, from a list made up from an examination. His class under the new classification was C 104 Janitor. From time to time he served temporarily as a foreman janitor between October, 1933, and July, 1936. His regular position as janitor was in the rooms of the Civil Service Commission. In 1935 he took an examination to establish an eligible list for the position of foreman janitor. On June 15, 1936, the commission reclassified as C 108 Foreman Janitor the position which he held as C 104 Janitor in the offices of the commission. On July 20, 1936, Rush was appointed to this position as reclassified. He held it at the time he took the 1939 examination for head janitor.

Plaintiff contends that the commission abused its discretion and acted without legal authority in reclassifying the position in the offices of the commission as of the class C 108 Foreman Janitor in 1936, for the reason that it did not involve duties prescribed for that class in the provision of the 1930 classification quoted above. For such reason, plaintiff contends, Rush did not hold a position as a foreman janitor and was ineligible to take the promotional examination for head janitor, open only to those who were foreman janitors. By his complaint in intervention Rush put in issue the validity of the 1936 order reclassifying his position as C 108 Foreman Janitor.

Plaintiff's main contention is that he was entitled to the position of head janitor without examination. This contention rests on the proposition that he had that right under the old charter, in effect until January 8, 1932, and rules of the commission pursuant thereto, and that § 142 of the new charter, quoted in the opening paragraph above, preserved such right. Rush and Morris did not become foreman janitors until after the new charter went into effect, and hence that charter is the sole measure of their rights to the position of head janitor.

The old charter, like the new, made ascertained merit and promotional examination the basis for advancement from class to class. Old charter: Stats.1899, pp. 241, 351, Art. XIII, § 8; new charter: Stats.1931, pp. 2973, 3064, § 146. But the old charter in 1913, Stats.1913, p. 1611, amending Art. XIII, § 2, authorized the commission to establish grades within classes. On the theory that it could provide for advancement from grade to grade within a class without promotional examinations, the commission adopted rule 38. That rule provided for advancement to a vacancy in a higher grade by the person in the next lower grade having the highest rating for service, without promotional examination.

Plaintiff contends that prior to the reclassification of November, 1930, he held a position in the next grade below that of Bellett, head janitor. After the November, 1930, reclassification the position of head janitor was in a different class from lower janitorial positions, rather than merely in a different grade. If the result of placing the head janitor position in a separate class was to render rule 38 inapplicable to that position after 1930, then plaintiff had no right under the old charter to advance to the position without examination. The consequence would be that § 142 of the new charter, which went into effect in 1932, could preserve no such right to him because such right no longer existed when the new charter went into effect. Plaintiff contends, however, that the benefit of rule 38 survived the reclassification of 1930 by reason of a 1925 amendment to the old charter which provided as to any classification the commission might make "that such classification and grading shall not operate to adversely affect the civil service classification or duties of any person holding a position at the time of the adoption of this amendment." Stats.1925, p. 1166. Plaintiff contends that to take from one in the class of janitor in the grade next below head janitor the right to advance to the head janitor position without examination is to affect adversely the former classification.

It is a premise of plaintiff's argument that he was in the next grade below Bellett. Rule 38 as it appears in the 1924 edition of

Charter Provisions, Rules and Classification, establishes grades based on salary applicable to all classes in the civil service. Positions carrying a salary of more than $250 and not more than $300 were grade eight. After August 1, 1924, Bellett received a salary of $260 and hence was in such grade. Plaintiff received a salary of $180, which placed him in grade five, for the salary range between $175 and $200. If no janitor received a salary in the intervening grades, six and seven, plaintiff was in the grade next below Bellett in the janitorial class. A reasonable interpretation of the evidence is that there was no janitor in the intervening grades when Bellett retired nor prior thereto. One Ralston also acted as assistant head janitor until his retirement in 1932, but it is not shown that he received a salary which placed him in a higher grade than plaintiff. Plaintiff testified to the foreman of the night gang receiving $5 more a month than he did, but this would not place him in a different grade from plaintiff.

[2] Conceding that plaintiff was in the grade next below Bellett, his contention nevertheless cannot be upheld. Plaintiff rests his case on rule 38, but overlooks rule 35 as it stood when the November, 1930, reclassification was made. Rule 35 required the position of head janitor to be filled by promotive examination. The rule in its 1930 form is as follows:

> "All positions of Foremen and Sub-foremen of the trades and skilled occupations shall be separately classified, and, when practicable, shall be filled by promotive examination. For each such position to be filled, the three highest eligibles, of the class involved, shall be certified.
>
> "All such Foremen and Sub-foremen regularly holding their positions on June 11, 1930, under the rules then in force, shall continue to hold their positions without examination and may be removed therefrom only for cause, under Rule 23."

The janitorial class was expressly included in the "trades and skilled occupations" when rule 35 was adopted in its 1930 form prior to the November, 1930, reclassification. Division N of the Classification preceding that of 1930, in which division the class of janitors was listed, is entitled "Mechanical Service (includes the trades and skilled occupations not classified elsewhere)." Charter Provisions, Rules and Classification, 1924 Ed., p. 81.

That the head janitor was a foreman within the meaning of rule 35, we have no doubt. That rule rendered rule 38 inapplicable to the head and sub-supervisory positions of any class in the trades and skilled occupations. The positions which Bellett and plaintiff held were not taken out of rule 35 because the Board of Public Works described them as head janitor and assistant head janitor. Nor was rule 35 inapplicable to the head supervisory position because the reclassification of 1930 gave to it the title head janitor. The question is whether the position occupied by Bellett was that of foreman within the meaning of rule 35 before the reclassification. We hold that it was. The requirement of the rule as to promotive examinations applied notwithstanding the head position was not separately classified until November, 1930. It follows that advancement to that position under the old charter and rules, as well as under the new, was by promotional examination.

[3] That the designations foremen and sub-foremen were intended to relate to the supervisory positions in any class in Division N regardless of the departmental title is indicated by the two earlier forms of the rule. As the rule appears in the 1916 edition of Charter Provisions, Rules and Classification (p. 48), it refers to foremen, inspectors and superintendents as overseers. The rule authorized departmental heads to appoint a temporary sub-foreman, but provided that all other positions of overseers should be classified according to duties and filled by examination. In the 1924 edition (p. 58), Rule 35 is entitled "Overseers." It provides that where positions of "overseers, foremen or chiefs" are not separately classified, "the appointing power may select the senior employee of a class to act as overseer, foreman or chief of such class of employees." Note that the rule provides for the appointment of the senior employee, rather than the employee with the highest rating for service as under rule 38. Before the 1930 reclassification the rule had been changed again to require the chief position to be filled by promotive examination. It is apparent that it was rule 35, and not rule 38, which regulated the filling of the head janitorial position under the old charter. Since rule 35 required a promotional examination, plaintiff had no right under the old charter to advance to the head janitor position without examination and hence

such right was not preserved to him by § 142 of the new charter.

[4] Defendant commission and the intervener contend that § 142 preserved rights which plaintiff had under the old charter but not rights which he had under rules enacted pursuant thereto; that if rule 38 was applicable to the head janitor position, the new charter did not guarantee to plaintiff the benefit of that rule or any other. This argument is unsound. Rules adopted by the commission under the rule making power conferred by the charter, and not in conflict with it, have the same force and effect as the charter. Mitchell v. McKevitt, 128 Cal.App. 458, 461, 17 P.2d 789; Bruce v. Civil Service Board, 6 Cal. App.2d 633, 637, 45 P.2d 419. For this reason we rest our decision on the proposition that it is rule 35, rather than rule 38, which is decisive. Under this conclusion it is unnecessary to consider the effect of the 1925 charter amendment, quoted above, as a restriction on the power of the commission to cut off rights under rule 38 through reclassification.

[5, 6] Reference has heretofore been made to the status resolution of 1933 which found Bellett to be occupying the position of head janitor under the new classification, and plaintiff the position of foreman janitor. That resolution contained provisions which plaintiff contends constitute a recognition of a right to succeed to the head janitor position without examination. If plaintiff had such right under the old charter and rules enacted pursuant to it, then § 142 preserved the right without need of its recognition by the commission. If he did not have the right under the old charter, then it was beyond the power of the commission to accord it to him by resolution. The new charter provides for advancement on the basis of promotional examinations and ascertained merit where practicable. Allen v. McKinley, 18 Cal.2d 697, 117 P.2d 342. The commission could not by general resolution provide a different basis of advancement for those who had been in the civil service under the old charter. Plaintiff recognizes this in his brief when he says: "Plaintiff does not look to it [the status resolution] for the creation of his right, but only to it as a recognition of the right he had under the old charter and rule 38." We conclude that plaintiff was not entitled to succeed to the position of head janitor without examination.

Plaintiff makes the additional point that Rush was improperly assigned to the head janitor position for the reason that he was ineligible to take the promotional examination for that position, which was open only to those who were foreman janitors; that Rush was not legally a foreman janitor. The facts are, as outlined above, that Rush became a janitor in 1927. In 1935 he was placed on an eligible list for the class C 108 Foreman Janitor as a result of an examination. At this time his position as janitor, class C 104, was in the rooms of the Civil Service Commission. In June, 1936, the commission changed the classification of that position from class C 104 Janitor to C 108 Foreman Janitor. On July 20, 1936, Rush was assigned to the position which he held until he was placed in the head janitor position after passing the 1939 examination in first place.

[7, 8] Plaintiff's contention is that the commission abused its discretion and thereby acted without authority of law in changing the classification of the particular position which Rush held from class C 104 to C 108 in 1936 for the reason that it involved no duties of the type prescribed in the official classification for the position of foreman janitor, but only ordinary janitor duties. The duties of the class C 108 Foreman Janitor are as follows: "Assists a Head Janitor in supervising a large group of Janitors or directs a large group of Janitors such as those at the Hall of Justice; looks after supplies; may keep time of subordinates." Plaintiff sought to show, through interrogation of Rush, that the janitorial position in the offices of the Civil Service Commission did not involve any duties whatsoever of the type prescribed for class C 108 Foreman Janitor at any time, either before or after the reclassification of that position. Plaintiff's purpose was to establish the commission's abuse of discretion. The court excluded the evidence on the theory that plaintiff could not make such an attack on the action of the commission. We are of the view that the court erred. This ruling was prejudicial. Plaintiff has an interest in eliminating Rush, since in such event if Morris takes the position plaintiff's name will be the only one, rather than second, on the eligibility list.

The complaint as first filed alleged: "That said Russell V. Rush has never held a position of foreman janitor in the employ of said City and County of San Francisco and for such reason was not qualified to take such examination." During the trial the following was added by amendment: "That said Russell V. Rush never did while employed in the position of Janitor in the rooms occupied and used by said Civil Service Commission have supervision of a large group of janitors or supervision of any janitors nor did he direct a large or any other group of janitors such as those at the Hall of Justice, nor did he look after supplies; never kept the time of subordinates; never assisted the Head Janitor in supervising a large group of janitors and never performed any duties or work except of the kind described under the duties attached to the classification of C 104 Janitor as set forth in the classification adopted about November 17, 1930, by said Civil Service Commission; *that the reclassification of the position occupied by the said Russel V. Rush by said Commission was illegal and without any authority in law* and that said Commission abused its discretion in permitting said Russell V. Rush to take said examination so held as aforesaid on April 7, 1939." (Italics added.)

Defendant commission and the intervener note that the allegation is that while employed as *janitor* Rush did not perform duties of the type required of a foreman janitor. What he did as janitor is immaterial, they say. The purpose of this allegation is, however, to show that it was improper to reclassify the position of janitor which Rush was filling as of the class foreman janitor because he was not performing duties of the type prescribed for a foreman janitor job.

Rush became a party to the action by his complaint in intervention in which he alleged that the commission reclassified the position which he held pursuant to the power and authority vested in it by the charter, and that he performed the duties of foreman janitor. The prayer was that the court determine that intervener at all times since June 1, 1939, had been entitled to the head janitor position.

[9] We are of the view that the pleadings and offer of proof sufficiently present the question of the commission's abuse of discretion in reclassifying the position of janitor which Rush held.

The judgment is affirmed insofar as it determines that plaintiff was not entitled to advance to the position of head janitor without examination. Insofar as it determines Rush's right to the position of head janitor the judgment is reversed for a trial on the merits on that issue. Each side shall bear its own costs on appeal.

KNIGHT and WARD, JJ., concur.

In re TEEL'S ESTATE.
Civ. 6844.

District Court of Appeal, Third District, California.

June 30, 1943.

Rehearing Denied July 20, 1943.

Order Denying Rehearing Vacated July 22, 1943.

Rehearing Granted July 30, 1943.

1. Wills 🔑155(1)

To set aside a will on ground of undue influence, it is necessary to show that influence was such as in effect to destroy testator's free agency and substitute for his own another person's will.

2. Wills 🔑166(1)

To set aside a will on ground of undue influence, evidence must be produced that pressure was brought to bear directly upon the testamentary act.

3. Wills 🔑159

Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough to justify setting aside will on ground of "undue influence", but it must be influence used directly to procure the will and must amount to coercion destroying free agency on part of testator.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influences".

4. Wills 🔑166(7)

Mere opportunity to influence the mind of testator, even coupled with an interest or a motive to do so, is not sufficient to establish "undue influence".

5. Wills 🔑166(2)

Evidence was insufficient to support finding of undue influence on part of husband in connection with will executed by wife disinheriting wife's married daughter.

6. Wills 🔑163(1)

Where the due execution of will was proved by testimony of subscribing witnesses, burden of proof was upon contestant to establish undue influence.

7. Wills 🔑82

A will cannot be set aside on mere ground that it is unjust or unnatural, since an unnatural, unfair or unjust will creates in itself no presumption of incompetency or undue influence.

8. Wills 🔑82

A will is not necessarily unnatural that favors a spouse over an adult daughter, especially where the child is self-supporting and is married with a husband living, and is not dependent upon testator.

9. Wills 🔑166(7)

Opportunity, even coupled with a motive alone, will not sustain a finding of undue influence, in the absence of evidence showing pressure operating directly upon testamentary act, and it cannot be presumed that because a husband has opportunity and inducement to exert undue influence over his wife that he has done so.

10. Wills 🔑53(2)

Evidence as to mental condition before or after execution of a will is important only in so far as it tends to show mental condition at the time of the execution of the will.

11. Wills 🔑54(1), 55(8)

That testator is a suicide may be given in evidence as tending to establish insanity, but more than mere fact of suicide must be shown to establish that the insanity was so complete as to destroy testamentary capacity, or that it was of such nature as to have exercised a direct influence bearing upon the testamentary act.

12. Evidence 🔑568(2)

The opinion of a lay witness as to mental capacity of testatrix has no greater probative value than the facts given by him as the basis of his conclusion.

13. Evidence 🔑568(2)

Facts given by contestant's witnesses, as basis of their opinions as to mental incapacity of testatrix, merely showing peculiarities, few isolated acts, idiosyncrasies or mental departures from the normal, but did not bear directly upon and influence the testamentary act, were insufficient to support finding of "mental incapacity".

See Words and Phrases, Permanent Edition, for all other definitions of "Mental Capacity".

14. Evidence 🔑571(2)

Physician's testimony that testatrix was incompetent, based on a question framed to call for an answer favorable to contestant, was the weakest and most unsatisfactory evidence.

15. Wills 🔑52(1), 55(1)

Testamentary capacity is always presumed, and burden is upon contestant to show affirmatively and by preponderance of the evidence that testator was of unsound mind at time of execution of will.

16. Wills 🔑50

Testator is of "sound mind" if at time of making will he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recall the nature and situation of his property, and to remember and understand his relation to the persons who have claims on his bounty and whose interests are affected by the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Sound Mind".

17. Wills 🔑31

"Mental incompetency" sufficient to avoid a testamentary act must be either insanity of such a broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion which influenced the creation of terms of the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Mental Competency".

18. Wills 🔑55(1, 3)

Evidence was insufficient to establish that at time of executing will testatrix failed to understand nature of her act or nature and situation of her property and her relation to her daughter who was disinherited, and failed to establish insanity of such a broad character as to establish "mental incompetency" generally, or any delusions or hallucinations which influence creation and terms of will.

THOMPSON, J., dissenting.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

In the matter of the estate of Irene L. Teel, also known as Irene L. Friend, deceased, wherein Rilma K. Gaskill contested the validity of decedent's purported last will and testament on ground of undue influence and mental incapacity. From a judgment denying probate of the proposed will, John E. Teel, proponent, appeals.

Reversed with directions.

Hill & Hill, of Eureka, for appellant.

John F. Quinn and Irwin T. Quinn, both of Eureka, for respondent.

ADAMS, Presiding Justice.

This is an appeal from judgment refusing admission to probate of the proposed will of Irene L. Teel.

The testatrix, who was a widow about sixty years of age, and proponent, a widower aged sixty-nine, intermarried on June 29, 1940. On November 14, 1940, at the office of H. L. Ricks, decedent's attorney, they executed formal wills under the reciprocal provisions of which each was the sole beneficiary of the other. At the same time they executed deeds whereby they created a joint tenancy between themselves in certain of their properties. On December 2, 1940, Irene Teel committed suicide.

Proponent's petition for admission to probate of his wife's will was opposed by contestant, Rilma K. Gaskill, her only child by a former marriage, on the grounds of decedent's lack of testamentary capacity and undue influence exerted by proponent. At the trial proponent made a prima facie case by calling the witnesses to the will, Attorney Ricks and his secretary, Mrs. Burgess. Evidence was then adduced by contestant, at the conclusion of which proponent made a motion for a nonsuit, which was denied. Proponent then offered further evidence and at the conclusion of the trial moved the court for a directed verdict. This motion was also denied and the case was submitted to a jury upon special interrogatories. The jury found in favor of contestant on both grounds. Proponent then made a motion for judgment notwithstanding the verdict, but this motion also was denied and judgment was entered in accordance with the verdict. This appeal is presented on the sole ground of the insufficiency of the evidence.

Proponent's motions should have been granted. The evidence produced by contestant is insufficient to show either undue influence or incompetency to make a will.

[1-4] As to what constitutes undue influence sufficient to support a finding, the court said in Re Estate of Arnold, 16 Cal. 2d 573, 577, 107 P.2d 25, 27:

"In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [In re] Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. [In re] Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [In re] Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.

" 'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." ' [In re] Estate of Gleason, 164 Cal. 756, 765, 130 P. 872."

Also see In re Estate of Hopkins, 136 Cal.App. 590, 602, 603, 29 P.2d 249; In re Calkins' Estate, 112 Cal. 296, 44 P. 577; In re Estate of Carithers, 156 Cal. 422, 105 P. 127; In re Estate of Clark, 170 Cal. 418, 149 P. 828; In re Estate of Anderson, 185 Cal. 700, 198 P. 407.

[5] There was no evidence produced by contestant of any such influence upon the testator. Attorney Ricks, who prepared the wills, testified that Mrs. Teel's will was prepared at her request and in accordance with her wishes; that she first came to his office on November 7th with Mr. Teel and stated that she wanted to make her will in favor of her husband, leaving nothing to her daughter; that at that time he tried to discourage her from omitting the daughter and told her to think it over; that he, however, took information from

both parties and prepared wills in accordance therewith, and that subsequently the two returned and the wills were executed by them; that he did not talk to Mrs. Teel alone and that both parties were present when both wills were signed. He testified, however, that there was no apparent domination by Mr. Teel, and that he saw no evidence of influence; that he kept Mrs. Teel's will after its execution and that she could have had it at any time, but never called for it. Mrs. Burgess testified also that Mrs. Teel was not acting under duress, menace, fraud or undue influence.

[6] The due execution of the will having been proved by the testimony of the subscribing witnesses thereto, the burden of proof was upon the contestant to establish undue influence. 26 Cal.Jur. 759; In re Estate of Black, 132 Cal. 392, 64 P. 695. There was no evidence produced by contestant in her case in chief bearing upon the testamentary act, or anything indicating coercion or lack of free agency on the part of decedent when she executed the will. Furthermore, one of contestant's own witnesses, Mrs. Hutchins, testified that decedent was a strong-willed woman.

Respondent's argument in support of the finding of undue influence is that Teel and decedent entered into a prenuptial agreement to make reciprocal wills, each naming the other as sole beneficiary, and that this shows that appellant married decedent for her money; that appellant "took decedent" to two other attorneys before their visit to Mr. Ricks; that he telephoned Mr. Ricks' office several times after the first visit to see if the papers were prepared; that he had in his possession necessary documents and made arrangements to furnish descriptions; that he discussed with Mr. Ricks and decedent the terms of the will and deeds; that he was present when the will was executed; that he took possession of the deeds after their execution; that there was a confidential relationship between Teel and decedent, and that Teel unduly profited under the will.

Even assuming the truth of the foregoing, it does no more than suggest motive and opportunity on the part of proponent, and completely fails to show pressure bearing directly upon the testamentary act or that testator's free agency was destroyed and proponent's will substituted for her own. Also, the evidence does not show that proponent "took" his wife to the other attorneys, but merely that the parties went together. Mr. Mitchell, one of these attorneys, who had previously transacted business for decedent, testified that in 1940 Mrs. Teel consulted him at least twice in reference to the disposition of her property; that Mr. Teel was probably present at one interview but that he did not participate in the conversation, and that on the other visit he talked to Mrs. Teel alone; that decedent told him that she had received a letter from her child demanding a share of the estate of the child's father, and that she asked if she was free to make such disposition of her property by will as she wished; and that he advised her that she was. Mr. Mitchell was apparently not asked to draw a will but merely to give advice as to what decedent could do. As to the visit to the office of Attorney Mace, there was no testimony that Teel took his wife to that office. Mr. Mace testified that she came there on November 1st with her husband and asked about making a will; that when he learned the nature of her business he took her into his private office, and that Teel did not participate in the conversation; that Mrs. Teel said she wanted to leave all to her husband, and that she was very emphatic that her daughter was to get nothing; that she said that she would think the matter over but did not return. These visits were prior to the visits to Attorney Ricks.

Respondent's argument that proponent unduly profited by decedent's will seems to be based upon a contention that decedent had more property than her husband and that, therefore, proponent, on her death, received more than decedent would have received had her husband predeceased her; but this does not make a case of unduly profiting under a will. Considered as a trade, it might have been a poor one, but upon Teel's death his wife would have received what little he may have owned, and after her death she had no use for either his or her own.

[7-9] A will cannot be set aside on the mere ground that it is unjust or unnatural. In re Estate of Martin, 170 Cal. 657, 663, 151 P. 138. An unnatural, unfair or unjust will creates of itself no presumption of incompetency or undue influence (In re Estate of Smith, 200 Cal. 152, 160, 252 P. 325; In re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148); nor is a will necessarily unnatural that favors a spouse over an adult daughter, especially where such child is self-supporting and is married with a

husband living, and is not dependent upon her mother. In re Estate of Stone, 172 Cal. 215, 222, 155 P. 992. Opportunity even coupled with a motive alone will not sustain a finding of undue influence in the absence of evidence showing pressure operating directly upon the testamentary act (In re Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762); and it cannot be presumed because a husband has opportunity and inducement to exert undue influence over his wife, that he has done so. In re Estate of Donovan, 140 Cal. 390, 73 P. 1081.

Without unduly prolonging a discussion of this phase of the case we are of the opinion that the very most that can be said of contestant's evidence of undue influence is that it showed opportunity and perhaps motive. Taking it in its aspect most favorable to contestant, and disregarding conflicting evidence, it does not show even general influence over the testator by proponent; and there was no evidence that his influence was brought to bear upon her testamentary act amounting to coercion destroying free agency on her part.

[10] Coming now to the evidence adduced on behalf of contestant relating to the mental capacity of the testatrix at the time the will was executed, it is to be considered that "evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will." In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 46; In re Estate of Sexton, 199 Cal. 759, 765, 251 P. 778. Also that the validity of wills of admittedly insane persons has been upheld where said wills were executed during lucid intervals. In re Estate of Fisher, 202 Cal. 205, 212, 259 P. 755; In re Estate of De Graaf, 34 Cal.App.2d 120, 93 P.2d 199; In re Estate of Young, 38 Cal.App.2d 588, 101 P.2d 770; In re Estate of Worrall, 53 Cal.App.2d 243, 246, 127 P.2d 593; 26 Cal. Jur. 634.

But taking the testimony adduced by contestant in its aspect most favorable to her, it is as follows:

Mrs. Hattie Hutchins (formerly Mrs. Colby), who from 1938 to 1939 lived on a portion of the property belonging to and next door to decedent, testified that decedent secured the execution of deeds that vested the title to the property occupied by the Colbys in Mr. and Mrs. Colby and herself as joint tenants, and that she put $2,500 in a joint bank account in her name and that of Mrs. Colby, so that the Colbys might build a house upon the property; that after Mr. Colby died the relations between her and decedent were not very friendly; that the witness found four flat tires on her car, broken red lights, damaged padlocks with solder poured in them, and that decedent girdled walnut trees on the lot so they would die; that in July, 1939, witness quitclaimed the property back to decedent and received $500. That during the time she lived next to decedent at times she firmly believed that she was mentally unbalanced; that she based this opinion on her actions, her looks and the things she did; that at times she had a peculiar look; that at one time decedent told her she had planted a hedge so a neighbor could not see her, and later trimmed it off so she could see; that she would tell one neighbor he could have feed for his cows, and in a day or two let another neighbor have it; that decedent tried to run one's life and wanted you to do absolutely what she wanted; that probably eight times she mentioned suicide, giving no reason except that once she said she felt "ornery"; that in 1938 or 1939 decedent said she thought she would see a doctor and have the wheels taken out of her head; that she mentioned leaving her daughter a ranch around Fruitland; that she didn't seem to want to leave her daughter and granddaughter any property; that she did not show peculiarities at all times; that she was "a very peculiar woman"; that they were not good friends at the time the witness left.

George Baham, brother of Mrs. Colby, testified to receiving a postal card from decedent in December, 1939, requesting him to have a deed from Mrs. Colby recorded when it had already been recorded; also a letter dated January 2nd in which decedent said she wanted Mrs. Colby to give her a quitclaim deed, though such a deed had already been given; that the letter meant "Just confusion; I don't know nothing else"; also a letter by testator dated February 19th regarding the same matter. (From this correspondence it appeared that decedent was worried because she had executed a deed of the same property to one Stevenson without getting a deed from Mrs. Colby, though the Colby deed had been executed.) This witness saw Mrs. Teel the day before she died, and testified also to events after her death concerning Teel's actions and two notes left by decedent. He had known decedent three and one-half years. When asked regarding her mental condition he answered: "I would say she was most peculiar"; "she would do something and then wish she hadn't done it and things of that kind, confusion."

Mrs. Gertrude Lewis, clerk in a dry goods store, testified that Mrs. Teel, three or four days before her suicide, bought a nightgown, saying she wanted a "real nice one" because "I won't use it but the once."

Mrs. Lola Lutman testified that after Mrs. Teel's death she found a letter from decedent in the mail box which they used jointly, which note read: "John is swell, don't think badly of him, he is a dear. Say nothing of this to John and use it just for yourself and Bud"; that the envelope contained $20, also a birthday card (witness was to have a birthday December 21st); that there was another envelope in the mail box addressed to Mrs. Carpenter containing about $65, which she saw Mr. Teel give to Carpenter that evening; that she found a note from decedent for Mr. Teel in a drawer in the kitchen where they kept writing material; that she did not read it but heard Teel read it; that in the letter testator spoke about money matters, said she was sorry they could not agree on money matters, but that nothing she could say would change his mind about money matters as he would say and always think he had to work; that there was something about how much she loved him and was sorry they couldn't be happy together. She also testified that Mrs. Teel had told her she wanted Teel to quit work, and that they could travel; that she had known Mrs. Teel for thirty years, lived near her for eighteen years, and the last eight years was with her a great deal.

Estelle Gaskill, contestant's daughter, fifteen years of age, said that Mrs. Teel, one day of a rodeo at Fortuna, offered her money to go to the rodeo, saying that she could not go as John was not able to go. Witness identified a card later received from Mrs. Teel saying they had her ticket and a new handkerchief for her but that she did not come to see them again before the rodeo. She also testified that she received a card from decedent on her birthday, November 27, 1940.

Mrs. Gaskill, Estelle's grandmother, testified that the day of the rodeo she had gone with Estelle to the Teel home and decedent had offered her [not Estelle] the money for Estelle's rodeo ticket.

Roy Brown, former business partner of Mr. Friend for six or seven years many years earlier, testified that in 1921 or 1922 he pulled Mrs. Friend out of the river; that he did not see her jump in; that he had previously heard her make remarks about committing suicide, but not since; that he saw her off and on after that. When asked as to her mental state, he said: "Why I consider she was badly unbalanced the first time I seen her and last act she did on earth"; that she once wanted him to go up and take a piece of their property, saying she would "fix up so I got it"; that she looked like she had "faded away in the last few years." On cross-examination he stated that he lived on the Gaskill place; that he once tried to sell decedent some fruit in 1940, after her marriage. Asked if in his opinion Mrs. Teel was insane he said: "Well she was not exactly insane, no, but she was daggone badly off balance * * * weakminded * * * would only carry one friend at a time"; that she did Andy's (Friend's) business; that he considered her unbalanced because she once bought a cow for $150 (in 1920, 1921 or 1922) that "had wonderful papers tied to her, but she was old, real old and she was not worth 25¢"; that he sold the cow and when he and Friend quit Mrs. Friend "soaked" him $75; that she bought a heifer for $80 that was only good for the butcher as its teats were grown together; that he had had no transactions with her since that time and based his opinions on transactions during 1920-1922 and her suicide. He said: "I considered her very queer * * * as long as I could keep her friendship she was all right, but she would turn her back on you * * * as long as she was your friend she would give you anything she had"; that when friendship ceased "she would get your goat if she could." (A motion to strike this testimony as too remote was denied.)

Mr. Teel, called under section 2055 of the Code of Civil Procedure, testified that he could not find the note left by his wife, but that it read: "Johnny, you will find the house clean and beds clean; go get you a pal. I am sorry, Rena."

George Friend, a brother of Andrew Friend, 85 years old, said he saw decedent quite often before his brother's death but that he did not see her very often after Andrew died; that his brother was blind for twenty years. As to what in his opinion decedent's mental condition was, he said: "Well it was rather bad"; "I would call her very peculiar." His reason was that "at times she would be very friendly and treat me nicely and other times she would be very cool for no cause as I could see. Sometimes she would jump in and get me a nice cup of coffee as soon as I went and other times she wouldn't give me anything to eat all day. I would call that peculiarities, wouldn't you?" He said that after his brother died he saw decedent about once a year—half a dozen times; that when he saw her about three years ago she was very pleasant; that he saw her just before she married Teel and she was pleasant then.

Rilma Gaskill, contestant, testified that as a girl she always had old-fashioned clothes, a little hat, etc., and boy's shoes; that the kids made fun of her; that she married in 1923 at the age of twenty-three, then taught school for two years, living at the Gaskill Ranch; that she left Humboldt County in 1925 and went to Oakland; that she had worked the last few years and that her husband was employed all the time; that her parents gave her some land on the Klamath River (238 acres); also lots in the Santa Clara tract at Eureka, which she finally sold for $400 or $500; that she sent money to her parents to make up a sum loaned to her Uncle George, at which time she and her husband put up $915; that they got back $1,200; that since living in Oakland she had gone to Humboldt County every vacation and paid visits to her parents when they were there; that her mother corresponded with her and her daughter and sent them Christmas and birthday cards, gifts, etc. Asked as to her mother's mental competency about the time the will was executed, she said: "I know that her mental condition was bad." The reasons given by her for believing her mother's mind was not right were: "She married Mr. Teel and she committed suicide after she had been married to him for five months. Some time before she was married to him she had written to me and asked me if it was all right if she gave the property there at Hydesville, the entire property to my daughter and asked if it would be all right if she would give it to her instead of to me. * * * She committed suicide and took the dog with her. * * * I was on the property when she attempted, or made her suicide attempt that Mr. Brown spoke about the other day. I was there when he brought her back to the house from the river and heard her say at other times that she guessed she would commit suicide. She was always complaining about pains in her head; she couldn't think straight. She feared that she had some incurable disease. She told me the last time I saw her before she passed away that she was sure she had some kind of a growth and she suffered all the time. She had low blood pressure, she doctored for that; * * * she wrote me that she couldn't think straight; * * * that was in 1934." (Here witness exhibited letters and postal cards from mother to daughter and granddaughter, sending love, etc. Some of these were sent on birthdays or other holiday occasions—one was sent to the granddaughter on her graduation from junior high school in 1940.) She stated she had discussed with her mother her marriage to Teel but had not objected; that at that time she mentioned property that had been her father's individual property—the Fruitland property; that she just asked her mother about Dad's property and if she intended to do anything about Dad's individual part of the property before she married; that her mother replied that there wasn't anything. She did not definitely recall that she ever assisted in the care of her father's and mother's business after she left home. She said that her mother had been peculiar back to some of her earliest recollections; that when she was a small child her mother would insist upon her giving food that was in a spoiled condition to her uncle; that she would buy clothing, hang it up in the closet and perhaps never wear it and perhaps later tear it up for rags; that about 1927 or 1928 she took a fancy to being an equestrian, and bought a saddle horse but didn't keep it very long and disposed of it; that she was always melancholy and mournful and couldn't understand why she couldn't be like other people; that she was not always melancholy; that she would be cheerful in the morning and in the afternoon would be moody and complain of pains; that she doctored all the time and was not able to do her work all the time. Other reasons for believing that her mother's mind was not right were that the last thing she did was to commit suicide with the dog; that she made a will disposing of her property to someone that was apparently more or less of a stranger to the family, while at the same time her letters and cards indicated loving and wanting to do things for her own family.

Rex Musser, a mortician at Fortuna, testified for contestant that when Andrew Friend died Mrs. Friend made arrangements for the funeral; that she was to bring Mr. Friend's clothing down, but instead she brought a dress.

Decedent's physician Dr. Kramer, called by contestant, testified that he had known decedent about seven years; that she had consulted him after her marriage; that she had low blood pressure and a cancer phobia (fear of cancer), but that he found no organic disease; that he last saw her in August, 1940; that he saw no evidence of insanity and, with the possible exception of that phobia, her mind seemed to be perfectly clear at all times; that in his talks with her he found nothing to indicate insanity. He did testify that the commission of suicide is not a normal act; also he was asked a hypothetical question as follows:

"What would your opinion of a person be who in 1922 threw herself into a river and attempted suicide—in an attempt to commit suicide and was pulled out and who thereafter at least six or seven times threatened to commit suicide, did commit suicide in December 2nd of 1940, that prior thereto, a month or two or two months, the time is a little indefinite, told her husband that she would or might commit suicide, a woman who at one time purchased a high priced animal for $175.00 and then disposed of it for a little or nothing, had to get rid of it, who at time three or four years, in 1937 or 1938 was in a business transaction, a transaction completely closed and the deeds had been drawn up and delivered and after all this was done she wrote a letter in which she stated that she wanted these quit-claim deeds to be made out and placed on record, when it already had been done; a woman that complained about her head, laid down a great deal, complained that she was not able to do her work; a woman that in drawing up her will left her property to a man she had been married four months to, cut out completely her only child, only daughter; who complained a great deal of headaches, she had low blood pressure, would you say a person that had such characteristics, whether or not * * * she was of sound or unsound mind?" and his answer was: "I would strongly suspect she was of unsound mind if all those facts were true."

However, some of the things upon which contestant's witnesses based their beliefs are explained.

The letter wherein testatrix told her daughter she couldn't think straight was introduced in evidence. It was as follows:

"Dearest kids—Just rec'd Stanleys very nice letter—many thanks—also yours, Rilma—and last & least—the check. The mtge is $3,652.50. ¼ is 913.12. You sent $750. That leaves $163.12. Plus corset money, 1.35 is $164.47. So take what is over on your check of $165. out of the tax money. Better keep it ¼ on everything. Taxes were $13.44 on one piece & $82.15 on the other. Total $95.59. ¼ is $23.89. Just think, there is nearly $75. interest already. The mtge from Sept. 5th & taxes from Nov. 14th. Keep these dates. Now Rilma if I make any mistakes in the figures, tell me, please, for my old head hurts & does not think good nor quick & I can not see good and am very liable to get something wrong. I do not mean to, so if I do, you come right back, right then. Don't hesitate, hear?

"I had a little lamp for the radio—one from the 10¢ store—the green one is real small on the bottom & the shade large, so your dad would likely tip it over. I will have a wire run thru the ceiling—should have been done before—& put it in the living room. It is too tall to go on the sideboard under the cupboards.

"Did I tell you we have a big Belgian shepherd dog? His name is King. Not cross but a good watch dog. Tell Estelle he brings in wood, brings our slippers and does all sorts of tricks even to bringing his pan in when you tell him. He is an old dear & thinks the world of us—will not go outside the yard unless I do. He is such an old mutt for us that he frets whenever he can not be right with us, guess I'll have to stay at camp next summer, so he can be with us.

"No there has not been much snow in the hill & only a few light frost here.

"I'll go now so the stage will get this today. Lots of love to all of you. Write often, come again, Stanley.

"Ma F."

Plainly it refers to the loan made by Mr. and Mrs. Friend and Mrs. Gaskill to the latter's uncle, to which she referred in her testimony. This letter refutes any inference of unsound mind and shows, on the contrary, that Mrs. Friend was attending to the business of the loan, and that she wanted to be entirely fair with her daughter and have the transaction fully understood by her.

The testimony of Musser, the mortician, about decedent's bringing a dress instead of her deceased husband's clothes was explained by Mrs. Lola Lutman, who, on that occasion, accompanied Mrs. Friend to the undertaker's. She testified that this incident occurred in connection with the funeral of Mr. Colby and not that of Mr. Friend; that Mrs. Colby asked Mrs. Friend to take clothes to the undertaker and gave them to her in a box; that Mrs. Friend had with her another box containing a dress she was taking to the cleaner, and by inadvertence gave the wrong box to Musser; that he immediately discovered the error and the boxes were exchanged.

Regarding the testimony of Mrs. Colby that she found her tires punctured, etc., it is to be noted that she did not testify that Mrs. Friend punctured her tires; she only intimated that she had done so.

[11-14] Much of the foregoing testimony of contestant's witnesses was remote in time, and little of it bore directly upon the time this will was executed or a period immediately before or after said date. On the other hand witnesses who had had almost daily contact with decedent up to the time of her death (including Mrs. Lola Lutman) uniformly testified to her soundness of mind and business ability. While it is true that testatrix committed suicide, the court said in Re Estate of Chevallier, 159 Cal. 161, 113 P. 130, 134, where it was held that the evidence fell far short of showing unsoundness of mind of the testator, that "The fact that the testator is a suicide may be given in evidence as tending to establish insanity, but there must be much more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity, or that it was of such a nature as to have exercised a direct influence and bearing upon the testamentary act." Also see In re Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann.Cas. 795; In re Estate of Muller, 14 Cal.App.2d 129, 57 P.2d 994; In re Estate of Little, 46 Cal.App. 776, 189 P. 818. The testimony of contestant's witnesses also furnishes little or no ground for holding that testatrix was of unsound mind. The opinion of a lay witness as to mental capacity of a testatrix has no greater probative value than the facts given by him as the basis of his conclusions (In re Estate of Short, 7 Cal.App.2d 512, 47 P.2d 555; In re Estate of Sexton, 199 Cal. 759, 251 P. 778; In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456), and the facts given by contestant's witnesses as the bases of their opinions are insufficient to show more than peculiarities of testatrix; and testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies or mental departures from the normal unless they bear directly upon and have influenced the testamentary act. In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434. As to the answer of Dr. Kramer to the hypothetical question asked him, the court said in Re Estate of Collins, 174 Cal. 663, 164 P. 1110, 1113, that such testimony, based on a question "skilfully framed to call for an answer favorable to the party in whose behalf it is asked", is testimony the weakest and most unsatisfactory. Citing In re Estate of Dolbeer, 149 Cal. 227, 243, 86 P. 695, 9 Ann.Cas. 795.

[15, 16] It is well established that testamentary capacity is always presumed and that the burden is always upon a contestant to show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time of the execution of the will. In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897; In re Estate of Short, 7 Cal.App.2d 512, 47 P.2d 555; In re Estate of McDonnell, 109 Cal.App. 577, 293 P. 651; In re Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551; In re Estate of Little, 46 Cal.App. 776, 189 P. 818. And a testator is of sound and disposing mind and memory if at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing and to understand and recall the nature and situation of his property, and to remember and understand his relation to the persons who have claims on his bounty and whose interests are affected by the provisions of the instrument. In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25, In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897.

[17] Incompetency or unsoundness of mind sufficient to avoid a testamentary act must be either insanity of such a broad

character as to establish mental incompetency generally, or some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion, and as to the latter the evidence must establish that the will itself was the creature or product of such hallucination or delusion and that it influenced the creation and terms of the will. In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; In re Estate of Collins, 174 Cal. 663, 164 P. 1110; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897; In re Estate of Chevallier, 159 Cal. 161, 113 P. 130.

[18] Here the evidence shows that at the time she made her will decedent understood the nature of her act, the nature and situation of her property and her relation to her daughter, and that the will was executed after several days of deliberation. Neither insanity of such a broad character as to establish mental incompetency generally, nor any delusions or hallucinations which influenced the creation and terms of her will, was shown. As was said by the court in Field v. Shorb, 99 Cal. 661, 670, 34 P. 504, 507, "it is quite probable that the finding was a result of a notion frequently entertained by jurors (and sometimes by courts) that a man should dispose of his property in contemplation of death in such manner as to suit the tastes and ideas of propriety of the jurors. It was probably thought that deceased should not have given so much to one not of his blood, when he had collateral kin."

Cases in which evidence more abundant than in the case before us was held to be insufficient to show incompetency are: In re Estate of Little, 46 Cal.App. 776, 189 P. 818 (where the testator had often threatened suicide and did commit suicide about thirty days after executing his will); In re Estate of Collins, 174 Cal. 663, 164 P. 1110 (where testatrix had paralysis, and evidenced idiosyncrasies, pecularities, and weakness); In re Estate of Hopkins, 136 Cal.App. 590, 29 P.2d 249 (where testator had a cancer phobia, was affected with melancholia, and may have committed suicide); In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434 (where testator drank to excess, picked up articles from garbage cans, pinned paper flowers on shrubs, and gave a friend a fish which he had soaked in kerosene); In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897 (where testator threatened suicide, had progressive senile dementia, was given to fits of rage, and exhibited peculiarities); In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25 (where testator had chronic alcoholism, had suffered several attacks of delirium tremens, was irrational and suffered from several diseases); In re Redfield's Estate, 116 Cal. 637, 48 P. 794 (where testatrix had delusions and irrational fears, and there was insanity in the family); In re Estate of Sexton, 199 Cal. 759, 251 P. 778 (where testatrix suffered from arteriosclerosis, had several paralytic strokes—cerebral hemorrhages); In re Estate of Perkins, 195 Cal. 699, 235 P. 45 (where decedent had hallucinations, loss of memory, and suffered from chronic Bright's disease); In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456 (where testator suffered lapses of memory, fainting spells, and had had a severe head injury); In re Estate of Chevallier, 159 Cal. 161, 113 P. 130 (where testatrix committed suicide); and In re Estate of Putman, 1 Cal.2d 162, 34 P.2d 148 (where testator was about 80 years old, used liquor habitually, and had arteriosclerosis).

The judgment is reversed and the trial court is directed to admit the will to probate.

PEEK, J., concurs.

THOMPSON, Justice (dissenting).

I dissent. It is my opinion the record contains an abundance of evidence to sustain the verdict of the jury and the judgment of the court to the effect that the will of Irene L. Teel is void for lack of testamentary capacity and on account of the undue influence of John L. Teel. I am in accord with the principles of law announced in the majority opinion. But I believe they do not fit the facts of this case. It is not the province of a reviewing court to weigh the evidence or to pass upon the credibility of witnesses in a will contest. The findings of a jury are entitled to just as much credence in a will contest as in any other civil action. It is the uniform rule in this class of cases that when a reviewing court has ascertained that there is substantial evidence to support the essential findings of a jury, its province is exhausted and a judgment in accordance therewith must be affirmed, regardless of the presence of conflicting testimony. In re Estate of Barr, 69 Cal. App. 16, 230 P. 181; In re Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; 26 Cal.Jur. 1101, § 356.

In the present case a unanimous verdict of the jury determined that the will was the product of an unsound mind and of the undue influence of Mr. Teel. The trial judge denied the proponent's motions for a directed verdict, a judgment notwithstanding the verdict and a motion for new trial. A careful reading of the record convinces me that the testatrix was of unsound mind; that she lacked testamentary capacity; and that her will was the product of the undue influence of John L. Teel. To my mind the evidence in this case adequately meets the requirements of even a strained construction of the law with respect to the issues involved.

We are confronted with the fact that the testatrix actually took the lives of herself and her pet dog in a tragic suicide within eighteen days from the time when she executed her will. By the terms of that will she disinherited her only living child by a former husband. That tragedy was the fulfillment of a suicidal mania which she possessed for many years. Some seventeen years previously she attempted to commit suicide by jumping into a river. Several witnesses testified to numerous threats to take her own life. She appears to have had the symptoms of paranoia, which is a fixed and progressive type of insanity. She had delusions, habitual melancholy, violent headaches and uncontrollable animosities against those who were her best friends; she had weird fancies, eccentricities in dress and in her conduct toward other persons, and she possessed a fixed suicidal mania.

Mrs. Teel was despondent and she often complained of severe headaches. She said she was unable to think or act reasonably. She implied that her mind was deranged when she once said she intended to go to a physician and have the wheels taken out of her head. She had a fixed delusion that she was afflicted with a cancer of the stomach. Her own physician testified that she possessed a "cancer phobia". After he examined her and took X-ray pictures and informed her that she had neither tumors nor a cancer and that she did not have any other stomach ailment, she did not appear to believe his statement. The delusion still remained. Her physician, Doctor Kramer, was the only medical expert who testified regarding her mental capacity. He had known her for about seven years. She consulted him four years before her death about her fancied stomach trouble. He was unable to disabuse her mind of that delusion of the presence of a cancer. He saw her in July prior to her death, and said she then appeared quite a bit older and emaciated. Although she was very slender she had lost considerable weight. He said she was generally melancholy. While he did say, "I saw no evidence of insanity", in response to the question as to whether her mind seemed clear, he replied, "With the possible exception of that [cancer] phobia." When he was asked if he considered suicide to be a normal act, he replied, "It certainly is an abnormal act." Finally in response to a very fair hypothetical question including the strange conduct and characteristics of Mrs. Teel, and her final act of suicide, when asked if he would consider such a person to be of sound mind, he replied, "I would strongly suspect she was of unsound mind."

Among a number of strange incidents which appear in evidence, a business transaction which Mrs. Teel had with a neighbor regarding the joint ownership of a home indicates that she had no real appreciation of the transaction or the ownership of the property. When her first husband, Andrew J. Friend, the father of Mrs. Teel's only living child, the contestant, died in 1936, and the proprietor of the mortuary where his body lay requested her to provide appropriate clothing for the burial she brought a box containing a dress.

It is not the province of the reviewing court to attempt to explain these numerous irrational and eccentric acts and statements of the testatrix on the theory that she must have been sane. That was the exclusive province of the jury. On appeal the tables are turned. If these acts and her conduct may reasonably be said to support the findings of the jury, then their conclusions should be upheld.

On the subject of undue influence it appears that the proponent, John E. Teel, married the testatrix June 29, 1940, five months after the death of his first wife. April 20, 1939, the testatrix executed a declaration of trust conveying to John E. Teel, as trustee, all of the property she possessed, including a $1,000 bond and real property valued at about $24,000, giving him absolute power to sell, lease, mortgage or hypothecate any and all of said property without her approval or consent. Prior to their marriage Mr. Teel and the testatrix agreed to execute mutual wills devising and bequeathing to each other all of their property. The value of his property was only about $1,000. After their marriage the spouses went together and consulted two different lawyers with the object of procuring the mutual wills and joint tenancy deeds to her real property. For some reason, these attorneys did not draw those instruments. November 7, 1940, they visited together the office of H. L. Ricks, an attorney at law in Eureka, for the same purpose of executing the mutual wills and the joint tenancy deeds. In several interviews with Ricks both of the spouses were present and both participated in the discussions. Mrs. Teel declared her intention to disinherit her daughter, but gave no satisfactory reason therefor. Ricks tried to persuade her that was unjust and wrong. They left but subsequently returned to his office and he drew three joint tenancy deeds to all of her real property, and the mutual wills. The wills were executed November 14, 1940, and the deeds on November 19th. By the terms of her will the testatrix devised and bequeathed all of her property to her husband, and in the event of his death to his son Roy Teel, with whom she was only slightly acquainted. John E. Teel was named as executor without bond, and in case of his death his son Roy was to act as executor without bond. Her daughter, Rilma K. Gaskill, the contestant, is not mentioned in the will. There is evidence that the bulk of the estate of testatrix consisted of community property acquired while she lived with her first husband, who was the father of the contestant. There is also evidence that Mrs. Gaskill was always very considerate of her mother, and that no sufficient reason for her disinheritance existed. The wills were left in the possession of the attorney, but John E. Teel returned several times and took possession of the deeds and other instruments and recorded them.

There is ample evidence of Mr. Teel's activity in procuring the execution of the will and the other documents. He unduly profited by the transaction. He was always present when they visited the lawyers to procure the execution of the documents. He took part in the conversations. A confidential relationship existed between the spouses.

Under the circumstances of this case the jury was warranted in assuming that the will was unnatural, since the testatrix disinherited her only living daughter by her first husband with whom she had been on good terms, without even mentioning her in the will. While it is true that one has a legal right to make an unnatural will, or even to disinherit those who would ordinarily be entitled to his bounty, where the question of testamentary capacity and undue influence are involved, such injustice and unnatural terms of the will may become persuasive evidence of the invalidity of the will. In re Estate of Johnson, 72 Cal.App. 663, 237 P. 816; 26 Cal.Jur. 633, § 7. In the text last cited it is said in that regard: "When accompanied by the fact that the provisions of the will are 'unnatural', evidence tending to show that the deceased was suffering from mental derangement or disorder will require a rejection of the propounded instrument."

The testimony of the attorney who drew the will or of the witnesses to a will with respect to the mental capacity of the testatrix is entitled to weight, but it is not controlling on that issue. In re Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; In re Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644. In the last mentioned cases judgments denying probate to the wills on the grounds of undue influence and unsound mind were affirmed on appeal. Hearings by the Supreme Court were denied. The present case appears to me to be much more conclusive than the previously cited cases of the fact that the testatrix was afflicted with settled insanity, and that she did not possess testamentary capacity. The case of In re Estate of Bucher, 48 Cal.App.2d 465, 120 P.2d 44, involved the questions of unsound mind as a result of habitual intoxication, and undue influence. After a verdict had been rendered in favor of the contestant the trial court rendered judgment notwithstanding the verdict, and admitted the will to probate. On appeal that judgment was reversed. The Supreme Court denied a hearing. That case is enlightening on the issues which are involved in this case on the subject of the province of a reviewing court to weigh the evidence and reverse the findings of a jury. It also announces the well established rule that the contestant is entitled to the benefit of all evidence adduced and of "all inferences which may legitimately be derived by the jury from the facts as established." 28 R.C.L. § 97.

While it is true that evidence of an unsound mind or of undue influence which will warrant the refusal to admit a will to probate on those grounds must be shown to have actually affected the execution of the instrument, it is not necessary to establish that result from direct evidence. They may be shown by circumstances which naturally lead to that conclusion. The contestant in this case is entitled to the full force of all the evidence adduced in support of the findings of the jury and the judgment of the court, including every natural inference which may be drawn therefrom.

I am persuaded there is ample evidence in this record to support the findings of the jury and the judgment of the court, and that the judgment should therefore be affirmed.

59 Cal.App.2d 451

PEOPLE v. SLATTERY.

Cr. 3687.

District Court of Appeal, Second District. Division 3, California.

June 28, 1943.

1. Forgery ⚷44(2)

In prosecution for forgery of fictitious name on checks, evidence that there was no account in bank in name of drawer and no arrangement for credit whereby bank would honor checks drawn under that name was "prima facie evidence" that name was fictitious.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

2. Criminal law ⚷511(1)

Evidence corroborated testimony of accused's accomplice that accused knew that checks were fictitious and sustained conviction for forgery of fictitious name on checks. Pen.Code, § 1111.

3. Criminal law ⚷1159(1)

If the circumstances shown reasonably justify a finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding.

4. Criminal law ⚷935(1)

Where prosecution was tried without a jury, trial judge's statement to accomplice witness that judge did not believe a word that witness had said did not evince a reasonable doubt as to accused's guilt so as to require a new trial where some of witness' statements were unquestionably true, after statement was made witness gave testimony implicating accused, and trial judge stated that he could not believe accused or accomplice. Pen. Code, § 1111.

Appeal from Superior Court, Los Angeles County.

Delphine Slattery was convicted of forgery of fictitious name, and she appeals.

Affirmed.

Robert E. Ford, of Hollywood, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Slattery and one Charles Peck were accused jointly, in two counts, of the crime of forgery of fictitious name. In a trial without a jury they were convicted. Defendant Slattery was granted probation upon condition that she pay a fine of $200. She appeals from the order denying her motion for a new trial.

Appellant asserts that the evidence was insufficient to support the judgment because there was no evidence, other than the testimony of her co-defendant Peck, an admitted accomplice, that the checks were fictitious or that she knew they were fictitious.

On July 7, 1942, appellant, a guest registered as H. L. Hunt at the Beverly-Wilshire Hotel, made a purchase at the W. & J. Sloane Furniture Company and delivered to that company a check in the sum of $30 drawn on a bank in Fresno, dated July 7, 1942, payable to H. L. Hunt, and bearing the name Geo. McCormick as drawer. She wrote the name "H. L. Hunt" on the back of the check. The difference between the purchase price, approximately $7, and the amount of the check was paid to her in cash by the furniture company.

On July 12, 1942, appellant delivered to the Beverly-Wilshire Hotel, in payment of her hotel bill of approximately $20, a check in the sum of $65, drawn on the same bank in Fresno, dated July 12, 1942, payable to H. L. Hunt, and bearing the same name as drawer. She wrote the name "H. L. Hunt" on the back of the check. The difference between the amounts of her bill and the check was paid to her in cash by the hotel.

There was no account in the Fresno bank in the name of Geo. McCormick, and there was no credit arrangement by which the bank would honor checks drawn under the name of Geo. McCormick. The checks were not paid by the bank and were returned to the payees. It was stipulated that "the bank manager's knowledge of the people in and surrounding Fresno County did not include a George McCormick." It was stipulated further that a handwriting expert would testify that the handwriting on the fronts of the two checks was identical with an exemplar of Peck's handwriting, and that Peck wrote the two checks. Peck had been convicted previously of grand theft as a result of borrowing money and giving as security therefor the furniture of appellant upon which there was a mortgage. Appellant was accused and tried jointly with him, but was acquitted.

Appellant told the assistant manager of the Beverly-Wilshire Hotel, when she delivered the check to him for approval as she was checking out of the hotel about 8:30 p. m. on July 12, 1942, that she knew George McCormick, that she had had checks from him before and the check was "perfectly all right"; that she had to leave hurriedly because she had just received word that her father was very ill in Santa Monica and she was rushing there to be with him. When she made that statement she knew that her father had been dead two years.

A police officer testified that appellant told him, when Peck was not present, that Peck and a man whom he introduced to her as George McCormick, a millionaire, were in her hotel room betting on horse races, and Peck gave her the checks to cash. He testified further that Peck told him, in the presence of appellant, that Peck had written the checks at the suggestion of appellant; that she told him to make them in the name of H. L. Hunt and sign the name "George McCormick"; that she told Peck the checks were to be given to bookmakers; that appellant and Peck were the only ones present in her hotel room when Peck wrote the checks and gave them to her; that he (the officer) then asked her to tell what part she took in passing the checks, and she said she had never seen Peck write a check and that she had been advised by her counsel not to discuss anything.

When she was arrested on August 14, 1942, she was at the railroad station preparatory to leaving for the East. Approximately two weeks before the trial she repaid the money she received upon the checks.

Appellant testified in substance as follows: She used the name, Mrs. H. L. Hunt, at the hotel because she had been there under that name about twelve years ago when she was married to H. L. Hunt. At other places she was known under the names of Lovejoy, Smith, Davenport, and Slattery. On July 7, 1942, she saw Peck in the hotel lobby with a man whom he introduced to her as George McCormick, a very wealthy man from San Francisco. Peck asked if she knew where they could get a bookmaker and, when she said she did not know, he asked if they could use the telephone in her room. She took them to her room, remained there about 5 minutes, and left them in her room while she went to a beauty parlor. She returned to her room within ½ hour and, as she entered her room, Peck had a check for $30 in his hand, told her they were going to play the races and asked if she would cash a check for McCormick at Sloane's when she made a purchase there. McCormick apologized for being short of money, but said the check was all right, and then she went to Sloane's, made a purchase and cashed the check. She returned about 11 a. m. and handed the money to McCormick. She saw Peck and McCormick again on July 12, 1942, in the hotel lobby and she permitted them to use her telephone again, but she remained away from her room. When she returned to her room they said they had been playing the races and that McCormick had lost considerable money. McCormick asked her if she could get a check cashed for him and she took the check for $65, went to the lobby, did not cash the check, returned and handed $65 to him from her own money. She left them again in her room, went to the lobby again, and when she returned they had gone. She cashed the $65 check at the hotel about 8:30 o'clock that evening and then left the hotel. She registered as Delphine Slattery at an apartment house that night, and the next day she registered at the Miramar Hotel under the name of Davenport. She left the Beverly-Wilshire Hotel to get away from Peck who had been bothering her by asking her to "raise money for him." He had also "hounded" her for money when she was at the Huntington Hotel. She had tried to help him several times by raising money for him when he was in trouble. When she was living at the Beverly Hills Hotel (not Beverly-Wilshire) prior to cashing the two checks above mentioned, she cashed a check for $35 at that hotel on July 5, 1942, drawn on a bank at Santa Barbara, payable to "L. H. Hunt" (not H. L.) and signed "Albert McKay," which check Peck gave to her as her winnings from a bet on a horse race. The hotel owner did not notify her the check came back. The night she left the Beverly-Wilshire Hotel, after cashing the $65 check, she and Peck left in a taxicab, stopped in front of the Beverly Hills Hotel, and Peck went in and paid to the hotel the $35 which it had paid to appellant when she cashed the "Albert McKay" check. She became acquainted with Peck about 2 years previously when she obtained race information from him. She knew when she cashed the checks that he was a race track tout.

Peck testified in substance as follows: He had known appellant 4 years. On July 7, 1942, he was with her in her room at the Beverly-Wilshire Hotel and she had a book of blank checks from the Fresno bank. She said she wanted to go East to see her daughter who was about to give birth to a child and that, although she could get the money for the trip by a loan on her furniture, she wanted Peck to write a check on the Fresno bank in order that she might show the out-of-town check to a bookmaker and thereby obtain credit to make a bet on the races. She said she would not cash the check. He wrote the check for $30 and left. He saw her again on July 12th at the hotel, although he had been trying to avoid her. After she asked him to write another check on the Fresno bank for $65 in the name of George McCormick in order that she might show it to a bookmaker, he wrote the $65 check and left. There was no George McCormick and he did not know anyone by that name. His (Peck's) only income was what his children gave him. He also wrote the check for $35, signed "Albert McKay," which she cashed at the Beverly Hills Hotel. She lived at 15 of the finest hotels and used different names at those places.

[1] The testimony of Peck, the accomplice, shows the the checks were fictitious and that appellant knew they were fictitious. A conviction cannot be had, however, upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. Penal Code, sec. 1111. The evidence that there was no account in the bank in the name of Geo. McCormick and no arrangement for credit whereby the bank would honor checks drawn under that name was prima facie evidence that the name, Geo. McCormick, was fictitious. People v. Eppinger, 1894, 105 Cal. 36, 41, 38 P. 538; People v. Cohen, 1931, 113 Cal. App. 260, 262, 298 P. 240. The handwriting expert said Peck wrote the checks. In addition to the prima facie evidence, and the handwriting expert's evidence, of the fictitious character of the checks, there were circumstances other than those included in the testimony of the accomplice which showed appellant's consciousness of guilt. The name of the payee, H. L. Hunt, was not the name she regarded as her true name. At the time she cashed the $65 check she left the hotel hurriedly and stated falsely that she was leaving hurriedly to be with her very sick father. Then she went directly to the Beverly Hills Hotel and repaid to that hotel money she had received from it one week previously upon the Santa Barbara bank check, given to her by Peck, and which check she said she did not know had been dishonored. That same night she registered at an apartment house under the name of Slattery, and the next day she moved to another place and registered under the name of Davenport. She had several aliases.

There were further circumstances, other than those shown by Peck's testimony, from which the trial judge could draw inferences of appellant's culpability. She knew that Peck, who handed her the first check of the alleged McCormick with the request that she cash it at Sloane's, had no money, credit, or income, and was entirely unreliable financially, that he could not be relied upon for truth, that he was a race track tout all of the time she had known him, and a convicted felon as a result of obtaining money by false pretenses in a transaction in which she also was involved. He had always "hounded" her for money, and she had "raised" money for him several times when he was in trouble. She had known the alleged McCormick, who apologized for being short of money and who was then gambling in the races, only a few minutes before she accepted his check upon the recommendation of the unreliable Peck. She was anxious to obtain money in order to go East to see her daughter.

[2, 3] The evidence other than the testimony of the accomplice tended to connect the appellant with the commission of the offenses alleged, and included sufficient corroboration of the testimony of the accomplice that she knew the checks were fictitious. If the circumstances shown in evidence reasonably justify the finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding. People v. Newland, 1940, 15 Cal.2d 678, 681, 104 P.2d 778. The evidence was sufficient.

Appellant refers to a statement by the trial judge, made to Peck while Peck was testifying, as follows: "I haven't believed a word you have said today * * *", and asserts that such expression evinces a reasonable doubt as to the guilt of appellant. Preceding that statement the judge and witness had been discussing at some length (6 or 7 statements by each) what was said by another judge at the time he sentenced Peck on the grand theft conviction, and what the general behavior of Peck had been. The record as to what was said at the time of that sentence was before the trial judge in the present case. The following excerpt from the transcript herein shows the full statement that was made regarding disbelief and the statements immediately preceding and succeeding it:

"The court: Then it did amount to something. Well, that has been your means of livelihood ever since you were born, trying to trick somebody.

"The witness: Well, your Honor, I never tried to—

"The court: Well, of course, I don't know. I haven't believed a single word you have said today, so don't tell what you have been trying to do. You are on probation now?

"The witness: Yes.

"The court: With a San Quentin sentence over your head?

"The witness: I know it; I know it. * * * Well, I didn't get any money. She admitted she didn't give me any money. She said she gave it to a man by the name of McCormick, and there was no such McCormick in existence. There was no such man in existence. She says she gave him the money, your Honor; she says she gave the money to him. Then she says I introduced the friend. I never introduced him to anybody. I told the truth. She made me write out the checks that she was going to show to the bookmaker."

[4] The statement that the judge did not believe a single word that Peck had said should not be adopted literally in view of the fact that some of Peck's statements were unquestionably true—for example, that he had been convicted of grand theft, was on probation, and he knew appellant. Furthermore, it appears from the above excerpt that, after said statement by the court had been made, Peck gave testimony implicating appellant. It may be that the court believed some of the testimony given by Peck after that statement by the court. It is to be noted, however, that thereafter the court said, concerning the testimony of both Peck and appellant, as follows: "Well, each one of them has certainly been crossing the other. So I can't believe either one." The judgment of the trial court that appellant was guilty was in accord with its statement that it did not believe appellant, and that judgment was consistent with the statements of Peck implicating appellant. In view of the judgment as to appellant it may be the court changed its mind at least in some respects as to its belief in the statements of Peck, therefore it should not be concluded that the court did not believe some of Peck's testimony implicating appellant.

The case of People v. Hidalgo, 1933, 128 Cal.App. 703, 18 P.2d 391, cited by appellant, is distinguishable from the present case. In that case stolen blank checks bearing the printed name of a corporation were used in the alleged forgery. The corporation was a bona fide entity, but no qualified representative of the corporation testified as to who were authorized to sign as drawers of the checks, and it was not shown that the alleged forged checks were not drawn by persons authorized to draw them. In the present case a prima facie case was established by showing there was no account in the bank in the name of Geo. McCormick, and there were other circumstances from which the fictitious character of the checks could be inferred.

The order denying the motion for a new trial is affirmed.

DESMOND, P. J., and SHAW, Justice pro tem., concur.

59 Cal.App.2d 510

Ex parte DE LEON.

Cr. 3712.

District Court of Appeal, Second District, Division 3, California.

June 29, 1943.

1. Habeas corpus 🔑83

On habeas corpus to secure custody of minor child, where petitioner's only attempt to controvert allegations in original and amended return was his request, acceded to by respondent, that petition should be deemed a traverse thereto, findings of superior court judge who was appointed as referee on allegations contained in original and amended return were established by petitioner's failure to deny them. Pen. Code, § 1484.

2. Habeas corpus 🔑90

On habeas corpus by father to secure custody of ten-year-old child from maternal grandmother, where District Court of Appeal appointed as referee the superior court judge who was about to determine grandmother's application for letters of guardianship, referee's findings as to care child was receiving in custody of grandmother, as to whether father was a fit or proper person to have child's custody, and as to child's preference between father and grandmother, were properly received.

3. Habeas corpus 🔑99(3)

On habeas corpus by father to secure custody of ten-year-old child from maternal grandmother, where mother was dead and child had always made her home with grandmother, District Court of Appeal would consider best interests of the child passing on father's application.

4. Parent and child 🔑2(4)

Evidence established that best interests of ten-year-old child would be served by permitting child to remain with her maternal grandmother with whom she had always lived, her mother being dead, instead of granting custody of child to father.

5. Habeas corpus 🔑25(2)

Where original letters of guardianship of ten-year-old child granted to maternal grandmother had been revoked by superior court on father's application, but appeal from such judgment was pending, and thereafter a subsequent judgment was entered by superior court again issuing letters of guardianship to grandmother, the action in superior court did not compel issuance of writ of habeas corpus awarding father custody of child. Probate Code, §§ 1406, 1440.

6. Parent and child 🔑2(2)

Since the adoption of the Probate Code in 1931, the father as such does not have right to custody of minor child, no matter what child's wishes or best interests may be. Probate Code, § 1406.

◆

Proceeding in the matter of the application of Miguel De Leon, on behalf of Tillie De Leon, for a writ of habeas corpus to secure custody of Tillie De Leon from her maternal grandmother.

Petition denied and writ discharged.

Bruno Newman and A. L. Oster, both of Los Angeles, for petitioner.

Marcus L. Roberts, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

By this proceeding, initiated by a petition for a writ of habeas corpus, the father of Tillie De Leon, a ten year old girl of Mexican parentage, born in California, seeks a coercive order of this court taking Tillie from her maternal grandmother and giving her into the custody of petitioner. We have concluded that the order sought should not be made.

Tillie first became the subject of court action in 1939 when her maternal grandmother was made guardian of her person. By a judgment entered on the eleventh day of March of this year, the 1939 letters of guardianship were revoked, upon the petition of Tillie's father. The judgment of revocation also provided that "the care, custody and control of said minor, Tillie De Leon is hereby awarded to Miguel De Leon, the father of said minor." An appeal was taken from this judgment by the grandmother, May 8. Before this, however, on April 20, 1943, she had filed a new petition that she be appointed Tillie's guardian. Two days later, April 22, a petition for a writ of habeas corpus was filed by Tillie's father with the clerk of the Supreme Court, and a writ was issued, returnable before this court.

Desirous of ascertaining certain facts deemed pertinent to the problems involved in the proceeding thus placed before us, we appointed the judge of the superior court who was about to conduct a hearing in order to determine whether or not to issue letters of guardianship to Tillie's grandmother, as a referee, so that the evidence which he was to take should serve both his purposes and ours. As a result of the hearing the superior court entered its judgment that Tillie's grandmother be appointed guardian of her person, and letters of guardianship were issued on the third day of June. The findings of fact, filed in the guardianship proceeding, are made the findings of the referee and as such forwarded to us, together with a transscript of the evidence taken at the hearing. We had these before us when this matter came on for hearing, June 11, and although opportunity was given no objection was made that the evidence was not sufficient to support the findings.

Looking to the findings, then, we discover that Tillie was born in April, 1933, in the home of her grandmother and that home is the only one she has ever known. (Her mother is dead.) Tillie's father has never contributed anything in excess of fifty dollars toward her support, nor has he at any time [since she was six or seven months old] visited or communicated with her during her lifetime, and he is not a fit or proper person to have her custody. From her grandmother, however, Tillie has received "excellent care, treatment, secular and religious training." It also was found that Tillie "is of sufficient age and mentality to form an intelligent preference between her father and [her grandmother]" and that during the last two months Tillie's physical and mental health has changed; "that she is now mentally and physically sick, and that such illness is due to fear, worry, and a dread that she might be separated from her grandmother."

[1] Petitioner objected to our receiving the referee's report and the transcript of evidence, not because of any irregularity in their procurement, but on the broad basis that the matters there gone into were not problems for us to weigh and determine, because they were not within the issues. Petitioner's objection has a better foundation than he suspects. The grandmother, to whom the writ was directed, made a return in which she alleged, among other things, that she had continuously provided Tillie with a comfortable home, food, clothing, education and religious training for over nine years and that the petitioner had neither seen nor attempted to contact his daughter since she was six months old, nor had he provided her with the necessities of life nor with any gifts, attention or affection. In an amended return she added to these averments that Tillie's health had been adversely affected by the threat of separation from her; "That said child is of sufficient age and mentality to form an intelligent preference and wishes to remain with the grandmother" and "That to separate said child from her grandmother and take her away from the only home said child has ever known will seriously impair the child's physical and mental health." The only attempt to deny or controvert these allegations, as section 1484, Penal Code, contemplates may be done, was petitioner's request, acceded to by the grandmother, that his petition should be deemed a traverse to the original and the amended return. As the petition was entirely silent respecting the allegations to which we have referred, its contents consisting of affirmative allegations concerning the revocation of the original letters of guardianship and concerning prior petitions for writs of habeas corpus, the subject matters of the referee's Findings appear in the main to be established by petitioner's failure to deny them as they appear in the original and amended return. See In re Delgado, 1930, 107 Cal.App. 688, 290 P. 589; In re O'Leary, 1932, 127 Cal. App. 183, 15 P.2d 761; In re Larabee, 1933, 131 Cal.App. 261, 21 P.2d 132; In re Gutierrez, 1934, 1 Cal.App.2d 281, 36 P.2d 712.

[2] Should we, however, give a most liberal interpretation to the stipulation that the petition should be deemed a traverse to the returns, by construing it as providing that the allegations of the returns should be deemed denied, then the referee's find-

ings should be received, approved and affirmed (In re Matusow, 1933, 129 Cal.App. 76, 18 P.2d 72), for the matters there covered are pertinent to our inquiry on petitioner's theory of the present status of affairs. Petitioner contends that the judgment revoking the original letters of guardianship is self-executing, with the result that notwithstanding the appeal the guardianship is at an end; that the father then, as the natural guardian is entitled to Tillie's custody without reliance upon the provision, in the judgment revoking the original letters of guardianship, that awarded her custody to the father, a provision which petitioner calls surplusage and concedes was improperly included in that judgment, for the father was not seeking to be appointed as Tillie's guardian. A further element in petitioner's position is that because of the pendency of the appeal, the superior court had no jurisdiction to entertain the second petition by Tillie's grandmother for letters of guardianship, so that the judgment that letters should issue is void on its face.

[3,4] We are not passing upon the validity of petitioner's theory, but, for the moment, are accepting it. Under his theory, as affairs now stand it is as though no guardian had been appointed for Tillie and petitioner, solely by virtue of the fact that he is her father, seeks an order of this court that she be taken from the only home which she has ever known, her home with her grandmother. Contrary to the holding in the case upon which petitioner relies, In re Hart, 1913, 21 Cal.App. 30, 32, 130 P. 704, that "In this proceeding this court is not called upon, nor, in our opinion, has its jurisdiction or authority to hear evidence with reference to the best interests of the child," it has been held that under such circumstances as those petitioner sees existing here, the child's best interest is involved, and governs the discretion vested in us respecting the making of the order petitioner seeks. The Hart case was, in effect though not expressly, disowned by the court which gave it birth, in Re McDaniel, 1928, 90 Cal.App. 307, 309, 265 P. 884. The distinction between the situation where a parent has, by an appropriate proceeding in the superior court, been appointed guardian of a child and that where a petitioner relies upon the mere status of parenthood for an order that the child be surrendered, is pointed out in the case of In re Britt, 1917, 176 Cal. 177, 181, 182, 167 P. 863. In the Britt case, as in two cases upon which it relied, In re Gates, 1892, 95 Cal. 461, 30 P. 596, and Matter of Application of Bell, 1915, 28 Cal.App. 547, 549, 153 P. 240, the facts that the petitioner had shown himself unfit as a parent by a marked lack of interest in or affection for his young child, over a period of years, and that the child had grown up with the tendrils of her infant affections firmly attached to the one in whose custody she was, were held good reasons for the denial of an order tearing the child from her only known home. The facts in the three cases last referred to are paralleled in the case before us. Petitioner has not been appointed guardian of Tillie. Since her birth he has shown scant interest in and no affection for her, none at all during the past nine and a half of her ten years of life. Her home has been with her grandmother whom she loves, naturally and deservedly. Inevitably her preference is to remain with her grandmother rather than to take up life with a stranger. Borrowing the words of Mr. Chief Justice Beatty, appearing in In re Gates, supra, 95 Cal. 461, 462, 30 P. 596, we "do not feel called upon to make any coercive order by which the mere legal right of the petitioner may be enforced against the child's manifest inclination and reasonable choice to remain where she is."

[5] We have considered this matter up to this point as though there were no superior court adjudication determining who should be Tillie's guardian. It is the fact, however, that even though the original guardianship letters have been revoked, an appeal is pending from the judgment of revocation whose outcome we do not wish to anticipate, and letters of guardianship have been issued to Tillie's grandmother by a judgment which is not void on its face. The tribunal vested by law with the duty of determining who shall be Tillie's guardian is the superior court. Probate Code, sec. 1440. While no action thus far taken has become final, such action as has been taken does not compel us to disturb the status in quo, and we are convinced that Tillie should be allowed, by us, to remain where she wishes to be, that is, with her grandmother. In re Green, 1924, 67 Cal.App. 504, 505, 506, 226 P. 76.

[6] Fundamentally, petitioner's position is that he is Tillie's father and as such has the right to her custody, no matter what

her wishes or best interests may be. Support is found for his position in such cases as Guardianship of Salter, 1904, 142 Cal. 412, 76 P. 51, where a conscious disregard of the child's welfare was justified upon the ground that section 1751, Code of Civil Procedure, required it. This section has been supplanted by the sections of the Probate Code having to do with the appointment of guardians for minors. Section 1406, of the Probate Code, opens with this sentence: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question." The philosophy of this sentence is not new, having been given expression, before the adoption of the Probate Code, in section 246, Civil Code, but it was not known in such cases as that last cited, and there were a number of them decided before the adoption of the Probate Code in 1931. These cases do not give us the law for today; section 1406, Probate Code, does that.

The objections to the introduction of evidence are overruled. The prayer of the petitioner is denied and the writ is discharged.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.

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59 Cal.App.2d 516

LEFTRIDGE et al. v. CITY OF SACRAMENTO et al.

Civ. 6759.

District Court of Appeal, Third District, California.

June 29, 1943.

Hearing Denied Aug. 26, 1943.

1. Municipal corporations 🔑216(2)

Under city charter conferring upon the Civil Service Board authority to adopt rules for selection and promotion of city employees, board is authorized to make reasonable classification of workmen for purpose of employment and promotion and city workmen employed in collecting and disposing of garbage within city boundaries are subject to classification by board.

2. Constitutional law 🔑62

Authority may be delegated by the legislature to administrative boards or officers to adopt and enforce reasonable rules to carry out the general purpose of statutes, even though the delegated power confers a discretion or the necessity of determining terms, qualifications, or conditions under which the board may act, so long as they come within the scope of the statute.

3. Constitutional law 🔑62

Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out a statute and various governmental powers for more efficient administration of the laws.

4. Officers 🔑103

Rules adopted and enforced by an administrative board or officer pursuant to authority delegated by the legislature must be reasonable in their application to the purpose for which the statute is enacted.

5. Officers 🔑103

A classification determined by an administrative board or officer pursuant to authority delegated by the legislature is presumed to be reasonable and valid and will be upheld unless it appears to be palpably arbitrary.

6. Municipal corporations 🔑216(2)

Under city charter authorizing Civil Service Board to adopt reasonable rules governing selection and promotion of city employees, board's separate classification of garbage-men, pick-up men, and dump-truck drivers was authorized as reasonable in view of duties performed.

7. Mandamus 🔑160(6)

Under petition for writ of mandate to compel Civil Service Board and city council to fix prevailing wage scale to be paid petitioners and to compel city to pay back wages for difference between amount which had been paid to petitioners and prevailing wage, trial court properly issued preliminary writ directing board to investigate, ascertain, and report to the court its findings regarding the prevailing wages paid in the vicinity for services similar to those performed by petitioners. St.1921, p. 1938, § 52.

8. Municipal corporations 🔑220(2)

Under city charter requiring Civil Service Board to transmit to city council notice of city's divergence from prevailing wage scale where, after hearing, board determined that no prevailing scale of wages existed in the vicinity which was at variance with wages paid to petitioners for the same class of work which they performed, board was not required to report to council. St.1921, p. 1938, § 52.

9. Mandamus 🔑66, 71, 72, 75

"Mandamus" is a proper remedy to compel a city council or a city civil service board to perform its mandatory duties prescribed by charter, but the writ may not issue to compel an officer or board to perform their duties in a particular way and will issue only to require performance of ministerial duties.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandamus".

10. Mandamus 🔑71

Exercise of discretion by an officer or board will not be interfered with by mandamus except for arbitrary disregard of the law or for flagrant abuse of discretion.

11. Mandamus 🔑75
Municipal corporations 🔑216(2)

Under city charter conferring discretion upon civil service board to classify city employees for purpose of selection and promotion, board in so doing has right to prescribe reasonable duties and qualifications for employees in such classifications which right will not be interfered with by mandamus.

12. Mandamus 🔑172

Mandamus may not serve the purpose of a writ of error, even though no appeal or writ of error is granted by law.

13. Appeal and error 🔑1

The right of appeal is statutory.

14. Mandamus 🔑168(3)

In proceeding for writ of mandate to compel Civil Service Board and city council to fix prevailing wage scale to be paid petitioners and to compel city to pay back wages for difference between amount which had been paid to petitioners and prevailing wage, evidence of prevailing wage paid in the vicinity to dump-truck drivers was properly excluded where such drivers belonged to a different class of employees than did petitioners. St.1921, p. 1938, § 52.

15. Mandamus 🔑168(4)

Evidence sustained findings and judgment discharging preliminary writ of mandate to compel Civil Service Board and city council to fix prevailing wage scale to be paid petitioners and to compel city to pay back wages for difference between amount which had been paid to petitioners and prevailing wage on ground that no prevailing scale of wages existed in the vicinity which was at variance with wages paid to petitioners for the same class of work which they performed. St.1921, p. 1938, § 52.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Nathaniel Leftridge and another against City of Sacramento and others for a writ of mandate, wherein a preliminary writ was issued. From an order discharging the writ, petitioners appeal.

Affirmed.

See, also, 48 Cal.App. 589, 119 P.2d 390.

Albert E. Sheets, Anthony J. Kennedy, and Carl Kuchman, all of Sacramento, for appellant.

Hugh B. Bradford, City Atty., of Sacramento, for respondent.

THOMPSON, Justice.

The petitioners have appealed from an order of court discharging the preliminary writ of mandamus which was issued directing the Civil Service Board of the City of Sacramento to hear, determine and report to the City Council the prevailing wages which were paid in that vicinity to employees who were engaged in the performance of services similar to those of petitioners who were a garbageman and a collector of refuse from the city streets, and when said prevailing wages had been ascertained that the city should pay petitioners at those rates. After notice and hearing by the Civil Service Board, findings were adopted to the effect that no divergence existed in that vicinity with respect to prevailing wages of employees engaged in such similar occupations. The proceedings and conclusions of the Board at that hearing were transcribed and filed in the Superior Court, both as a return to the petition and as a transcript of evidence for consideration of the court. That record on appeal, consisting of 320 pages, was certified to this court by the trial judge. Further oral and documentary evidence was taken by the trial court in the mandate proceeding on the subject of the prevailing rate of wages paid for similar services in the vicinity of Sacramento. Thereupon the respondents were exonerated from failure to perform their respective duties, and the writ was discharged. From that order the petitioners have appealed.

The principal questions to be determined are whether the Civil Service Board was warranted in classifying the services of the petitioners as "garbageman" and "pick-up man" as distinguished from "truckmen" or "dump-truck drivers", and if so, whether there was a divergence in the prevailing scale of wages in the vicinity of Sacramento between those classifications of employment. The further problem involved is whether the court may by means of mandamus try the question de novo regarding the divergence of prevailing wages.

The amended petition for a writ of mandamus was filed in the Superior Court of Sacramento County, October 30, 1939. It contains four separate causes of action. The first one alleges that Nathaniel Leftridge was employed by the City of Sacramento "driving and operating a dump truck and with the use of such dump truck collecting, removing, transporting, dumping and disposing of garbage"; that he was paid $131.30 per month of 26 days, or $5.05 per day, for his services, and that the prevailing wages in that vicinity which were paid to "garbage dump truck" men was the sum of eighty-five cents per hour. It is alleged the Civil Service Board of that city failed and neglected to ascertain the prevailing wages which were paid to employees in that vicinity, engaged in the classes of work which are performed by the petitioners, and failed to report those rates to the City Council as required by Section 52 of the Charter of Sacramento, St.1921, pp. 1919, 1938, and that the City Council has refused to allow or pay said employees the prevailing wages to which they are entitled.

The second cause of action further alleges that said Nathaniel Leftridge is entitled to the unpaid portion of the prevailing wages of his class of employment, from April 17, 1939, at the rate of eighty-five cents per hour, aggregating the sum of $110.25, the payment of which was refused.

The third cause of action alleges that the petitioner, Chris Jacobsen, was employed by said city "driving and operating a dump truck, performing miscellaneous labor such as shoveling, cleaning up wreckage and debris from the streets" of Sacramento; that he was paid for said services $125.58 per month of 21 days, or $5.98 per day, and that the prevailing wages paid to "Waste Removal Dump Truck" men in that vicinity was the sum of eighty-five cents per hour.

The fourth cause of action further alleges that said Chris Jacobsen presented for payment to the treasurer of said city his claim for the unpaid difference between his paid wages and the prevailing rate for such services in that vicinity, amounting to $42.09, which was refused.

The prayer asks for a writ of mandamus requiring the Civil Service Board of the City of Sacramento to "hold investigations to ascertain the prevailing scale of wages" in that vicinity which was paid to employees of the same classes of services in which the petitioners are engaged, and to report to the City Council the result thereof, and that the City Council shall thereupon fix, allow and pay to petitioners the prevailing wages so ascertained, as required by Section 52 of the Charter of Sacramento. The petition further prays that the auditor and treasurer of said city be required to allow and pay petitioners the respective unpaid amounts of their wages thus ascertained and allowed.

A demurrer to the petition was overruled. The respondents answered the pleading, denying the material allegations of the petition. After a partial hearing the court issued a preliminary writ of mandamus directing the Civil Service Board of the City of Sacramento to forthwith hold an investigation to ascertain the prevailing scale of wages paid in that vicinity to men employed in performing services similar to those classes in which the petitioners were engaged, and to report the result of its investigation to the City Council. The council was then directed to adjust, allow and pay the petitioners wages in accordance with such prevailing scales. The hearing of the petition was then continued and the respondents were directed to appear before the court on or before a specified date and file their return showing the result of their investigation. In response to that order the Civil Service Board fixed October 10, 1940, and the City Hall in Sacramento as the time and place of conducting that investigation. Notice of that hearing was duly served on all interested persons, including the petitioners and their attorneys. At that hearing oral and documentary evidence was adduced in behalf of both parties. Numerous reports and signed questionnaires regarding the subject of prevailing wages were filed by scores of individuals and many firms who were engaged in and about Sacramento in trucking and in services similar to those which were performed by the petitioners.

Several letters were also received and filed with the board from officers of other cities regarding the scale of wages paid to garbagemen, dump-truck drivers and other employees of similar classes. The information was received chiefly from individuals and firms within the County of Sacramento who were engaged in collecting garbage, cleaning streets, hauling refuse, merchandise, materials, milk and products of various kinds, by means of trucks, drays, dump-trucks, and other vehicles. It appears that other than the city there was but one garbage firm which was engaged in that business in Sacramento County. The hearing before the board lasted for several days. At the conclusion of the evidence the matter was elaborately argued before the board and submitted for determination. The evidence and proceedings, together with the findings of the board on the subject of prevailing wages of similar classes of employees were transcribed and filed. In effect, the board determined that the classes of employment in which the petitioners were engaged were separate and distinct from those of "truck-drivers", or "dump-truck operators", and that there was no discrepancy in that vicinity between the wages which were paid to the petitioners and the compensation which was paid to workmen in other similar classes of employment, and that the petitioners were therefore not entitled to an increase of wages. The result of that hearing and investigation was transcribed and certified to the trial court and filed in this proceeding as a return to the petition and as an exhibit for the consideration of the court. That transcript, consisting of 320 pages, was authenticated by the trial judge as a part of the record on appeal. It contains specifications of the duties and qualifications, required by the Civil Service Board, of employees of the city with respect to several classifications, including "garbagemen", "pick-up men", "dump-truck drivers" and "truckmen". The duties of these several classes differ materially. Several obvious distinctions, with respect to the duties and qualifications of these employees, exist between the classes to which the petitioners belong and those of a dump-truck driver or a drayman. For instance, the record shows that garbagemen are accompanied by helpers in canvassing their respective districts for the purpose of collecting garbage. They operate trucks equipped with automatic hoisting devices. They are required to travel from door to door, and to carry by hand the garbage cans from the rear of the premises to the trucks stationed on the streets, and to then dump the contents in the trucks. The helpers then drive the vehicles to the adjoining house, while the garbagemen proceed to visit that back yard for other garbage receptacles. This process is repeated until the load is completed. The trucks are then driven to the point of disposal and the load dumped. The garbage cans weigh from fifty to ninety pounds. Sixty-five per cent of the working time of these men is consumed in procuring, carrying and dumping the cans. Only about thirty-five per cent of their time is consumed in driving the trucks for collecting and disposing of the garbage. In other words, the majority of their working time is employed in manual labor, and not in driving the trucks. Apparently no unusual skill in operating a motor vehicle is required. No mechanical skill in caring for their machines is required. On the contrary, truck drivers, according to the duties required by the city, are engaged chiefly in driving their vehicles. They are required to possess enough mechanical skill to "clean, lubricate, and make minor operating repairs on their motor trucks." Their business is to drive the trucks and to haul materials, equipment, supplies and laborers for the benefit of the city. The specifications for that classification also require the truckman to possess an education equivalent to completion of the eighth grade, and to have had at least two years of successful experience in driving two-ton trucks. No reason is suggested why these classifications and the distinct duties and qualifications of each are not reasonable. They appear to be reasonable.

A similar situation exists with relation to the class of "pick-up men". Their chief duty is to collect grass and debris from the streets within prescribed districts. The driving of their trucks is unimportant compared with the manual labor required to collect and load the refuse matter. There appears to be satisfactory reason for separately classifying "pick-up men" for their line of duty.

[1-3] Section 43 of the charter confers upon the Civil Service Board the authority to adopt rules for the selection and promotion of employees of the city. This provision authorizes that board to make reasonable classifications of workmen for the purpose of employment and promotion. The business of collecting and disposing of garbage within the boundaries of a city is certainly within the province of the municipality. It is a well-established principle that authority may be delegated by the legislature to administrative boards or officers to adopt and enforce reasonable rules and terms to carry out the general purpose of a statute, even though the delegated power confers a discretion or the necessity of determining terms, qualifications or conditions under which the board may act, so long as they come within the scope of the statute. Fillmore Union High School Dist. v. Cobb, 5 Cal.2d 26, 33, 53 P.2d 349; 5 Cal.Jur. 683, § 97; Mitchell v. McKevitt, 128 Cal.App. 458, 461, 17 P.2d 789. In 1 Cooley's Const.Lim., 8th Ed., p. 231, it is said in that regard:

"Boards and commissions play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws."

In the case of Gaylord v. City of Pasadena, 175 Cal. 433, at page 436, 166 P. 348, 349, it is further said in that regard: "It has become increasingly imperative that many quasilegislative and quasijudicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done at all, and their doing, in a very real sense, makes for the safety of the republic and is thus sanctioned by the highest law. For, as the Supreme Court of the United States declares: 'Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.' Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523."

[4, 5] It is true that rules which are thus adopted and enforced must be reasonable in their application to the purpose for which the statute is enacted, and they must not be arbitrary or discriminatory. Martin v. Superior Court, 194 Cal. 93, 227 P. 762; 5 Cal.Jur. 823, §§ 188–193. A determined classification is presumed to be reasonable and valid, and will be upheld unless it appears to be palpably arbitrary. Sequoia National Park Stages Co. v. Sequoia & General Grant National Parks Co., 210 Cal. 156, 162, 291 P. 208; In re Weisberg, 215 Cal. 624, 12 P.2d 446.

[6] In the present case the prescribed qualifications and duties of a garbageman and a pick-up man do not appear to be unreasonable or arbitrary. The distinctions between such occupations and that of an ordinary dump-truck driver are apparent and important. In the latter pursuit it is ordinarily essentially and almost exclusively the duty of the drivers of trucks to operate their machines in transporting goods and materials. In the occupations of garbagemen and pick-up men it appears that their chief duties and the majority of their time is required to procure the garbage, carry the containers to their vehicles and to dump their contents or to shovel up and transfer the grass and debris from the streets to their machine. The reason for adopting the distinctions between the duties and qualifications of ordinary truck or dump-truck drivers and garbagemen or pick-up men is clearly within the purpose and spirit of Section 43 of the Charter which authorizes the Civil Service Board to adopt reasonable rules governing the selection and promotion of the employees of the city.

It is true that it was the duty of the Civil Service Board to familiarize itself with the scale of wages paid for the classes of work performed by the employees of the city, and for that purpose to hold investigations to ascertain the prevailing wages in that vicinity paid for similar employment, when it was deemed necessary to do so. It is also true that when a divergence between the wages paid to city employees and the prevailing wages paid to other workmen in similar occupations in that vicinity was found to exist, it was the duty of the board to inform the City Council of that fact, in which event it was the duty of the Council to adjust its employees' wages to that prevailing scale. Section 52 of the charter so provides. It reads:

> "It shall be the duty of the Civil Service Board to familiarize itself with the scale of wages paid to all classes of employees both in and out of the City service, and for that purpose it shall, whenever it may be deemed necessary, hold investigations to ascertain the prevailing scale of wages. Whenever it shall be found that the City has diverged from such scale, the Board shall transmit, in writing, to the City Council notice of such divergence and it shall be the duty of the Council to adjust the wages paid to said prevailing scale."

[7] In view of the allegations of the petition in this proceeding it was entirely proper that the trial court should have issued the preliminary writ, as it did, directing the Civil Service Board to hold an investigation pursuant to the preceding section of the charter to ascertain and report to the court its findings regarding the prevailing wages which were paid in that vicinity for services similar to those which were performed by the petitioners.

[8] After due notice to the interested parties, that investigation was held. As a result of that hearing the board determined that no prevailing scale of wages existed in that vicinity which was at variance with the wages paid to the petitioners for the same class of work which they performed. It was therefore unnecessary for the board to make that report to the City Council. The proceedings and findings of the board upon that hearing were transcribed and filed in the mandamus proceeding as a return to the petition. Upon that return, and upon further hearing before the trial court, it was determined that the petitioners had no valid cause of action, and the writ was therefore discharged and the respondents were exonerated from all alleged dereliction of their respective official duties.

[9-11] Mandamus is a proper remedy to compel a city council or a city civil service board to perform its mandatory duties prescribed by the charter. McAlpine v. Baumgartner, 10 Cal.2d 409, 74 P.2d 753. In the present case the writ was properly issued to require the Civil Service Board to ascertain the prevailing scale of wages paid in the vicinity of Sacramento to employees performing the duties of the class of workmen to which the petitioners belong, pursuant to the provisions of Section 52 of the Charter. The writ, however, may not compel an officer or a board to perform the duties in a particular way. It will issue only to require the performance of ministerial duties. The exercise of discretion on the part of such officer or board will not be interfered with in that proceeding except for arbitrary disregard of the law or for flagrant abuse of discretion. Mosesian v. Parker, 44 Cal.App.2d 544, 548, 112 P.2d 321; Morales v. Ingels, 30 Cal.App.2d 182, 85 P.2d 907; 16 Cal.Jur. 809, § 28; 34 Am.Jur. 859, § 70. A discretion was conferred upon the Civil Service Board of Sacramento by Section 43 of the Charter to classify its employees for the purpose of "selection and promotion". In so doing it had a right to prescribe reasonable duties and qualifications for employees in such classifications.

[12, 13] Numerous cases hold, and the rule is firmly established that mandamus may not serve the purpose of a writ of error even though no appeal or writ of error is granted by law. J. & W. C. Shull, Inc., v. Merced Irrigation Dist., 90 Cal.App. 270, 265 P. 965; 16 Cal.Jur. 811, § 29; 34 Am. Jur. 842, § 50. The right of appeal is statutory. None exists unless the legislature sees fit to grant it. It is true that in the cases of Standard Oil Co. of California v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Drummey v. State Board of Funeral Directors etc., 13 Cal.2d 75, 87 P. 2d 848; Laisne v. Calif. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457, and some other California cases, the office of extraordinary writs, such as certiorari and mandamus, appear to have been greatly extended contrary to the former prevailing rule. These cases hold that the trial court may hear de novo the proceedings which occur before inferior tribunals or boards with state-wide jurisdiction. This proceeding in mandamus does not involve proceedings of a state-wide board. The modification of the former rule in that respect appears to be a radical departure from the former well established principle. It has led to much confusion. The effect of this change upon a vast, increasing bulk of litigation affecting the duties imposed by law upon inferior tribunals and boards is suggested in able articles appearing in 15 Southern California Law Review at page 391 and in 25 California Law Review at page 275. Three justices dissented from the majority opinion in the Laisne case. The case of Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, 109 P.2d 935, which involved a state-wide board, is distinguished from the previously mentioned cases, on the ground that it was concerned with a question of law only and not with a review of the discretionary conclusions of a board regarding the facts considered. The Bodinson case involved the construction of the statute to determine whether the board was legally authorized to pay unemployment wages to certain employees of an industry who were engaged in a sympathetic strike. At page 330 of 17 Cal.2d, at page 941 of 109 P.2d of that report the court said:

> "The writ of mandamus may therefore be used in this state, not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power."

We do not understand the preceding language authorizes a trial de novo upon all questions in the Supreme Court or in a trial court upon a proceeding in mandamus. A trial of the facts of that case was not involved. The facts were settled by the pleadings. The court said in that regard: "The question presented is one of law. We are not concerned here with the degree of finality which the legislature may have intended to confer upon the Commission's determinations of fact."

In the present case the court in the mandamus proceeding tried de novo the question of prevailing wages. In addition to the transcript of proceedings before the Civil Service Board which was filed in the trial court, additional oral evidence was adduced. Upon the record before the trial court it held there was no discrepancy between the prevailing wages paid in the vicinity of Sacramento to employees who were engaged in similar occupations and those received by the petitioners. The writ was therefore discharged.

[14] The appellants, however, contend there is no conflict of evidence for the reason that it appears without dispute that dump-truck drivers received approximately ninety cents per hour for their services. That is true, but that fact is not conclusive of this proceeding. We may concede that the character of the vehicles used by the respective drivers was the same. But neither the duties nor the qualifications of such operators were the same, as we have previously stated. Sixty-five per cent of the working time of the petitioners was devoted to manual labor. They were not required to possess or exercise the same mechanical skill of ordinary dump-truck drivers. The court did not err in sustaining objections to evidence of the prevailing wages which were paid in that vicinity to dump-truck drivers, for the reason that they belonged to a different class of employees.

[15] The findings and judgment are supported by substantial evidence.

The order discharging the writ is affirmed.

PEEK, J., and ADAMS, P. J., concur.

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59 Cal.App.2d 342

PEOPLE v. DARCY.

Cr. 2212.

District Court of Appeal, First District, Division 1, California.

June 25, 1943.

Hearing Denied July 22, 1943.

1. Criminal law ⇨1023(10, 13)

Where pronouncement of judgment was suspended and accused placed on probation, his appeal need not be considered as applying to a judgment or verdict, though appeal from order denying a new trial remained unaffected. Pen.Code, § 1237.

2. Criminal law ⇨1134(8)

An attack upon an indictment or alleged irregularities occurring before issue of fact joined by plea are not properly matters to be determined on appeal from order denying a new trial.

3. Criminal law 🔑105

Lack of jurisdiction, if disclosed by the pleadings, may be raised at any time.

4. Criminal law 🔑1134(8)

On appeal from order denying a new trial, objections relating to extradition proceedings and to sufficiency of indictment charging perjury upon ground that certain alleged false statements were immaterial could not be considered as an attack upon the indictment.

5. Perjury 🔑34(1)

The falsity of evidence upon which it is sought to establish perjury must be proved by two witnesses, or by one witness and corroborating circumstances. Pen. Code, § 1103a.

6. Perjury 🔑34(4)

Naturalization papers of accused's father and applications for passports made by accused giving a different name and place of birth from those contained in accused's affidavit of registration as a voter and statements made by accused to immigration inspector inconsistent with registration affidavit satisfied statutory requirement that perjury may be proved by one witness and corroborating circumstances. Pen.Code, § 1103a.

7. Perjury 🔑11(1), 12

To constitute "perjury", a false statement must be material to the matter at issue and must be made willfully. Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Perjury".

8. Perjury 🔑12

The statutory definition of perjury requiring the false statement to be made "willfully" uses quoted word in sense of knowingly or intentionally so that it must be differentiated from the same word when used in an indictment charging a fraudulent purpose. Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Willfully".

9. Perjury 🔑1

A false statement need not be made for the purpose of injuring another in order to constitute "perjury". Pen.Code, § 118.

10. Perjury 🔑33(2)

Evidence warranted conclusion that false statements as to name and place of birth contained in affidavit of registration as a voter were "willfully" made within meaning of statutory definition of perjury. Pen.Code, § 118.

11. Perjury 🔑36

Whether a false statement was made willfully or as the result of an honest mistake is a question of fact for the jury. Pen.Code, § 118.

12. Perjury 🔑11(2)

False statements as to name and place of birth contained in affidavit of registration as a voter were "material to the matter at issue" within meaning of statutory definition of perjury, though affiant could have established his citizenship and right to vote had he given true name and place of birth. Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Material to Matter at Issue".

13. Elections 🔑59

There is a difference in meaning between the words "elector" and "voter", an elector being one who has the qualifications to vote but may not have complied with legal requirements as conditions precedent to exercise of the right to vote.

See Words and Phrases, Permanent Edition, for all other definitions of "Elector" and "Voter".

14. Officers 🔑18

An elector possessed of necessary constitutional and statutory qualifications is entitled to hold office though his name is not on the great register of voters.

15. Perjury 🔑11(2)

The test of whether a false statement was "material to the matter at issue" within statutory definition of perjury is not that injury actually occurred as a result of statement but that falsehood could have influenced or changed the status of subject of statement to benefit of falsifier or detriment of others and it is sufficiently material if it might have affected the proceeding in or for which it was made. Pen. Code, §§ 118, 123.

16. Perjury 🔑10

That oath under which false statement was made was administered in an irregular manner is no defense to prosecution for perjury. Pen.Code, § 121.

17. Perjury 🔑1

One who, being required by law to make a statement under oath, willfully and knowingly falsifies such statement, purportedly made under oath, in any particular, is guilty of "perjury" as a matter of law, regardless of whether oath was in fact taken or whether maker knew the materiality of the falsehood, the offense being completed upon delivery of affidavit to another person, with intent that it be uttered or published as true. Pen.Code, §§ 118, 121, 123, 124, 129.

18. Names 🔑20

Though a change of name may be effected by usage without a legal proceeding, the change should be with reference to all affairs.

19. Elections 🔑106

In registering as a voter, the full name must be given and where last name has been changed by order of court or by marriage, a notation of such fact should be made upon re-registration. Pol.Code, § 1097.

20. Perjury 🔑12

An "assumed name" given in affidavit of registration as a voter is in fact a "false name" within meaning of statutory definition of perjury. Pen.Code, § 118; Pol. Code, § 1097.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumed Name" and "False Name".

21. Perjury 🔑32(2)

In prosecution for perjury for giving false name and place of birth in affidavit of registration as a voter, affidavits showing birth at a place other than that stated in registration affidavit were relevant on the issue of willfulness. Pen.Code, § 118.

22. Perjury 🔑32(2)

In prosecution for perjury for giving false name and place of birth in affidavit of registration as a voter, other registration affidavits containing similar false statements were admissible to show intent. Pen.Code, § 118.

23. Criminal law 🔑662(4)

The rule that accused has a right to be "confronted by witnesses" against him has no application to documentary evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Confronted by Witnesses".

24. Criminal law 🔑1165(1)

In prosecution for perjury for making false statements in affidavit of registration as a voter, failure to produce as a witness the deceased deputy registrar of voters before whom allegedly false affidavit was made was not prejudicial error.

25. Criminal law 🔑1165(1)

Failure to produce accused's father as a witness to prove falsity of name and place of birth given in accused's affidavit of registration as a voter was not prejudicial error, where father's naturalization papers were introduced to prove accused's true name and place of birth and accused had previously made method of father's naturalization a part of application for passport. Pen.Code, § 118.

26. Criminal law 🔑15

Amendment to Political Code providing for "cancellation for all purposes" of all affidavits of registration meant only cancellation for purposes pertaining to future voting, and in view of statute providing that repeal of any law creating a criminal offense does not bar prosecution for previous violation of repealed law unless repealing act expressly declared such intention, amendment did not bar subsequent prosecution for perjury for false statements contained in registration affidavits thus canceled. Pen.Code, § 118; Pol.Code, §§ 329, 1094.

See Words and Phrases, Permanent Edition, for all other definitions of "Cancellation For All Purposes".

27. Constitutional law 🔑250
Perjury 🔑15

Contention that hundreds of other similar untruths appeared in city and county records and that accused was singled out for prosecution because he was a communist presented no defense to prosecution for perjury for giving false statements in affidavit of registration as a voter and did not tend to establish that accused was deprived of constitutional right to "equal protection of the laws". Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

28. Criminal law 🔑670

Where prosecution for perjury was by indictment, offer to prove that despite existence of hundreds of other similar untruths in city and county records accused alone was singled out for prosecution because he was a communist was insufficient in absence of offer of proof that grand jury had singled out accused because of his political affiliation or that any member of police department or district attorney had persuaded or instigated investigation by grand jury or return of indictment. Pen. Code, § 118.

PETERS, P.J., dissenting.

◆

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Samuel Adams Darcy was convicted of perjury and upon motion for probation, pronouncement of judgment was suspended. From judgment and order denying his motion for new trial, defendant appeals.

Purported appeal from judgment dismissed and order denying motion for new trial affirmed.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, and Charles J. Katz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Atty. Gen., John F. Hassler, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Leslie C. Gillen, Asst. Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Appellant was indicted, tried by a jury and convicted of perjury. The indictment contains one count which alleges in substance that on March 27, 1934 in an affidavit of registration as an elector he stated under oath before a deputy registrar of voters authorized to administer oaths in the department of elections at San Fransciso that his name was "Sam Darcy" and his place of birth "New York", whereas his true name is Samuel Dardeck or Samuel Adams Dardeck and his place of birth Ukraine, Russia.

A demurrer and supplement to demurrer to the indictment were overruled; a motion to dismiss the indictment and a motion to quash the same were dismissed, and a challenge to the jury panel was disallowed. Upon the return of the verdict, motions in arrest of judgment and for a new trial were made and denied, whereupon a motion for probation was made and granted, and the pronouncement of judgment suspended.

Appellant did not testify in his own behalf. However, as appears from testimony given by him before the Immigration and Naturalization Service at Ellis Island, New York, he was born in Orinion, Russia, and given the name of Srool Adam Dardeck. With his brothers and sisters he was brought to the United States by his mother, his father having emigrated to this country a year earlier. The latter secured naturalization and it is by reason of this fact that appellant as a minor child acquired his citizenship. He was married in New York in 1926 under the name of Samuel Adams Darcy; in 1927 he remarried his wife in Chicago under the name of Samuel Adams Dardeck. In the same year, he applied for passports to Europe for himself and his wife whom he stated he "married on May 13, 1927," his application stating under oath that his name was Samuel Adams Dardeck and that he had been born in Russia. In 1932 in connection with an interview with an inspector of the police department of Long Beach to establish his identity, he signed the name of Sam Darcy to a written statement that he was born in New York. Affidavits, also, made by him in 1931, 1932 and 1934 before the registrar of voters in San Francisco gave his name as Samuel Adams Darcy, Samuel Darcy and Sam Darcy, respectively, and his birthplace as New York. In 1934, also, he filed under oath a declaration of candidacy for the office of governor of this state. Among other things he stated in the declaration that he had been a resident of this state for eight and a half years. In 1935, he again applied for a passport to Europe, his application referring to the 1927 passport and giving his birthplace as Ukraine, Russia. Also, in 1935, he testified before the naturalization and immigration service that his name was Samuel Adams Darcy; that he was known in California as Sam Darcy and Samuel Adams Darcy; that his address at the time was Jersey City and that he had used this address for several years for personal business, but that he was a registered voter in San Francisco. At this time he again gave his birthplace as Ukraine, Russia.

At about the time of the filing of the indictment against appellant by the grand jury, he left this state and went to the state of Pennsylvania, where, on September 19, 1939, he was apprehended and extradition proceedings instituted against him. He resisted these proceedings by resort to the federal courts, without success, and was returned to this state to stand trial.

At his trial he exercised his legal right not to testify. Evidence offered and received on his behalf tended to prove that during his several years residence in this state he commonly used and was known by the name of Sam Darcy; that he followed the calling of journalist and political writer, advocating the principles of the communist party, and was on one occasion the candidate of that party for the office of mayor of San Francisco, and on another, as stated, for that of governor of the state. It is not contended that he used that name for any fraudulent purpose.

Appellant urges various grounds for reversal, namely (1) that the indictment fails to charge the offense of perjury inasmuch as the alleged false statements were immaterial to the proceeding in which they were made; (2) that the making of them was not legally proven, since the record disclosed no willfulness or criminal intent, and was not established by the testimony of two witnesses, or of one witness and proof of corroborating circumstances; (3) that the prosecution failed to confront the appellant with necessary witnesses, namely, his father (whose record of naturalization was used to establish appellant's birth in Russia), and the deputy registrar in San Francisco (before whom the alleged false statements were made—and who at the time of the trial was no longer living); (4) the erroneous admission or exclusion of evidence, and (5) that by his prosecution and conviction he was denied the equal protection of the law.

[1-4] The appeal purports to be taken from the judgment and the order denying the motion for a new trial; it is treated and referred to in the briefs of appellant as an appeal from the verdict. It is not in fact such. People v. Allen, 19 Cal.App.2d 301, 65 P.2d 382; People v. Boles, 35 Cal.App.2d 461, 95 P.2d 949; People v. Richardson, 23 Cal.App.2d 428, 73 P.2d 610; People v. Arrangoiz, 24 Cal.App.2d 116, 74 P.2d 789. Judgment was not pronounced; it was suspended, and the defendant on his motion placed on probation. Under such circumstances, it is not necessary to consider the appeal as applying to a judgment or verdict (In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644; People v. Marconi, 118 Cal.App. 683, 5 P.2d 974); the appeal from the order denying appellant's motion for a new trial remains unaffected. Penal Code, sec. 1237; People v. Johnston, 37 Cal.App.2d 606, 100 P.2d 307. An attack upon an indictment, or alleged irregularities occurring before issue of fact joined by plea are not properly matters to be determined on an appeal from an order denying a motion for a new trial (People v. Duncan, 50 Cal.App.2d 184, 122 P.2d 587; People v. Turner, 39 Cal. 370), but lack of jurisdiction if disclosed by the pleadings may be raised at any time. The indictment on its face shows the jurisdiction of the court over the defendant for the alleged offense. Any objections relative to extradition proceedings or to the sufficiency of the indictment, upon the ground that certain alleged false statements were immaterial, etc., may not, in view of the necessity of dismissing the appeal from the purported judgment, be considered as an attack upon the indictment. However, the materiality of the alleged statements as presented in evidence will be considered.

[5] The falsity of evidence upon which it is sought to establish perjury must be proved by two witnesses, or by one witness and corroborating circumstances. Penal Code, sec. 1103a. The affidavit containing the perjurious matter was introduced through a deputy registrar of voters. The particular officer who administered the oath to appellant was no longer living at the time of the trial. The deputy witness testified to the official position, and to his familiarity with the signature, of the deceased deputy. Other documents containing the identified signature of "Sam Darcy", including a declaration of candidacy for governor, were also admitted in evidence.

[6] To prove the falsity of the statement in appellant's registration affidavit, the naturalization papers of his father, which had also been made a part of the applications for passports, and which showed the name of Dardeck and gave a place of birth different from the affidavit, were introduced. Several applications for passports, signed by appellant under oath and showing a different name and his place of birth as Russia instead of New York, were marked as exhibits. Statements made by him to an immigration inspector in the presence of a special agent of the department of state of the govern-

ment of the United States contained the following:

"Q. Have you at any time registered in the State of California or elsewhere as having been born at New York? A. I don't think so. My recollection is that I didn't register as being born in New York, the fact is that I was not born there so why should I register that way.

"Q. Of what country are you a citizen? A. The United States.

"Q. How do you claim United States citizenship, on what grounds? A. Upon my father's citizenship papers."

The foregoing testimony standing alone more than fulfills the requirements of section 1103a, Penal Code, that perjury may be proved by one witness and corroborating circumstances. People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611; People v. Curtis, 36 Cal.App.2d 306, 98 P.2d 228; People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951; People v. Davis, 210 Cal. 540, 293 P. 32; People v. Gray, 52 Cal.App.2d 620, 127 P.2d 72; People v. Pustau, 39 Cal. App.2d 407, 103 P.2d 224.

[7-11] A false statement must be material to the matter at issue and must be made willfully. Penal Code, sec. 118. By this section defining perjury, the word "willfully" is used in the sense of knowingly or intentionally and should be differentiated from the same word when used in an indictment charging a fraudulent purpose. To sustain a perjury charge it is not necessary that the false statement be made for the purpose of injuring another. From the evidence as recounted the jury could easily conclude, to a moral certainty and beyond reasonable doubt, that the statements in the affidavit of registration were made "willfully." Whether a false statement has been made willfully or as the result of an honest mistake is a question of fact solely for the jury to decide. People v. Todd, supra.

[12-14] Contrary to the contention of appellant that he was an elector, entitled to vote irrespective of whether he was born in Russia or New York, the statements assigned as perjurious were material as a matter of law. The words "elector" and "voter" are often used interchangeably but there is a difference in meaning. An elector is one who has the qualifications to vote but may not have complied with the legal requirements, that is, the conditions precedent to the exercise of his right to vote. An elector possessed of the necessary constitutional and statutory qualifications is entitled to hold office though his name is not on the great register of voters. Bergevin v. Curtz, 127 Cal. 86, 59 P. 312. Appellant argues that if the holding in the Bergevin case is correct, it is immaterial whether he made false statements as to his name and place of birth since he could have accomplished the same result by registering under his real name and giving his correct place of birth.

[15] Under appellant's analysis, if the person who makes the affidavit actually has the qualifications to vote, it is immaterial whether or not his answers under oath be truthful. Following his theory a person could register under an assumed name and give a false place of birth, and not be subject to a charge of perjury. Information required in registration is material, its purpose being to make sure that only qualified persons register and vote. It is to effect this purpose that such information is required to be given under oath, and it serves as a basis for an investigation of qualifications of a person who registers. Citizenship is a material factor in the right to register, and subsequently to vote. If registrants were permitted to make false statements of the type herein with impunity, election frauds would be furthered. One person could register several times giving different names and places of birth, or varying statements of the basis of his right to vote. The test in a perjury charge is not that injury actually occurred as a result of the false statements, but that the falsehoods could have influenced or changed the status of the subject of the statement to the benefit of the falsifier or the detriment of others. It is sufficiently material if it might have affected the proceeding in or for which it was made. Penal Code, sec. 123; People v. Pustau, supra. In the present instance the registrar of the City and County of San Francisco was prevented from examining the father's naturalization papers for the purpose of verifying appellant's citizenship, and appellant was benefited at least to the extent of eliminating delay in the determination of that question, or trouble and possible embarrassment in explaining the names given or assumed by him.

[16, 17] The law views with abhorrence the use of falsehoods to such an extent that it is no defense to a prosecution for perjury that the oath was administered in

an irregular manner. (Penal Code, sec. 121.) A person who, being required by law to make a statement under oath, willfully and knowingly falsifies such statement, purportedly made under oath, in any particular, is guilty of perjury as a matter of law whether or not the oath was in fact taken (sec. 129), and regardless of whether the maker knew the materiality of the falsehood (sec. 123), and the offense is complete upon delivery of the affidavit to another person, with the intent that it be uttered or published as true (sec. 124).

[18-20] It is conceded that appellant did not by legal proceeding change his name from Dardeck to Darcy. The name Darcy was a name particularly assumed by him when in California. Generally in Russia and in New York he went by the name of Dardeck. Appellant contends that a change of name does not necessarily involve a legal proceeding; that one may adopt a name by using it. This method seems to have been approved under certain conditions and stations in life but the change should be with reference to "all affairs." Ray v. American Photo Player Co., 46 Cal.App. 311, 189 P. 130; In re Useldinger, 35 Cal.App.2d 723, 96 P.2d 958. Usage has sanctioned an assumed business or so-called "stage" name. In some instances, such as in applications for passports the assumed name must be discarded for the original or true name. In registering in California, the "full name," including christian or given, and middle name, if any, is required. The place of birth or method of acquiring citizenship should be underlined in the affidavit. The necessity and materiality of giving the true name when registering as a voter has heretofore been considered. In addition it is required that when the last name has been changed by order of court or by marriage, a notation of such fact shall be made upon re-registration. Political Code, sec. 1097. An assumed name is in fact a false name. In requiring the name and place of birth it was never contemplated by the statute that false information should be given.

[21, 22] Since willfulness in the making of the statements was a material issue, affidavits showing birth in a place other than New York were relevant. Other registration affidavits were admissible to show intent.

[23-25] The rule of right of confrontation has no application to documentary evidence. The claim that prejudicial error was committed in failing to produce the deceased deputy registrar as a witness needs no comment. Perhaps it would have been well, if possible, to have produced the father of appellant, or to have made a showing of an effort to produce him. However, the method of the father's naturalization was made a part of appellant's application for passport. If there was error in this regard, it was trivial and not prejudicial.

[26] Appellant contends that the effect of an amendment to section 1094 of the Political Code was to declare a general amnesty for all perjurious statements in registration affidavits. In substance the amendment provides that on a specified date all affidavits of registration should be cancelled for all purposes. This section was adopted in connection with a permanent registration, the main purpose being to prevent old registrations being used for voting purposes. "Cancelled for all purposes" simply means for purposes pertaining to future voting; it certainly was not intended to forgive prior crimes of perjury. Kerr v. Russell, 4 Cal.2d 634, 51 P.2d 1095. Appellant's interpretation is answered by the provisions of Political Code section 329 as follows: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act." There is no express declaration in the amendment cancelling criminal liability. People v. Barton, 48 Cal.App.2d 565, 119 P.2d 952.

[27, 28] Finally it is contended that appellant's conviction constituted a denial of the equal protection of the laws of the United States and of the State of California in that he was singled out for prosecution for the sole reason that he is a communist. An offer was made to show, through certain county clerk assistants and deputy registrars, that hundreds of untruths pertaining to place of birth, etc., appeared in the records of the City and County of San Francisco and elsewhere in the state. At one time appellant offered to show "hundreds of thousands of similar and identical errors in registration" in San Francisco; that in many instances registrants voluntarily or upon notice had corrected the affidavits, and that the only prosecution

instituted was against him. He further offered to prove that the police department and the district attorney of the City and County of San Francisco had singled him out because "he is a communist." The district attorney, under subpoena, was in the court room but was not sworn as a witness. The record does not disclose that any member in authority of the police department was called as a witness in respect to this matter, or that any one from that department with any knowledge upon the subject was ever subpoenaed. There is no evidence to show that any city and county or state official ever signed a complaint before a magistrate or otherwise alleging perjury against appellant. He was prosecuted by indictment. There was no offer to prove that the grand jury had singled him out because he is a communist, or that any member of the police department or the district attorney had persuaded or instigated the investigation by the grand jury or the return of the indictment. In those respects the offer of proof was insufficient.

Assuming that any part of the offer was sufficient to support appellant's contention, we will consider the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L. Ed. 220, relied upon by him. In that case an ordinance of the City and County of San Francisco required persons operating laundries in wooden buildings to obtain licenses. The petitioner was convicted of operating such a business without one. It appeared that licenses had been refused to all Chinese but had been granted to Caucasians. The court released the petitioner upon the ground that the administration of the ordinance violated the provisions of the constitution in that it made an arbitrary and unjust discrimination, based solely on the question of race, between persons otherwise similarly situated.

The facts and the law are not analogous. If appellant herein, otherwise legally entitled to register, had been refused such privilege solely upon the ground that he was a member of a designated political party, or that he professed a certain creed, or that he was of another than the white race, and subsequently appellant voted or attempted to vote and was prosecuted and convicted therefor, the Yick Wo case might be of some assistance to him. If Yick Wo had made false statements in his application for a license to operate a laundry, and had been charged with perjury in connection therewith instead of with operating such business without a license, a holding that he could make such statements with impunity is inconceivable. The maladministration of the licensing power was the prime reason for the release of Yick Wo. In that case, referring to the ordinance, the court said (118 U.S. at page 373, 6 S.Ct. at page 1073, 30 L.Ed. 220): "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States." In Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142, a gambling case, the court refused to follow the ruling in the Yick Wo case, taking care to differentiate the facts.

Appellant sought to inject a false issue into the trial of the charge, which, if approved, could easily lead to a rule that if some guilty persons escape, others who are apprehended should not be prosecuted. There was no denial of the use of the assumed name and the false designation of place of nativity. Among other defenses appellant sought, by way of offer of proof, an acquittal upon the claim that others equally guilty had not been prosecuted and that he had been prosecuted because he is a communist. The first claim would be equally meritorious if presented in connection with a traffic violation, and the second would establish a precedent that nationality, race or creed might be used in all criminal cases as a defense. Both claims would simply cloud the real issue. The basis of the claim in the Yick Wo case was not that petitioner therein had been arrested because he was Chinese, but that he had been refused a license on account of his nationality. There was an apparent scheme or plan to keep Chinese from operating laundries. Attention has not been called to any offer of proof indicating that there was a scheme to prohibit communists from registering. California has recently been presented with a similar theory as developed by the appellants in People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437. In that case it was held that the decision in the Yick Wo case does not endorse the proposition that one charged with crime may justly complain because others who have committed the same offense, and are known to the authorities, are not brought to trial. The court said there was an obvious distinction between extending protection to persons of Chinese nationality, in pursuit of the harmless and somewhat necessary business of laundering, and the extension of a like protection to those engaged in the vicious social evil of pandering. Whatever may be said relative to the proposed defense in a pandering charge may certainly with equal propriety be said of the offense of perjury, a crime per se.

The purported appeal from the judgment is dismissed. The order denying the motion for a new trial is affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice.

I dissent.

This appellant has been found guilty of perjury. The alleged perjury consists in the charge that in his affidavit of registration he gave his name as Sam Darcy when his true name is alleged to be Samuel Dardeck, and that he gave his place of birth as New York, when, in fact, it was Russia. This, the lower court held to be perjury, although the evidence admittedly shows that appellant possessed all of the requirements of an elector, and was legally entitled to register as a voter. In other words, the statements found to have been false in no way impaired the purity of the ballot, in no way qualified an otherwise incompetent elector, and in no way gave the franchise to a person not entitled to it. For this offense appellant has been found guilty of perjury for which he could have been subjected to imprisonment for a maximum period of fourteen years. Penal Code, § 126. It is my opinion that the evidence, as a matter of law, is insufficient to support the conviction.

The evidence, on the name issue, showed the following: At birth appellant was named Srool Adam Dardeck. From his earliest youth he was called Samuel or Sam, and sometimes used the middle name of Adams. For many years, in California and elsewhere, he was known as Sam Darcy. He married under that name in 1926 and the next year was remarried under the name Dardeck. Several applications for passports were secured under the name Dardeck. In California, where he took an active part in political affairs, he was always known as Sam Darcy. He was a candidate for mayor of San Francisco in 1931, and was the Communist candidate for Governor in this state in 1934. Both candidacies were under the name Sam Darcy. He wrote political pamphlets and lectured under that name. The evidence is undisputed that in this state he was always known as Sam Darcy, but that in his dealings with the Federal government in connection with passports he used his birth name of Dardeck.

It seems to be the theory of the majority opinion that the use of other than a birth name in registering, unless a change in name is confirmed by court decree, as a matter of law, constitutes the crime of perjury. That is not the law. Under the common-law rule, where it is not done for a fraudulent purpose, a person may lawfully change his name without resort to legal proceedings. See cases collected 45 Cor.Jur. p. 381, § 15; 38 Am.Jur. p. 610, § 28. A statute such as exists in this state providing a statutory proceeding for securing court approval of a change of name, as long as the statute does not provide that the statutory method is exclusive (and the statute of this state does not so provide), in no way affects this rule. Such statute is in aid of the common-law rule. As long as it is not done for a fraudulent purpose, a man may change his name without resort to the courts, and the name so assumed becomes his legal name. In re Ross, 8 Cal.2d 608, 67 P.2d 94; Emery v. Kipp, 154 Cal. 83, 97 P. 17, 19 L.R.A.,N.S., 983, 129 Am.St.Rep. 141, 16 Ann.Cas. 792; In re Useldinger, 35 Cal.App.2d 723, 96 P.2d 958; Ray v. American Photo Player Co., 46 Cal. App. 311, 189 P. 130; Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 187 P. 996; for cases from other states see 45 Cor.Jur. p. 382, fn. 86; 38 Am.Jur. p. 610, § 28; annotations 110 A.L.R. 219; 2 L.R.A.,N.S., 1089; L.R.A.1915D, 982; 14 L.R.A. 692.

In the instant case there was neither charge nor evidence that appellant used the name Darcy for any false, fraudulent or criminal purpose. This is admitted by respondent. The evidence is uncontradicted that in this state he had never been known by any other name. The fact that he occasionally used his birth name of Dardeck in his passport applications in no way detracts from the fact that he was generally known as Darcy. In view of the fact that his citizenship was dependent upon the naturalization of his father, it is obvious he had to use such name in such applications, because, otherwise, there would have been no record of his citizenship. In this state appellant's name was legally Darcy, and no crime was committed by registering under that name.

The second charge is that appellant falsely averred he was born in New York, when, in fact, he was born in Russia. It may be conceded that the evidence supports the finding that this statement was wilfully false. This, however, does not make it perjurious. In order to be perjury the false statement must be material. § 118, Penal Code. The material issue in an affidavit of registration is whether the registrant has the right to vote. Under the Constitution and laws of this state, citizenship, age and residence are the three main requisites for an elector. Electors possessing those qualifications may lawfully register, and, if registered, may vote. The object of registration laws is to prevent unqualified persons from voting. Bergevin v. Curtz, 127 Cal. 86, 59 P. 312; Welch v. Williams, 96 Cal. 365, 31 P. 222. Such laws are aimed at preserving the purity of the ballot box and are not aimed at preventing a qualified elector from voting. They are for the purpose of preventing fraudulent voting. Attorney General v. Common Council of City of Detroit, 78 Mich. 545, 44 N.W. 388, 7 L.R.A. 99, 18 Am.St.Rep. 458. The registration laws are not intended to act as a trap for a qualified elector, so that for minor discrepancies he is either to be deprived of the right to vote or subjected to a trial for perjury. Neither in the majority opinion nor in the brief of the Attorney General is one case cited (and I have found none) where a conviction for perjury has been sustained for a misstatement in an affidavit of registration where, in fact, the registrant was qualified to vote. Darcy was admittedly a qualified elector. He was lawfully entitled to register. He was a citizen. At most, his registration was a faulty one that could have been canceled or corrected. § 300, Elections Code, St.1939, p. 69, superseding § 1109, Pol.Code. The election law provides sufficient penalties for faulty registration. Under § 300 of the Elections Code any person may proceed by action to cancel an illegal registration, while under § 139 of that code, St.1939, p. 58 (old § 42a, Pen.Code), every person who allows himself to be registered "knowing himself * * * not to be entitled to registration" is subject to imprisonment for a maximum of three years. It is inconceivable that the legislature intended that a faulty registration of a qualified person should constitute perjury with a maximum punishment of fourteen years when a deliberate illegal registration by an unqualified person should only be punished by three years maximum. It was never the purpose of the perjury statute to permit prosecutions on matters not material to the purpose of the affidavit. The affidavit signed by appellant required him, among other things, to answer as to his occupation and his height. If he had incorrectly designated his occupation, or his height, being qualified to register, could he be subjected to the penalties of perjury? Obviously, it was never the intent or purpose of the perjury statute to include such immaterial misstatements. The only material misstatements that could constitute perjury are those in relation to the qualifications set forth for a qualified elector in § 1, Art. II of the Constitution. That section requires that the registrant be twenty-one years of age, a citizen for at least ninety days, a resident of the state for one year and of the county for ninety days, and of the precinct forty days. There was no false statement as to any of these matters. Darcy was a citizen and had the necessary residential requirements. The material fact was that Darcy was a citizen, not how he acquired citizenship. See Leavine v. State, 101 Fla. 1370, 133 So. 870. The cases in this state properly have been very strict in requiring the false statement to be material to the specific inquiry before a conviction for perjury will be sustained. Thus, although testimony in an action may be false and wilfully false, it is not perjurious if it relates to collateral matters. People v. Ah Sing, 95 Cal. 657, 30 P. 797; People v. Jones, 123 Cal. 299, 55 P. 992; People v. Perazzo, 64 Cal. 106, 28 P. 62; People v. McDermott, 8 Cal. 288; People v. Planer, 23 Cal.App.2d 251, 72 P.2d 767.

The Attorney General argues that false statements as to place of birth could be used for a fraudulent purpose by an unqualified person to qualify himself as a voter. That is not the test. The test is whether this false statement was material

22 Cal.2d 474

ALLEN et al. v. CALIFORNIA MUT. BUILDING & LOAN ASS'N et al.

S. F. 16873.

Supreme Court of California.
July 8, 1943.

As Modified Aug. 2, 1943.

1. Appeal and error 🔑1097(1)

It is a rule of general application that all questions and issues adjudicated on a prior appeal are the "law of the case" upon all subsequent appeals, and will not be reconsidered.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error 🔑1097(1)

The rule that all questions and issues adjudicated on prior appeal are the "law of the case" upon all subsequent appeals, applies to decisions of District Court of Appeal after they have become final.

3. Appeal and error 🔑1097(2)

The doctrine of "law of the case" applies even though appellate court may consider its former decision erroneous, in absence of unusual circumstances leading to injustice or unfairness.

4. Appeal and error 🔑1099(7)

If plaintiffs' evidence does not prove allegations of complaint, which was considered and held sufficient on former appeal, the doctrine of "law of the case" does not apply.

5. Appeal and error 🔑1097(6)

In action based on alleged fraud of building and loan association who induced plaintiffs to exchange their investments in association for shares of stock in another corporation, a decision of District Court of Appeal, on prior appeal, that complaint was not insufficient for failure to allege that plaintiffs' claims were presented to commissioner in control of association for purpose of liquidation, was "law of the case" on subsequent appeal presenting same issue, in view of fact that Supreme Court had denied petition for hearing as to first appeal.

6. Appeal and error 🔑1099(7)

Where District Court of Appeal on appeal in action based on alleged fraud of agents of building and loan association in inducing plaintiffs to exchange their investments in association for shares of stock in another corporation, held that complaint sufficient, evidence on subsequent trial that corporation was organized to purchase the stock of association, and that in accordance with such plan association and corporation fraudulently induced plaintiffs to exchange their investments in association for stock of corporation, and showing means by which this was carried out, sufficiently proved case within the law of the case established on prior appeal.

7. Building and loan associations 🔑42(17)

Under Building and Loan Association Act, Legislature intended to liberalize statutory requirements for filing of claim in favor of one who, as admitted by books of association, was an investor of association at time it was taken over by commissioner for liquidation, so that, if books of association show indebtedness, investor should not be required to present a claim duplicating data on its own records. St. 1935, p. 1500, § 13.16.

8. Building and loan associations 🔑42(17)

An investor in a building and loan association whose withdrawal order or assignment of certificate evidencing his deposit of money has been recorded on books of association has ceased to be an "investor" according to those books for purposes of his rights in filing claim against association in liquidation. St.1935, p. 1500, § 13.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Investor".

9. Building and loan associations 🔑42(17)

The purpose of a claim against building and loan association in liquidation by commissioner is to give commissioner information concerning indebtedness of the association. St.1935, p. 1500, § 13.16.

10. Appeal and error 🔑1097(2)

The doctrine of the "law of the case" should not be adhered to when application thereof results in unjust decision.

11. Building and loan associations 🔑42(16, 17)

Investors and mutual shareholders in building and loan association, fraudulently induced to convert shares into mutual stock of another corporation which was agent of association, were entitled to restoration of their respective interests as holders of investment certificates and as mutual shareholders of association, and also to dividends declared in liquidation proceedings against association. St.1935, p. 1500, § 13.16.

12. Appeal and error ⟹1097(1)

As general rule, all questions presented by record must be raised upon first appeal from adverse ruling, as thereafter all matters within scope of action and relevant to issues will be deemed to have been concluded by the judgment.

13. Appeal and error ⟹1097(1)

In any later consideration of same controversy, it will be held that prior judgment by implication, if not directly, has determined all issues related to subject matter and raised by proper pleadings.

14. Appeal and error ⟹1097(8)

Where amended complaint filed in February, 1936, charged that during 1929 to 1931 inclusive, by reason of fraudulent representations of building and loan association, plaintiffs were induced to exchange their investments in association for stock of another corporation was held to be insufficient, and judgment was rendered for plaintiffs on pleadings, but subsequently a motion for new trial was granted and on appeal the order was affirmed by District Court of Appeal and Supreme Court denied petition for hearing, complaint was not subject to attack as not stating cause of action on subsequent appeal, under doctrine of "law of the case" even if corporation's records placed its stockholders upon notice so as to bar action under three-year statute of limitations. St.1935, p. 1500, § 13.16; Code Civ.Proc. § 338, subd. 4.

15. Limitation of actions ⟹201

Where it appears on face of complaint that cause of action is barred by limitations and statute is pleaded, a judgment may be rendered for defendant if case is submitted upon pleadings.

16. Appeal and error ⟹1099(3)

Where answer pleaded three-year statute of limitations as barring cause of action for fraud in inducing investors in building and loan association to exchange their investments for stock in another corporation, and trial court granted new trial after entering judgment for defendants on the pleadings, and such decision was affirmed on appeal by District Court of Appeal, and Supreme Court denied petition for hearing, the holding that cause of action was not barred by limitations was implicit in order granting new trial, affirmed on appeal, within "law of the case" doctrine. St.1935, p. 1500, § 13.16; Code Civ.Proc. § 338, subd. 4.

17. Limitation of actions ⟹100(12)

Where plaintiffs were induced to exchange their investments in building and loan association for shares of stock in another corporation by alleged fraudulent representations of association's agents, even if plaintiffs were chargeable with knowledge of fraudulent misrepresentations on their receipt of stock certificates of corporation because of absence therefrom of the express language required by statute that stockholder might withdraw his investment in corporation, so as to bar their right to maintain action for fraud under three-year statute of limitations, the discovery of falsity of alleged statement concerning right to withdraw did not give plaintiffs notice that other representations concerning corporation were untrue, as respects limitations. St.1935, p. 1500, § 13.16; Code Civ. Proc. § 338, subd. 4.

18. Limitation of actions ⟹100(12)

In action on alleged fraud of building and loan association in inducing plaintiffs to exchange their investments in association for shares of stock in another corporation, the fact that after no dividend was declared in December, 1931, plaintiffs endeavored to obtain from corporation's officers the amount of their investment, and that some of them joined stockholders' committee which employed attorney to protect their interests did not compel holding that three-year statute of limitations commenced to run as of that date, where officers of association and corporation countered plaintiffs' complaints with explanations and promises of prospective earnings, which warranted trial court's finding that plaintiffs continued to rely on good faith wisdom and advice of officers and directors of association and corporation, and they did not learn that stock was valueless until corporation's adjudication in bankruptcy in 1933. St.1935, p. 1500, § 13.16; Code Civ. Proc. § 338, subd. 4.

19. Appeal and error ⟹1099(3)

In action based on alleged fraud of building and loan association in inducing plaintiffs to exchange their investments in association for shares of stock in another corporation which was association's agent, wherein complaint showed facts upon which plaintiffs' contention was based, and defendants' answer pleaded three-year statute of limitations as defense, and statute providing that statute of limitations shall be deemed to have commenced to run from beginning of process of liquidation of insolvent building and loan association, issue of limitations was before trial court when it ruled on pleadings by granting judgment for defendants on pleadings, and was concluded by affirmance of order granting new trial under doctrine of "law of the case". St.1935, p. 1500, § 13.16; Code Civ.Proc. § 338, subd. 4; § 348.

20. Action ⚷63

Delay alone does not constitute "laches" unless it is accompanied by circumstances from which prejudice may result.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

21. Building and loan associations ⚷42(16)

Claims of fraud by investors against building and loan association were not barred by "laches" because of delay of over three years in bringing action, where no injury to association or inequity was caused by delay. St.1935, p. 1500, § 13.16.

22. Building and loan associations ⚷42(17)

The provision of statute that any investor in building and loan association without presenting a claim shall be entitled to any dividends "hereafter" declared, even if presented after statutory time, was intended to protect investor whose creditor relation to association appears without contradiction on books of association from losing his right to share in liquidation of insolvent organization's assets through negligence or inadvertence in failing to file claim within prescribed period; the use of the word "hereafter" expressing legislative intention that 1935 amendment should apply to dividends declared after September 15, 1935, its effective date, in assets of association then in process of liquidation. St.1935, p. 1500, § 13.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Hereafter".

23. Building and loan associations ⚷42(17)

Where first dividend of building and loan association in liquidation was declared on December 2, 1935, each of investors and mutual shareholders in association was entitled to share in first and all subsequent dividends though none of them filed claim under 1935 amendment to statute authorizing any investor in building and loan association in liquidation without presenting a claim to be entitled to any dividend "hereafter" declared. St.1935, p. 1500, § 13.16.

24. Appeal and error ⚷1097(6)

The doctrine of "law of the case" does not require Supreme Court to follow an interpretation of statute by District Court of Appeal in a decision as to which Supreme Court denied petition for hearing, when decision is clearly "obiter dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Obiter Dictum."

25. Building and loan associations ⚷42(6)

When Building and Loan Commissioner takes possession of property, business, and assets of building and loan association which he deems to be in an insolvent or unsafe financial condition, his future action is not limited to liquidation and distribution of its assets, but he may administer association's affairs so as to restore, if possible, its economic stability and then consent to association's resumption of business on conditions approved by him. St.1931, p. 539, § 13.11.

26. Building and loan associations ⚷40

If Building and Loan Commissioner after taking possession of building and loan association's assets on ground of unsafe financial condition allows association to resume business as going concern, association should assume its continuing obligation to pay interest on deposits of its investors, even as to period during which its assets were in temporary control of Commissioner. St.1931, p. 539, § 13.11.

27. Building and loan associations ⚷42(17)

If Building and Loan Commissioner after taking possession of assets of building and loan association which he deems to be in insolvent or unsafe financial condition instead of restoring property, business, and assets to association determines to liquidate them, the right of association's investors to interest should be subject to usual equitable principles governing liquidation which is equality among creditors. St.1931, p. 539, § 13.11.

28. Building and loan associations ⚿42(17)

In absence of express statutory provision on matter, an investor in building and loan association in process of liquidation by commissioner is not entitled to payment of interest on his claim after commencement of liquidation proceedings, where assets are insufficient to pay principal of all claims in full.

29. Building and loan associations ⚿42(17)

A determination of Building and Loan Commissioner to liquidate building and loan association after taking possession of its property, business, and assets is evidenced by filing of inventory of its assets and publication of notice to all persons having claims against it, whether creditors, or investors, or otherwise, to present them within a specified period. St.1935, p. 1500, § 13.16.

TRAYNOR and SCHAUER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Maurice T. Dooling, Judge assigned.

Action by Mrs. W. A. Allen and others against California Mutual Building & Loan Association, a corporation, and another to establish claims against the Building & Loan Association in liquidation. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed.

For prior opinion, see 129 P.2d 703.

D. T. Jenkins, of San Jose, and Patrick J. Kearns, of San Francisco, for appellants.

F. W. Sawyer, of Los Angeles, and Wm. R. Biaggi, of San Jose, for respondents.

EDMONDS, Justice.

So far as the merits of the controversy are concerned, Allen and those who in the superior court established their right to share in the assets of California Mutual Building and Loan Association, are in the same position as the investors whose judgment against that now insolvent corporation was affirmed in Alexander v. State Capital Co., 9 Cal.2d 304, 70 P.2d 619. The association and the Building and Loan Commissioner, in appealing from the judgment rendered against them, do not deny that, by fraudulent representations, the respondents were induced to exchange their investment certificates for stock of the State Capital Company, but they contend that (1) the failure to file a claim against the insolvent corporation; (2) the statute of limitations; and (3) laches, bar any recovery by them.

In their second amended complaint, the respondents alleged that prior to January 23, 1933, each of them became, and still is, an investor in the association by the purchase of an investment certificate and a deposit of money which is recorded in a pass book account and deposit book. On that date the association was taken over by the Building and Loan Commissioner for the purpose of liquidation. Four years previously, State Capital Company was organized as an agency of and for the purpose of assisting the association in the transaction of its business. By fraudulent representations of the association's agents during the period from 1929 to 1931, the respondents were induced to exchange their "investments" for shares of stock of State Capital Company, to their damage in the amount of their respective deposits in the association.

The complaint refers to the respondents not only as the owners of building and loan investment certificates but also as "investors" having "investments" or "holdings" in the association. The record is not specific in identifying the status of each one of them, but from the findings it may be inferred that some of the respondents held withdrawable, mutual membership shares and others owned investment certificates. See Martin v. California Mut. B. & L. Ass'n, 18 Cal.2d 478, 116 P.2d 71.

When the case was called for trial, before the first witness was sworn, the appellants objected to the taking of any evidence upon the ground that the complaint does not state a cause of action. This objection was sustained, and judgment rendered for the appellants upon the pleadings. Later, the court granted a motion for a new trial and, upon appeal, its order was affirmed. Allen v. California Mut. B. & L. Ass'n, 40 Cal.App.2d 374, 104 P.2d 851, 853. This court denied a petition for a hearing.

By its decision, the District Court of Appeal held that Allen and his associates sued to assert rights as investors, hence "They were entitled to plead an action to quiet title. That they have done and more too." Also, said the court, "The plaintiffs alleged that by the fraudulent misrepresentations of the defendant corporation they were induced to exchange securities, issued by the defendant corporation, for securities of State Capital Company, an agent of said defendant; that such exchange was not based on any consideration moving from plaintiffs to defendant; that the defendant corporation still holds the securities which the plaintiffs delivered to it; and that all of said facts appear on the books and records of said defendant. In other words they alleged in effect that there was merely an exchange in form but not in fact, and that the transaction was a mere change in the form of accounts between the plaintiffs and the corporate defendant. Manifestly if these allegations are true, and the defendants' motions admitted the truth thereof, it is clear the plaintiffs are and at all times have been 'investors' in the defendant corporation."

Following this decision, there was a trial upon the merits. The trial court found that, in 1929, the association and the company launched a campaign for the purpose of obtaining investments of the one in exchange for the capital stock of the other. Permits were issued by the Corporation Commissioner for the sale of the company's stock but these were conditioned upon the requirements that each sale be for cash and that a copy of the permit be shown to each purchaser. The respondents would not have exchanged their investments in the association for capital stock of the company but for the false representations made by the agents of the company and the association. Each of the exchanges and conversions of investments for the capital stock was void because the stock was not issued or sold for cash and, for the further reason, that no copy of the permit for the sale of stock was exhibited to the investor. The court also found that the first cause of action is not barred by any statute of limitation nor are the respondents' rights barred by laches.

From these facts, the court concluded that investors who are the respondents upon this appeal are entitled to a judgment decreeing the respective transfers made by them to be void, and restoring them to their respective status either as the holder of a pass book investment certificate or as a mutual shareholder in the amount and as of the date of each exchange appearing upon the books of the association and the company. Each of those persons, the court continued, has established a valid claim, as such investor, against the appellants for the amount of his investment, the claim to be paid out of the special trust account and reserve fund of the association's assets established by the commissioner and in the due course of the administration of the liquidation proceedings by him. Judgment was entered accordingly.

The appellants now urge that as the facts found by the trial court clearly establish that the respondents did not appear upon the books of the association as investors at the time the commissioner took over the association and, under the applicable statute, only such investors are excused from filing claims, the trial court erred in rendering judgment for the respondents. But, in making this contention, say the respondents, the appellants are rearguing a question now res judicata by the decision upon the former appeal.

[1-3] It is a rule of general application that all questions and issues adjudicated on a prior appeal are the law of the case upon all subsequent appeals and will not be reconsidered. Wells v. Lloyd, 21 Cal.2d 452, 454-458, 132 P.2d 471; Blanton v. Curry, 20 Cal.2d 793, 801, 129 P.2d 1; Gore v. Bingaman, 20 Cal.2d 118, 121-123, 124 P.2d 17; Security-First Nat. Bank v. Marxen, 19 Cal.2d 100, 119 P.2d 131; Clayton v. Schultz, 18 Cal.2d 328, 115 P.2d 446; Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252. This doctrine applies to decisions of the District Courts of Appeal after they have become final. Wells v. Lloyd, supra, 21 Cal.2d at page 483, 132 P.2d 471; Gore v. Bingaman, supra, 20 Cal. 2d at page 122, 124 P.2d 17; United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 284 P. 922; Otten v. Spreckels, 183 Cal. 252, 191 P. 11; Hill v. Maryland Casualty Co., 28 Cal.App. 422, 152 P. 953. And even when, upon the second appeal, a court is convinced that the prior decision of a question of law was erroneous, it will refuse to reexamine that issue in the absence of unusual circumstances leading to injustice or unfairness. Wells v. Lloyd, supra, 21 Cal.2d at page 484, 132 P.2d 471; Gore v. Bingaman, supra, 20 Cal.2d at page 121, 124 P.2d 17; Penziner v. West American Finance Co., supra; Hoffman v. Southern Pac. Co., 215 Cal. 454, 11 P.2d 387; Newport v. Hatton, 207 Cal. 515, 279 P. 134; McEwen v. New York Life Ins. Co., 187

Cal. 144, 201 P. 577; Tally v. Ganahl, 151 Cal. 418, 90 P. 1049; see England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813.

[4, 5] Considering the decision of the District Court of Appeal for the purpose of determining the extent to which the law of the case controls a determination of the present controversy, it appears that upon the first appeal, as here, the association and the commissioner attacked the respondents' complaint as insufficient to state a cause of action. Since the respondents alleged that they had exchanged their interests in the association for shares of the capital stock in the company, said the appellants, they no longer appeared upon the books of the association as investors, and consequently their claims were, by the express provisions of section 13.16, of the Building and Loan Act, supra, barred because of the failure to file the required claims with the commissioner. In ruling against this contention, the District Court of Appeal not only held that the complaint states a cause of action but that although they demand damages, "their complaint was answered and they may be awarded such relief as comes within the issues. Sec. 580, Code Civ.Proc. If they establish their claim as alleged, the trial court may find they are still the owners of their original certificates and, if so, they will then be entitled to present them to the defendant commissioner and share in subsequent dividends as provided in Act 986, supra. Section 13.16, paragraph 3, contains this sentence: 'Any investor, without presenting a claim, shall be entitled, as to any dividends hereafter declared, to share in such dividends to the extent, and in the proper relative order of priority, of any claim shown by the books of the association to exist in his favor against the association.'" Allen v. California Mut. B. & L. Ass'n, supra, 40 Cal.App.2d at page 379, 104 P.2d at page 854.

It is true, of course, that if the respondents' evidence does not prove the allegations of the complaint which was considered upon the former appeal, the doctrine of the law of the case does not apply. Archer v. City of Los Angeles, 19 Cal.2d 19, 29, 119 P.2d 1. And the appellants charge that although the findings of the trial court, in terms relate facts which the District Court of Appeal said were, in effect, pleaded by the respondents, they are not supported by the evidence.

It is not necessary to question the appellants' assertion that the withdrawals of the respondents' investments appeared by appropriate entries in the books of the association at the time the commissioner took over the association for the purpose of liquidation because the former decision clearly contemplates this situation. Under such circumstances, said the District Court of Appeal, if the respondents were defrauded, they are entitled to a decree declaring them still to be investors in the association, such restoration being effective as of the date of the exchange.

[6] And considering other evidence which is admitted by the appellants to be true, it is clear that the respondents have proved a case within the decision upon the prior appeal. Thus it is conceded that the company was organized to purchase the guarantee stock of the association then outstanding. In accordance with this plan, the association and the company fraudulently induced the respondents to agree to exchange their investments in the association for the capital stock of the company. To consummate the transaction, the respondents were induced to sign orders on the association for the withdrawal of their deposits. These they delivered to the stock salesmen together with their pass books. By appropriate entries the orders were subsequently credited to the purchase by the company of the guarantee stock of the association. And findings that the company did not receive any cash for the sale of its stock other than by means of the credits upon the purchase of the association's guarantee shares, or that the permits were not exhibited to the respondents as required by their terms, stand unquestioned.

The District Court of Appeal concluded that an order sustaining an objection to the introduction of any evidence upon the ground that the complaint does not state a cause of action is, in effect, the same as one granting a nonsuit. This holding places an order which is based upon the construction of a pleading in the same category as one predicated upon an evaluation of evidence. But eliminating thta procedural question from present consideration, the court held that thoe investors who, by reason of fraudulent representations, made transfers of their certificates, or amounts represented thereby, which appear upon the books of the association, continue to be "the owners of their original certificates." As such owners they are entitled to share in subsequent dividends declared by the commissioner.

It is difficult to follow that reasoning. Until 1935, the Building and Loan Association Act, supra, provided that "the claim of any investor, appearing upon the books of the association to be a valid claim," might be presented later than those of creditors or investors generally. Stats. 1933, p. 2719; Deering's Gen. Laws, 1933 Supp., Act 986, § 13.16. Effective September 15, 1935, "Any investor, without presenting a claim, shall be entitled, as to any dividends hereafter declared, to share in such dividends to the extent, and in the proper relative order of priority, of any claim shown by the books of the association to exist in his favor * * *." Stats. 1935, p. 1500; Deering's Gen. Laws, 1935 Supp., Act 986, § 13.16. If the District Court of Appeal correctly construed the statute, a commissioner endeavoring to liquidate an association will encounter many practical difficulties. How may he know whether any particular person whose name appears on the books of the association as having been, at one time, an investor, assigned his certificate by reason of fraudulent representations, or in a transaction in which there was a failure of consideration, or under other circumstances which enables him to later attack the transfer? And how far back in time must the commissioner go in scrutinizing the record of transfers?

[7-9] A fuller consideration of the question than could be given in connection with the petition for a hearing in this court of the prior appeal leads to the conclusion that the Legislature in 1935, and also by the prior enactment, intended to liberalize the statutory requirements for the filing of a claim in favor of one who, as admitted by the books of the association, was an investor of the institution at the time it was taken over by the commissioner. The purpose of a claim is to give the commissioner information concerning an indebtedness of the institution. If the books of the association show the indebtedness, said the Legislature, the investor should not be required to present a claim which duplicates the data on its own records. But to say that an investor whose withdrawal order or assignment of the certificate which evidenced his deposit of money has been recorded on the books of the association is still an investor according to those books, ignores the meaning of the statute and the obvious purpose of its enactment.

[10, 11] However, although the District Court of Appeal erroneously construed and applied these provisions of the Building and Loan Act, supra, the trial court's determination of the rights of the respondents, by following the law of the case, leads to no such result as is contemplated by the rule which allows an exception to that doctrine when an application of it would bring about an injustice. See England v. Hospital of Good Samaritan, supra, 14 Cal.2d at p. 791, 97 P.2d 813. On the merits, the respondents have the same rights to share in the proceeds of the liquidation as the plaintiffs in the Alexander case, who similarly exchanged investment certificates or mutual shares in the association for the capital stock of the company, and it appears that the commissioner has set aside an amount sufficient to pay their demands, on a pro rata basis, with those of the judgment creditors in the earlier litigation. Under these circumstances, as, by the law of the case, the evidence fully supports the judgment, the respondents are entitled to restoration to their respective interests as holders of investment certificates and as mutual shareholders in the association, and also to the dividends declared in the liquidation proceedings. Alexander v. State Capital Co., supra.

A second point which is urged as a ground for the reversal of the judgment is the trial court's ruling that the cause of action is not barred by the statute of limitations relied upon by the appellants, nor by laches. Assuming that the claim of each of the respondents appears upon the books of the company, say the appellants, that record shows him to be only a former investor, who, because of the alleged fraud has a cause of action either for damages or for restoration to his former status as an investor. In either case, they insist, the gravamen of the action is fraud. And, as a stockholder, each respondent is charged with notice of what was spread upon the records of the company; therefore, his cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure establishing a three year period of limitation for the commencement of an action for relief upon the ground of fraud.

[12-14] As a general rule, all questions presented by the record must be raised upon the first appeal from an adverse ruling, as thereafter all matters within the scope of the action and relevant to the issues will

be deemed to have been concluded by the judgment. Moreover, in any later consideration of the controversy, it will be held that the judgment, by implication, if not directly, has determined all issues related to the subject matter and raised by proper pleadings. McCandless v. City of Los Angeles, 10 Cal.App.2d 407, 413, 52 P.2d 545; Texas Co. v. Moynier, 137 Cal.App. 112, 113, 29 P.2d 873; 5 C.J.S., Appeal and Error, § 1825, n. 97, p. 1279; and see Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Barrow v. Santa Monica B. Sup. Co., 9 Cal.2d 601, 606, 71 P.2d 1108; Andrews v. Reidy, 7 Cal.2d 366, 370, 371, 60 P.2d 832; Lanktree v. Lanktree, 6 Cal.2d 120, 122, 56 P.2d 943; Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 511-513, 258 P. 387. The sufficiency of the second amended complaint, filed in February, 1936, was the substantial issue raised in the prior appeal. It charges that during the years 1929 to 1931 inclusive, by reason of the fraudulent representations of the association, the respondents exchanged their investments in it for stock of the State Capital Company. If it be assumed that the records of a corporation place its stockholders upon notice to the extent claimed by the appellants, the complaint does not state a cause of action but it is not now subject to attack.

[15, 16] Where it appears upon the face of the complaint that a cause of action is barred by the statute of limitations, and the statute is pleaded, a judgment may be rendered for the defendant if the case is submitted upon the pleadings. Wormouth v. Hatch, 33 Cal. 121; 16 Cal.Jur., Limitation of Actions, § 212, p. 618. The appellants, in their answer, have pleaded the provisions of section 338, subdivision 4 of the Code of Civil Procedure as barring the cause of action stated in the second amended complaint. If, therefore, the appellants' contention as to the notice given by the corporation's books is sound, the trial court properly entered judgment for them upon the pleadings. Implicit, therefore, in the order granting the respondents' motion for a new trial, which was affirmed upon appeal, is the holding that the cause of action is not barred by the statute of limitations. McCowen v. Pew, 18 Cal.App. 302, 123 P. 191, Reclamation Dist. No. 3 v. Goldman, 65 Cal. 635, 4 P. 676, and see 2 Cal.Jur., Appeal and Error, § 568, pp. 966, 967.

[17] Another reason which is urged as a ground for the reversal of the judgment, is that the respondents were notified of the fraudulent misrepresentations upon the receipt in December, 1931, of certificates of stock of the State Capital Company. Immediately upon receiving a certificate of stock, say the appellants, those who claim to have acted upon the representations of the association were put on notice that they had no right to withdraw their money from the company, for any such preference would have to be stated in the stock certificate. This argument admits the absence from the stock certificate of any express language that a stockholder might withdraw his investment in the State Capital Company. But even if he could be charged with knowledge based upon the statutory requirements, as to form, of a stock certificate, the discovery of the falsity of the statement concerning a right to withdraw did not give him notice that other representations concerning the Company were untrue.

[18] Nor does the fact that, after no dividend was declared in December, 1931, some of the respondents admittedly endeavored to obtain from the company's officers the amount of their investments, or that some of them joined a stockholders' committee which employed an attorney to protect their interests, necessarily compel a holding that the statute of limitations commenced to run as of that date. For the record shows that the officers of the association and the company countered the complaints of the respondents with explanations based upon the then current economic depression and promises of prospective earnings. This and other testimony in the record adequately supports the finding of the trial court that the respondents continued to rely upon the good faith, wisdom, and advice of the officers and directors respecting the two corporations and did not learn that the stock was valueless until the adjudication in bankruptcy of the company in March, 1933, and the publication two months later by the commissioner of the notice to creditors of the association.

[19] The appellants also rely upon the provision of section 348 of the Code of Civil Procedure that, when a building and loan association has become insolvent and is in the process of liquidation, "the statute of limitations shall be deemed to have commenced to run from the beginning of the process of liquidation." Since the Building and Loan Commissioner took over the assets of the California Building and

Loan Association in January, 1933, they assert, this action, filed more than three years after that date, is barred by subdivision 4 of section 338 of the Code of Civil Procedure. But assuming, without deciding, that the process of liquidation, within the meaning of section 348, supra, commenced upon the date of the take-over by the commissioner, the appellants may not now raise the issue that the action is for that reason barred. For, the complaint shows the facts upon which the appellants' contention is based, and by their answer the statute now relied upon was pleaded as a defense. The issue was therefore before the trial court when it ruled upon the pleadings and is concluded by the affirmance of the order granting a new trial.

[20, 21] Concerning the equitable defense, it is well settled that delay alone does not constitute laches unless it is accompanied by circumstances from which prejudice may result. Alexander v. State Capital Co., 9 Cal.2d 304, 313, 70 P.2d 619, Gibson v. Mitchell, 9 Cal.2d 718, 725, 726, 72 P.2d 740, Security T. & S. Bank v. Southern Pac. R. R. Co., 214 Cal. 81, 88, 3 P.2d 1015, Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767, Silver Burdett Co. v. State Board of Education, 36 Cal.App.2d 714, 719, 98 P.2d 533. Here, as was said in Alexander v. State Capital Co., supra [9 Cal.2d 304, 70 P.2d 623], "There is no suggestion * * * that the lapse of time resulted in any injury to the Building & Loan Association, nor has it been made to appear that by reason of lapse of time it is inequitable to enforce the demands of the respondents." And the unchallenged finding of the trial court is that the commissioner has created a special trust and reserve fund for the purpose of paying the respondents' claims should they be declared valid by the court.

[22, 23] In 1935, the provision which allowed "the claim of any investor, appearing upon the books of the association to be a valid claim, presented after the expiration of the" statutory time, to share in any subsequently declared dividend was relaxed to allow an investor, without filing a claim, to share in any dividend declared after the effective date of the amendment. The obvious purpose of the statute is to protect the investor whose creditor relation appears without contradiction upon the books of the association from losing his right to share in the liquidation of the insolvent organization's assets through negligence or inadvertence in failing to file a claim within the prescribed period. The use of the word "hereafter" expresses the legislative intention that the amendment should apply to dividends declared after September 15, 1935, its effective date, in the assets of associations then in the process of liquidation. As the first dividend of the California Building and Loan Association was declared on December 2, 1935, although none of the respondents filed a claim, each of them is entitled to share in the first and all subsequent dividends.

But the appellants assert that, under the decision upon the prior appeal, the respondents are not entitled to share in any liquidating dividends declared prior to the judgment establishing their claims. In support of their contention, they refer to the concluding paragraph of the opinion, which reads: "As the action must go back to the trial court for further proceedings, it should be stated that we notice the use of the word 'hereafter' in the statute we have just quoted. It is evidently a misprint for 'thereafter'. Any other construction would lead to absurd results. To illustrate, let us assume that since September 1, 1935, dividends have been declared and paid as provided in Act 986, supra. The sentence we have quoted took effect on the date last mentioned. According to the meaning of said sentence as it is written, all sums so paid would have to be recalled, reapportioned, and these plaintiffs included. As stated above that would be an absurdity. Construing the word as thereafter instead of hereafter, the sentence has a reasonable meaning. Those who delay in presenting their claims lose their rights to participate in dividends theretofore declared and paid, but after their claims have been presented, as in said sentence provided, they are then entitled to the rights provided therein."

[24] This discussion is obviously based upon the erroneous assumption that the presentation of a claim by the investor was still required under the 1935 amendment, and this in spite of the inclusion of the words "without presenting a claim" in the statute. And the doctrine of the law of the case does not require this court to follow an interpretation which is clearly obiter dictum. The statement of facts in the discussion, assumed for the purpose of illustrating the necessity of the court's construction of the statute, presupposed a situation where the commissioner paid out

all of the liquidating dividends accruing subsequent to September 1, 1935, without establishing a reserve or trust account for the benefit of the investors who had not filed claims with him, and, consequently, to allow such investors to share in dividends already apportioned and paid in their entirety to the other creditors would have required the amounts paid to be recalled and reapportioned. But upon trial, the court found that the commissioner had created a trust account, for the benefit of the respondents, and had placed in it a ratable amount of each of the dividends he had theretofore declared from the proceeds on liquidation.

After decreeing that the respondents be restored as holders of passbook investment certificates in the appellant association, the judgment orders that each of them recover the amount of such investment certificate account and for costs, "with interests provided by his, or her, or their, respective investment certificate to date of payment." The appellants assert that interest is only payable up to the time of insolvency.

[25-28] When the Building and Loan Commissioner takes possession of the property, business and assets of a building and loan association which he deems to be in an insolvent or unsafe financial condition, his future action is not limited to the liquidation and distribution of its assets, but he may administer the affairs of the company so as to restore, if possible, its economic stability and then, consent to the association's resumption of business upon conditions approved by him. Stats.1931, ch. 269, pp. 539, 540; Deering's Gen. Laws, Act 986, § 13.11. If the association is allowed to resume business as a going concern, it should assume its continuing obligation to pay interest upon the deposits of its investors, even as to the period during which its assets were in the temporary control of the commissioner. But, if instead of restoring the property, business and assets to the association, the commissioner determines to liquidate them, the right of the investors to interest should be subject to the usual equitable principle governing liquidation, namely, equality among creditors. In the absence of an express statutory provision upon the matter, an investor in a building and loan association in the process of liquidation by the commissioner is not entitled to the payment of interest on his claim after the commencement of the liquidation proceeding, where the assets are insufficient to pay the principal of all claims in full. In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 134, 147, 99 P.2d 251. Under this rule, as the respondents alleged and the court found that the assets and property of the association upon liquidation will enable its creditors and investors to receive approximately 65 cents on each dollar owed them, the determination concerning interest is erroneous.

[29] The determination of the commissioner to liquidate an association, after taking possession of its property, business, and assets, is evidenced by the filing of an inventory of its assets and the publication of notice to all persons having claims against it, whether as creditors or investors or otherwise, to present them within a specified period. Sec. 13.16. But by stipulation of the parties, they have agreed that liquidation of the association commenced on January 23, 1933. Accordingly, the judgment is modified by striking therefrom the words "to date of payment" (par. 3) and inserting in lieu thereof "to January 23, 1933," and as so modified, the judgment is affirmed, respondents to recover costs upon appeal.

GIBSON, C. J., and SHENK, CURTIS, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. The majority opinion concedes not only that plaintiffs failed to present a claim to the Building and Loan Commissioner pursuant to section 13.16 of the Building and Loan Association Act (Deering's Gen. Laws, Supp., Act 986) but that under a proper construction of the act they could not be regarded as investors excused from presenting claims since their claims did not appear on the books of the association. Plaintiffs are thus allowed to recover without complying with the statutory conditions to recovery. I do not agree that this paradox is compelled by the doctrine of the law of the case.

The first appeal in this action involved the sufficiency of the allegations of plaintiffs' second amended complaint. The present appeal involves the sufficiency of the evidence to support the findings and judgment. The opinion of the District Court of Appeal on the first appeal sets forth that paragraph III of the second amended complaint alleged that plaintiffs were investors within the meaning of section 13.16 of the Building and Loan Association Act (Deering's Gen. Laws, Supp., Act 986). It appears that defendants contended that there was an inconsistency between the specific allegation of paragraph X of the second amended complaint that plaintiffs exchanged their interests for shares of stock in the State Capital Company, and the general allegations of paragraph III, and that the specific allegation was controlling. Little v. Union Oil Co., 73 Cal.App. 612, 238 P. 1066; Aitken v. Stewart, 129 Cal.App. 38, 18 P.2d 988. The court declared that this contention would be persuasive if there were no other facts involved. "But there are many other allegations. The plaintiffs alleged that by the fraudulent misrepresentations of the defendant corporation they were induced to exchange securities, issued by the defendant corporation, for securities of State Capital Company, an agent of said defendant; that such exchange was not based on any consideration moving from plaintiffs to defendant; that the defendant corporation still holds the securities which the plaintiffs delivered to it; *and that all of said facts appear on the books and records of said defendant.* [Italics added.] In other words they alleged in effect that there was merely an exchange in form but not in fact, and that the transaction was a mere change in the form of accounts between the plaintiffs and the corporate defendant. Manifestly if these allegations are true, and the defendants' motions admitted the truth thereof, it is clear the plaintiffs are and at all times have been 'investors' in the defendant corporation. We are unable to say, therefore, that the plaintiffs' complaint did not state facts sufficient to constitute a cause of action." Allen v. California Mut. B. & L. Ass'n, 40 Cal.App.2d 374, 378, 379, 104 P.2d 851, 853.

It is clear from the foregoing that the second amended complaint was held to state a cause of action not simply because of the alleged fraud, but because all the facts showing the fraud and showing the exchange to be without consideration and merely an exchange in form, appeared on the books and records of the defendant. This allegation that all such facts appeared on the books and records of defendant relates to the terms of section 13.16 that an investor need not present a claim with respect to "any claim shown by the books of the association to exist in his favor against the association." Nothing in the record, however indicates that such facts appeared on defendant's books and records. The books of the defendant association showed that plaintiffs ceased to be certificate holders in the association between 1929 and 1931. The books of the State Capital Company showed that at about the same time plaintiffs became stockholders in that company. Plaintiffs do not state the nature of their action, but whether it is an action for rescission, for damages, or to quiet title, the claims asserted did not appear upon the books and records of the association. They are therefore barred by the provisions of the Building and Loan Association Act relating to the presentation of claims in liquidation.

The majority opinion does not rest with its interpretation of the opinion of the District Court of Appeal but extends the doctrine of the law of the case to issues that were not considered in that opinion. In the present appeal defendants contend that plaintiffs' rights are barred by the statute of limitations. The majority opinion holds that since the availability of this defense was established by the pleadings, the District Court of Appeal determined that the statute was inapplicable by holding the pleadings sufficient even though it does not mention the statute. It has long been settled in this state, however, that only issues considered in the earlier opinion become the law of the case. Trower v. City and County of San Francisco, 157 Cal. 762, 765, 109 P. 617; Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049; Central Nat. Bank v. Peck, 15 Cal.App.2d 512, 59 P.2d 599; see Moore v. Trott, 162 Cal. 268, 273, 122 P. 462; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St.Rep. 87; Cowell v. Snyder, 171 Cal. 291, 297, 152 P. 920; Klauber v. San Diego Street Car Co., 98 Cal. 105, 107, 32 P. 876. With two exceptions, the cases relied upon in the majority opinion involved res judicata, and the rule announced in relation to that doctrine has no application to the doctrine of the law of the case. The first of the two cases not concerned with res judicata, Texas Co. v. Moynier, 137 Cal.App. 112, 29 P.2d 873, holds merely that when a judgment is reversed with directions, the trial court must follow the directions. In the second, People v. Walton, 10 Cal.App.2d 413, 51 P.2d 1117, the court disposed of a question on the merits, noting that the opinion on a previous appeal had reached the same result. The doctrine of res judicata does not require a court to decide a case on an erroneous basis, as the law of the case does, and is therefore not so narrowly applied. Allen v. Bryant, 155 Cal. 256, 258, 100 P. 704; see England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813; 2 Cal.Jur. 947. It is designed to make a judgment the final determination of a lawsuit by precluding the parties from presenting the same cause anew even when they have additional arguments. The decision that is the law of the case, however, is made in anticipation of further litigation, and is intended not as a final determination of the rights of the parties but as a guide upon retrial. It does not foreclose the consideration of new legal issues arising from changes in the evidence or pleadings (Cowell v. Snyder, supra; Bayer v. Barrett, 127 Cal.App. 305, 15 P.2d 801; 5 C.J.S., Appeal and Error, § 1964, p. 1508; 2 Cal.Jur. 951), and there is no reason why it should foreclose the presentation of issues not previously considered.

SCHAUER, J., concurred.

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ELLIOTT et al. v. BERTSCH.

Civ. 6789.

District Court of Appeal, Third District, California.

June 30, 1943.

1. Pleading 🔑114

It is not essential that traverse should be expressed in negative words, since in construction of pleading, for purpose of determining its effect, its allegations must be liberally construed with view to substantial justice between parties. Code Civ.Proc. § 452.

2. Pleading 🔑114

Generally, any allegation in an answer which, if found to be true, necessarily shows allegation of complaint as to same matter is untrue, is a good "traverse" and sufficient as a denial. Code Civ.Proc. § 452.

See Words and Phrases, Permanent Edition, for all other definitions of "Traverse".

3. Pleading 🔑114

Where plaintiffs alleged ownership of land by adverse possession, defendant's specific allegation of ownership of water and water rights was directly contrary to plaintiffs' allegation of ownership and therefore was sufficient denial and placed both questions in issue. Code Civ.Proc. § 452.

4. Adverse possession 🔑114(1)

Plea of adverse possession must be sustained by the clearest and most satisfactory proof.

5. Adverse possession 🔑112

Plaintiffs who claimed land by adverse possession had burden of proving all elements necessary to establish such possession in manner and for time prescribed by law.

6. Adverse possession 🔑106(1)

The measure of a prescriptive right is the extent and manner of its use at time it accrued.

7. Adverse possession 🔑33, 85(1)

Plaintiffs who claimed land by adverse possession had burden of clearly proving open and notorious use, hostile and adverse to the original owner's title.

8. Adverse possession 🔑85(1)

Unless use by adverse possessors was so open and notorious and of such a nature as to impute knowledge and unless shown to have been adverse and not permissive, such use was "permissive" in absence of proof to the contrary.

See Words and Phrases, Permanent Edition, for all other definitions of "Permissive Use".

9. Quieting title 🔑47(2)

Where action to quiet title involved two parcels of property, and bond for deed, under which defendant claimed easement to water, covered only one parcel, findings that defendant was owner of water on one parcel and plaintiffs were owners of water on other were not inconsistent.

10. Trial 🔑397(1)

Generally, unless waived, full findings are required on all material issues. Code Civ.Proc. § 632.

11. Appeal and error 🔑1071(6)

A party cannot complain of failure to make findings when, if made, they must necessarily be adverse to him. Code Civ. Proc. § 632.

12. Appeal and error 🔑1071(6)

Where plaintiffs in action to quiet title failed to sustain burden of establishing elements necessary to establish ownership of water rights by adverse possession, plaintiffs could not complain of lack of finding on the question, since a finding, of necessity, would have had to be against plaintiffs. Code Civ.Proc. § 632.

13. Appeal and error 🔑1071(6)

One who has burden of proof on issue and who offers either no evidence or only slight evidence is not prejudiced by failure of trial court to find on such issue. Code Civ.Proc. § 632.

14. Judgment 🔑681

Where predecessors in interest of plaintiffs who claimed title to land, and of defendant who claimed right of easement for water, were parties to prior foreclosure action, there was "privity" of interest and the parties were bound by determination in foreclosure action that defendant's predecessors had certain water rights. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

15. Judgment 🔑950(1)

In action to quiet title, judgment entered in favor of defendant's predecessors in interest for easement for water, in a prior foreclosure proceeding, was admissible under defendant's general allegation of ownership even though defendant did not specifically plead the judgment. Code Civ.Proc. § 1908.

16. Judgment 🔑678(1)

A judgment necessarily affirming the existence of any fact is conclusive on the parties or their privies whenever existence of that fact is again at issue between them.

17. Judgment 🔑712

In action to quiet title wherein plaintiffs claimed title under sheriff's deed resulting from mortgage foreclosure and defendant claimed easement for water, decree in prior foreclosure action which found that defendant's predecessors were owners of water rights was admissible as evidence of defendant's title, even if decree were not conclusive. Code Civ.Proc. § 1908.

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Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Wilson E. Elliott and others against Clarence F. Bertsch to quiet title to land. From judgment quieting plaintiffs' title subject to certain easement to water in favor of the defendant, plaintiffs appeal.

Affirmed.

Hill & Hill, of Eureka, for appellant.

John F. Quinn, of Eureka, for respondent.

PEEK, Justice.

Plaintiffs appeal from a judgment quieting their title to certain real property subject to defendant's easement to the water on said land, and the further right to lay and maintain water pipes in connection with the use thereof.

Plaintiffs acquired title to the property by virtue of a sheriff's deed dated October 15, 1928, resulting from the foreclosure of a mortgage on the property in question. The right of easement claimed by the defendant had its source in a conditional sales agreement entitled "Bond for Deed", dated September 11, 1907. Plaintiffs' immediate predecessors in interest, the mortgagors under said mortgage, were the successors in interest of H. Johansen, who also was the grantor of the water and water rights to F. H. Bertsch and wife, the predecessors in interest of their son, the defendant herein.

The plaintiffs' complaint contained two causes of action, the first, following the usual quiet title procedure, alleged ownership and possession, while the second was based upon an allegation of adverse possession. The defendant's answer which denied plaintiffs' first cause of action made neither reference to nor denial of plaintiffs' allegation of adverse possession but affirmatively alleged ownership of certain water and water rights on the land.

At the conclusion of the hearing the court made its decree as previously mentioned. The plaintiffs thereupon proposed certain findings of fact and conclusions of law to the effect that the allegations in their complaint relative to their ownership and possession were true; that upon receipt of the sheriff's deed they had entered into possession of the premises and ever since have been in "actual, continuous, open, notorious, exclusive and adverse possession thereof, and used the waters thereon for the ordinary purposes of husbandry and paid all the taxes thereon."

Such proposed findings were rejected by the trial court with a statement in a memorandum of opinion particularly addressed to the question of adverse possession that: "I do not believe the evidence warrants such a finding. * * * In the present case the court has already found the easement of water rights was acquired by deed and there has been no use by the plaintiffs, the owner of the premises, which is adverse to the defendant's enjoyment of such right. * * *."

The Findings of Fact and Conclusions of Law, as signed by the court, in effect were as follows:

That the plaintiffs were the owners of certain real property described in the complaint except that the defendant was the owner of certain water rights and easements in relation thereto, and that the ownership of plaintiffs was subject to the rights of defendant. There was no finding on the question of adverse possession. The court then found as a conclusion of law that plaintiffs were entitled to a decree quieting their title to the real property subject to defendant Bertsch's interest in the water and water rights, and gave judgment accordingly.

Numerous questions are raised by plaintiffs in this appeal, (1) that the finding that defendant was the owner of all water rights on said property was not sustained, for by the failure to answer plaintiffs' second cause of action defendant admitted the adverse possession of plaintiffs; (2) that even if that were not the law, the adverse possession of plaintiffs was established by uncontradicted evidence; (3) that the findings are inconsistent in that both parties are found to be the owners of the water and water rights; (4) that the trial court refused to make a finding on the issue of adverse possession which was a material issue in plaintiffs' complaint; (5) that the admission of the judgment roll in the previous foreclosure proceedings was error and prejudicial to plaintiffs; (6) indefiniteness of the interest of defendant in the property included in the original contract of sale to support a finding that defendant had any interest therein, and (7) a lack of evidence that the terms of said agreement had been fulfilled.

[1-3] Defendant answers plaintiffs' first contention by stating that the affirmative allegation contained in his answer as regards the water is directly contrary to plaintiffs' allegation of adverse possession and therefore such affirmative defense placed in issue the entire question. Though defendant's allegation is more of an argument than a denial it is contrary to plaintiffs' allegation and is the equivalent of a direct denial. It is not essential that a traverse should be expressed in negative words, since in the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. Section 452, C.C.P; Perkins v. Brock, 80 Cal. 320, 22 P. 194. "It may be said, generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse and sufficient as a denial." Burris v. People's Ditch Co., 104 Cal. 248, 37 P. 922, 923. The defendant pleaded specifically his ownership of the water and water rights. Such allegation was directly contrary to plaintiffs' allegation of ownership, and therefore, according to the above rule, was a sufficient denial and placed both questions in issue.

[4-8] Plaintiffs insist that regardless of the pleadings the evidence of their adverse possession is uncontradicted. It must be admitted that no one should be deprived of his property upon a plea of adverse possession unless such plea is sustained by the clearest and most satisfactory proof. That burden was upon the plaintiffs to prove all of the elements necessary to establish adverse possession in the manner and for the time prescribed by law. An examination of the record in the present case discloses that the plaintiffs' case consisted of the testimony of the plaintiff, Wilson E. Elliott, that they had been in possession of the property since the date of the sheriff's deed; that they had paid all of the taxes, and upon such proof they rested their case. Upon cross-examination Elliott admitted he had dug a well and erected a windmill, had

placed a trough where water seeped in, and dug a ditch. No showing was made as to the amount of water used, nor the beneficial purposes and the reasonable necessity therefor, if any, for which it was used, nor if the use was continuous or seasonal, all of which was essential to his case. The measure of a prescriptive right is the extent and manner of its use at the time it accrued. 25 Cal.Jur. 1152, 1155, 1161. The plaintiffs had the further burden of clearly proving all of the other essential elements necessary to establish their title by adverse possession, i. e. actual, open and notorious use, hostile and adverse to the original owner's title. 25 Cal.Jur. 1157, 1158; Crain v. Hoefling, 56 Cal.App.2d 437, 132 P.2d 882. Unless the use by plaintiffs was so open and notorious and of such a nature as to impute knowledge, and unless shown to have been adverse and not permissive, such use must be held to be permissive in the absence of proof to the contrary. Crain v. Hoefling, supra.

[9] Plaintiffs further complain that the findings are inconsistent in that the court finds both plaintiffs and defendant are entitled to the water in question. From our examination of the record we understand it to be that two parcels of property are involved, and that the "Bond for Deed" covered only one parcel; therefore, a finding that the defendant was the owner of the water on the one parcel and that plaintiffs were the owners of the water on the other, cannot be considered as inconsistent.

[10-13] Plaintiffs also contend that their allegation of adverse possession presented a material issue within the contemplation of Section 632 of the Code of Civil Procedure, and therefore it was mandatory upon the trial court to make a finding thereon. It is generally true that unless waived, full findings are required on all material issues, the exception being that a party cannot complain of a failure to make findings when, if made, they must necessarily be adverse to him. The evidence produced by plaintiffs failed to prove the elements necessary to establish ownership of the water by adverse possession. As the plaintiffs failed to sustain the burden which the law placed upon them of establishing each element of their case by satisfactory proof it is obvious that had the trial court found on this question such finding of necessity would have had to be against them, and therefore plaintiff cannot complain of the lack of such finding. Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226. It is also true that the one who has the burden of proof upon an issue and who offers either no evidence or only slight evidence is not prejudiced by a failure of the trial court to find on such issue. Pinheiro v. Bettencourt, 17 Cal.App. 111, 118 P. 941.

[14, 15] Nor does this court find merit in appellant's further contention as regards the introduction of certain evidence alleged to have been improper, to wit, the judgment roll in the foreclosure proceedings out of which the plaintiffs received their deed from the sheriff. The disposition made of this issue makes it unnecessary to discuss the remaining questions raised by plaintiffs. It would seem that the findings and decree in the foreclosure proceedings were properly introduced in evidence. The titles claimed to the property in dispute were hostile to each other. The predecessors in interest of both parties herein were parties to the antecedent foreclosure action and thereby established a definite privity of interest. Therefore they were bound by the determination of the court in the previous foreclosure action which found "that the defendants F. H. Bertsch and Elida Bertsch are the owners of a certain water right * * *." Section 1908, C.C.P. In alleging his cause of action in the present case defendant did not specifically plead the judgment entered in favor of his predecessors in interest in the 1927 foreclosure proceedings. He did, however, offer the earlier judgment in evidence, and it was accepted over plaintiffs' objection. Under defendant's general allegation of ownership it was properly admitted by the trial court. McKinley Bros. v. McCauley, 215 Cal. 229, 9 P.2d 298.

[16, 17] It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again at issue between them. In re Clark's Estate, 190 Cal. 354, 212 P. 622; Freeman on Judgments, Sections 249, 253. Even though this fact were not true, nevertheless the foreclosure proceedings would be competent evidence of defendant's title and therefore were properly admitted by the trial court. Chapman v. Moore, 151 Cal. 509, 91 P. 324, 121 Am.St.Rep. 130; Scott v. Warden, 111 Cal.

App. 587, 296 P. 95; Alamenda County Title Insurance v. United States F. & G. Co., 121 Cal.App. 73, 8 P.2d 912.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

59 Cal.App.2d 597

MANNON v. PESULA et al.

STANDISH et al. v. YORKVILLE LUMBER CO., Ltd.

Civ. 12411.

District Court of Appeal, First District, Division 1, California.

July 8, 1943.

Hearing Denied Sept. 1, 1943.

1. Corporations ⚷298(1), 398(3)

Where corporation, by its president and secretary, who were majority stockholders, consented to sale of machinery in which corporation claimed an interest, sale was authorized, notwithstanding that no formal meeting authorizing sale was conducted.

2. Corporations ⚷426(9)

A corporation, by seeking to recover proceeds of sale of machinery in which it claimed an interest "ratified" the sale, even if sale was originally unauthorized.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratify".

3. Liens ⚷7

Equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and to prevent unfair result.

4. Liens ⚷7

Where conditional sales contract whereby machinery, cutting rights and timber were to be sold provided that buyers should pay to bank certain amount for each 1,000 feet of lumber sold, the payments to be applied to extinguishment of certain debts of seller, contract impliedly gave seller's creditors whose debts were to be extinguished out of payments under contract an "interest" in machinery for security purposes in event buyers defaulted.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

5. Contracts ⚷187(3)

Where conditional sales contract whereby machinery, cutting rights and timber were to be sold provided that buyers should pay to bank certain amount for each 1,000 feet of lumber sold, the payments to be applied to extinguishment of certain debts of seller, seller's creditors whose debts were to be extinguished out of payments under contract were "third party creditor beneficiaries" of the contract, and contract could be enforced by them. Civ. Code, § 1559.

See Words and Phrases, Permanent Edition, for all other definitions of "Third Party Creditor Beneficiary".

6. Sales ⚷479(2)

A default in terms of conditional sales contract by conditional buyer and repossession by conditional seller is not a "rescission" of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Rescission".

7. Contracts ⚷272

Even if parties to conditional sales contract in which certain creditors of conditional seller were third party creditor beneficiaries could rescind contract at any time before creditor beneficiaries brought suit, evidence of buyer's default did not establish a "rescission" precluding third party creditor beneficiaries from enforcing the contract. Civ.Code, § 1559.

8. Contracts ⚷274

Where agreement was entered into by conditional seller of machinery, cutting rights and timber with certain creditors of seller whose debts would be extinguished out of payments under conditional sales contract, that in event of buyer's default, creditors should have a security interest in repossessed property, even a formal rescission of contract would not affect creditors' right to security interest in property.

9. Judgment ⚷251(1)

Fact that a party pleads an erroneous theory does not bar him from recovering, if he also pleads facts to support a proper theory of recovery.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action in interpleader by Charles M. Mannon against Anna Pesula and others, wherein cross-complaints were filed by Yorkville Lumber Company, Ltd., Allan Standish, Henry B. Hickey, and Emma R. Hickey, as executor and executrix of the estate of H. B. Hickey, deceased. From a judgment in favor of Yorkville Lumber Company, Ltd., Allan Standish and Henry B. Hickey and Emma R. Hickey, as executor and executrix of the estate of H. B. Hickey, deceased, appeal.

Reversed.

R. Clarence Ogden, of San Francisco, for appellants.

Harry W. Falk, Jr., and Charles Kasch, both of Ukiah, for respondent.

PETERS, Presiding Justice.

Charles M. Mannon brought this action in interpleader to determine conflicting claims to the sum of $1,975.31, the proceeds from the sale by Mannon of certain sawmill machinery and equipment. The conflicting claimants, each of whom filed cross complaints, are Yorkville Lumber Company, Ltd., in whose favor the trial court found, and H. B. Hickey and Allan Standish, the appellants. Hickey has since died and his executors have been substituted. Others were named as defendants but were either never served or have defaulted.

The facts are as follows: In 1932 C. J. Pesula and N. P. Burgess entered into a partnership for the purpose of cutting and manufacturing into lumber certain timber growing on lands then owned by Miles Standish. Miles Standish died and Allan Standish and H. B. Hickey became the owners of the timberland. In May of 1932 Standish and Hickey entered into a written agreement with Pesula, who was acting on behalf of the partnership, under which Pesula was to harvest timber on the Standish and Hickey lands and to manufacture it into lumber there. It was contemplated that Pesula and Burgess would construct a sawmill on the premises. The agreement provided that from the proceeds of the sale of the lumber Standish and Hickey were to be paid $1 per thousand feet of lumber sold; Pesula was to receive $1 per thousand feet to amortize the cost of the sawmill; operating expenses were to be paid, the balance divided equally between the contracting parties.

Pesula and Burgess did not have sufficient capital to purchase and install the sawmill. The construction of the mill and the purchase of the required machinery were almost entirely financed through loans from the Savings Bank of Mendocino County. The first loan from the bank was secured in July of 1932. The bank was unwilling to lend the money without security. Standish and Hickey agreed to and did give the bank as security a deed to the timberland, intending it as a mortgage. This was in accordance with an oral arrangement between Pesula and Burgess, and Standish and Hickey. When Pesula and Burgess needed more money the bank was unwilling to make further loans without more security. In August, 1932, Hickey pledged with the bank his personal collateral of a value of $10,000 as additional security for the Pesula-Burgess loans. Further loans were made until in November, 1932, Pesula and Burgess owed the bank $9,000.

The payment of these loans was admittedly the primary obligation of Pesula and Burgess. A large portion of the money secured from the bank was used to install and build the sawmill, and to make payments thereon to the sellers. Burgess testified that some portion of the purchase price had been advanced by him and Pesula, but he was unable to remember or estimate the amount that had been so contributed. The only reasonable inference from the evidence is that the borrowed funds paid for the major portion of purchase price and installation of the machinery and equipment, the proceeds from the sale of which are the subject of the present action.

The construction of the sawmill was completed in November, 1932, and operations began. At about this time Pesula and Burgess organized a corporation, the respondent Yorkville Lumber Company, Ltd., to take over operations. It was intended that this corporation should issue 250 shares. A permit was secured from the Corporation Commissioner which provided for the issue of 247 shares to be divided equally between Pesula and Burgess in exchange for a transfer by them of their cutting rights to the timber and interest in the machinery and equipment. The other three shares were to be issued for

$100 per share. Certificates for one share each in the names of Pesula, Burgess and Mannon (plaintiff herein) were prepared and detached from the stock book, and thereafter retained in the law office of Mannon who had handled the incorporation. The three men constituted the board of directors and officers of the corporation. Mannon was also president of the bank that had made the loans above described. The $100 a share required by the permit was not paid for these three shares. What was done about the other 247 shares is not shown by the record. It is admitted that Pesula and Burgess at no time formally executed a transfer of the cutting rights to the timber or of their interest in the sawmill to the corporation. It is admitted by all here concerned, however, that after the corporation was organized it thereafter conducted operations on the lands, and both parties to this appeal discuss the rights of the parties as if Yorkville Lumber Company, Ltd., subsequent to its formation, owned the machinery in question. It is apparent that Pesula and Burgess were the beneficial owners of the corporation, and that the recovery by the Yorkville Company in the present action is, in effect, recovery by Pesula and Burgess.

In February, 1933, the Yorkville Company increased its loan from the bank to $12,000 for which the corporation executed two $6,000 notes, the old Pesula and Burgess notes being surrendered. Standish and Hickey had agreed with the bank that the deed, and the Hickey pledge of collateral, should be security for the indebtedness of the Yorkville Company to the bank.

In June of 1934 the Yorkville Company borrowed $5,000 from Standish, for which it gave Standish its promissory note. Thus, at this time, the land and timber of Standish and Hickey were mortgaged to secure the $12,000 indebtedness of the Yorkville Company to the bank. In addition, Hickey had pledged collateral of a value of $10,000 to secure that indebtedness, and Standish had loaned the company $5,000. Although the machinery and equipment had been largely, if not entirely, purchased and installed with these borrowed funds, title thereto was in the Yorkville Company, and Standish and Hickey and the bank had no written evidence of any lien thereon for security.

In the fall of 1934 the Yorkville Company ceased operating the mill, having found the operation not profitable. Nothing had ever been paid to Standish and Hickey under the agreement whereby they were to receive $1 per thousand feet of lumber manufactured and sold. All sums received from the sale of the lumber were paid to the bank to be applied on the loan or were used in paying for operations. After operations ceased in 1934 some lumber was thereafter sold and the proceeds paid to the bank. In March of 1936 the Yorkville Company's debt to the bank had been reduced to $9,200.

Prior to March of 1936 Standish and Hickey incorporated under the name of Standish & Hickey, Ltd., and apparently conveyed title to the timberlands to this company. No facts concerning this incorporation appear in the record, but it is apparent that Standish and Hickey were the beneficial owners of that company, and that it may be treated as the alter ego of those two men, and it is so treated by the parties here involved.

On March 31, 1936, a written agreement was entered into between the Yorkville Company and Standish & Hickey, Ltd., as first parties, and R. E. Williams and H. B. Hickey, Jr., as second parties. H. B. Hickey, Jr., is the son of Hickey, who, with Standish, owned the land. This agreement is the basis of appellants' claim to the proceeds from the sale of the machinery. It recites that Standish & Hickey, Ltd., owns the timber on the lands in question subject to the cutting rights of the Yorkville Company, and that the last named company owns the cutting rights and the machinery located on the land, and that the Yorkville Company is indebted to the Savings Bank of Mendocino County. It provides that the first parties agree to sell and the second parties agree to buy the timber, sawmill, machinery, appliances, tools and accessories. The second parties agree to prosecute lumbering operations diligently and to pay the bank $3 for each thousand feet of lumber sold and shipped from the sawmill until 9,000,000 feet shall have been paid for, or all the timber manufactured and sold. If there are more than 9,000,000 feet, all footage over that figure is to be paid for at the rate of $1.00 per thousand feet. As to the disposition of the money paid to the bank the agreement provides:

"Said Savings Bank of Mendocino County shall apply all moneys received by it hereunder to the extinguishment of the debt owing to it by Yorkville Lumber Company, and the debt owing to Allan M. Standish by Yorkville Lumber Company and thereafter shall apply all moneys received hereunder as jointly directed by Yorkville Lumber Company, Ltd., and Standish & Hickey, Ltd."

It is then provided that "first parties [which includes Standish and Hickey as well as the Yorkville company] reserve title to all property covered by this contract" except that title to the lumber shall pass to second parties at the time of manufacture; that first parties agree that on the fulfillment of the contract they will execute a bill of sale to the personal property to second parties; that if second parties default, first parties shall be released from all obligations and second parties shall forfeit all right to the property, and all payments made by the second parties prior to such default shall be retained by the first parties as rent for the use of the premises and equipment and as compensation for the lumber. The agreement is signed by Standish & Hickey, Ltd., by H. B. Hickey, president, and A. M. Standish, Secretary; by Williams, and Hickey, Jr., and by the Yorkville Lumber Co., Ltd., by C. J. Pesula, President, and Charles M. Mannon, Secretary. Burgess did not approve this transaction, and did not sign the agreement.

Hickey, Jr. and Williams went into possession under this agreement and operated for some time. Pursuant to the agreement they paid to the bank several thousand dollars at the rate required in the agreement, which was applied by the bank to the loan due it. In May of 1937 Hickey, Jr., and Williams discontinued operations. The contract provided a formal means of default by which such default was to be "conclusively established." That means was not adopted by Hickey, Jr. and Williams. They simply ceased operations and moved off the premises. There can be no doubt but that they defaulted under the contract. They make no claim to any part of the proceeds from the sale of the equipment.

Early in June, 1937, a meeting was held at Mannon's office to determine what should be done. Mannon, Ogden, attorney for appellants, Pesula, Hickey, Sr., Hickey, Jr., one Peterson who represented Williams, and apparently Burgess, were present. At that time Hickey, Jr., and Williams (and the Yorkville Company) owed the bank $7,240.54. Mannon and Allan Standish testified that all parties present agreed that the mill equipment should be sold by Mannon for the best price he could get, and that he should be the judge of the price. It was further agreed, according to Mannon, that the proceeds from the sale shoud be applied to the debts of the Yorkville Company, to the bank and to Standish. Burgess participated in the discussion and "didn't protest" against the above agreement, according to Mannon. This testimony of Mannon was corroborated by several of the others then present. Burgess testified he could not remember the meeting of June, 1937, that he may or may not have been there. He further testified that he had an informal understanding with Mannon that the latter could attempt to find a purchaser, but that no price was set, and Mannon was to consult the stockholders if he got a buyer. Thereafter, Mannon took charge of the property and sent several prospective purchasers to look it over. He was unable to immediately find a purchaser. In October, 1938, the bank refused to wait longer for its money. It paid the debt owing to it by the Yorkville Company by the sale of the Hickey collateral, and the notes of the Yorkville Company were marked "paid" and delivered to Hickey, Sr.

Mannon finally found a purchaser for the machinery and equipment in April of 1940, and it was sold to him for slightly less than $2,000. Before he completed the sale Mannon communicated with Pesula's attorney and with Standish. He was not sure whether he communicated with Hickey, Jr., and Williams. He had also written to Burgess enclosing a form of consent. He received no reply from Burgess. On April 18, 1940, he completed the sale. A dispute having arisen over who was entitled to the money, he instituted this suit in May, 1941.

The trial court found that Mannon had no authority to sell the machinery, and that the sale constituted a conversion. The finding of conversion is immaterial. No personal judgment was sought against Mannon. During the trial a stipulation, signed by the attorneys for appellants and respondent, was introduced in evidence which provided that Mannon could deposit the sums received by him with the clerk of the court and "be discharged from all liability to all defendants herein."

The finding that Mannon had no authority to sell, insofar as it affects the rights of any of the litigants now before the court, is unsupported by the evidence. It is true that Burgess testified that he did not give his consent to the sale, but his personal consent was not required. Pesula and Mannon were two of the three directors of the Yorkville Company. They were also president and secretary of that company, and between them controlled a majority of the stock. They consented to the sale. Standish and Hickey, Sr., Williams and Hickey, Jr., also consented.

[1] The fact that Burgess may or may not have been present at the June, 1937, meeting, and the fact that he did or did not consent to the sale, are false issues. The Yorkville Company was present in the persons of its president and secretary. They consented. It is true that the meeting was not conducted formally as a meeting of the Yorkville Company, nor were minutes kept, but two directors, the majority stockholders, and the president and secretary consented. Burgess had opposed the decision of Pesula and Mannon to have the Yorkville Company enter into the Hickey, Jr.-Williams contract, but it is not contended that such agreement was not binding on the Yorkville Company by reason of the concurrence of the two other directors.

[2] There is another reason why Burgess' failure to consent is immaterial. This is a contest over the proceeds of the sale, with the Yorkville Company claiming on one hand, and Standish and Hickey claiming on the other. It is not an action for conversion nor to set aside the sale and recover the property. By seeking to recover the proceeds of the sale, the Yorkville Company has necessarily ratified that sale, even if it was unauthorized originally as to that company by reason of the absence of consent by Burgess. The classic example of ratification occurs where an agent has sold without authority, and the principal, instead of repudiating the sale, ratifies by suing for the purchase price. (See cases collected 1 Cal.Jur. p. 774, § 67.) The Yorkville Company, by laying claim to the proceeds of the sale, ratified the sale.

On the evidence above summarized the trial court found that the Yorkville Company on April 18, 1940, was the owner and entitled to possession of the sawmill, machinery and equipment, that Standish and Hickey had no interest therein, and that the Yorkville Company was entitled to the proceeds of the sale. It was the position of the trial court, and it is the position of the Yorkville Company on this appeal, that the situation is one where title to the machinery was in the Yorkville Company, and Standish and Hickey failed to protect themselves by taking a lien thereon.

[3] The facts present a somewhat unusual situation. The sawmill equipment was purchased and installed almost entirely with funds of Standish and Hickey. Pesula and Burgess may have contributed an undetermined amount and may have contributed their time, but the major portion of the cost was paid for by Standish and Hickey. The loans from the bank and the $5,000 loan from Standish were obtained with the express understanding that the funds should be invested in the sawmill. In addition, the timber belonging to Standish and Hickey has been cut and they have not received one cent therefor. Standish and Hickey, as well as the Yorkville Company, hoped to share in the profits of the venture. The funds were so invested, but did not yield the contemplated profit. All that is left of the venture is the proceeds from the sale of the machinery. Standish was never repaid, and the bank loans were satisfied through the sale of the Hickey collateral. The result is that the funds and property of Standish and Hickey have purchased the machinery. Even if the debts owed by the Yorkville Company to Standish and Hickey are barred by the statute of limitations, as respondent contends but did not prove, it would seem that under the circumstances the powers of equity are broad enough to create an equitable lien on the proceeds of the sale of the equipment. Those proceeds are far less than the total sum owing from the Yorkville Company to Standish and Hickey. The equity courts look with favor upon equitable liens, and frequently such liens are employed to do justice and equity and to prevent unfair results. Carter v. Holt, 28 Cal.App. 796, 154 P. 37; Hurley v. Atchison, Topeka & Santa Fe Ry., 213 U.S. 126, 29 S.Ct. 466, 53 L.Ed. 729; Red Bud Realty Co. v. South, 96 Ark. 281, 131 S.W. 340; Pacific Ready Cut Homes v. Title I. & T. Co., 216 Cal. 447,

14 P.2d 510; City of Los Angeles v. Knapp, 7 Cal.2d 168, 60 P.2d 127; Wagner v. Sariotti, 56 Cal.App.2d 767, 133 P.2d 430.

[4] It is not necessary, however, to rely solely on the theory of an equitable lien in order to conclude that Standish and Hickey had an interest in the machinery. The contract of March 31, 1936, reasonably interpreted, gave them such an interest. That contract was between the Yorkville Company, Standish & Hickey, Ltd., which was the alter ego of Standish and Hickey, and Hickey, Jr., and Williams. This contract describes the Yorkville Company as the owner of the machinery and cutting rights, and Standish & Hickey, Ltd., as the owner of the timber. It was primarily a conditional sales contract whereby the machinery, cutting rights, and timber were to be sold to Hickey, Jr., and Williams. But the contract also conferred certain important rights on Standish and Hickey. It provided that the buyers should pay to the bank $3 for each thousand feet of lumber sold. This payment was the consideration for timber, as well as for the machinery. The payments made to the bank under this contract were to be applied to the extinguishment of the Yorkville Company's debt to the bank (to which Hickey has been subrogated) and to the $5,000 debt owing by the Yorkville Company to Standish. It must be remembered that the Yorkville Company had completely ceased operations in 1934. Obviously, Standish and Hickey were unwilling that the buyers under the conditional sales contract should go into possession of their timber or of the machinery that their money had purchased unless some provision was made for their protection. The provisions that the buyers should pay the bank, and the bank should apply the money to the Yorkville Company's debts, were patently designed to give Standish and Hickey the protection they needed. To that extent it was an agreement between the Yorkville Company and Standish & Hickey, Ltd., whereby Standish and Hickey were to have security for their respective claims. It is a clear implication from the agreement that the bank (and therefore Hickey) and Standish were given an interest in the machinery and equipment for security purposes in the event that the buyers defaulted. When the buyers did default the interest which the bank (and therefore Hickey) and Standish had in the consideration to be paid by the buyers, attached to the property which had been the subject of that contract. When the contract is considered as a whole, and in the light of its background, this construction is reasonable and fair and in no way strained. It is fortified by the agreement made in Mannon's office in 1937, to the effect that he should sell the machinery and apply the proceeds to the Yorkville Company's debts to the bank and to Standish.

The situation is simply, one where Standish and Hickey have entered into a contract with the Yorkville Company that the bank and they shall have an interest in the consideration to be paid by the conditional buyers for the lumber and machinery. By clear and reasonable implication the bank and Standish and Hickey were given an interest in the property for security purposes which attached when the conditional buyers defaulted. When Mannon sold the property, Standish, and Hickey as successor to the bank's interests, were entitled to the proceeds of the sale in payment of their claims. It is unnecessary to determine the relative rights of Standish and Hickey because they have agreed that judgment may be entered in their favor without such division.

[5] Appellants also contend that they were third party creditor beneficiaries of the 1936 contract. That is undoubtedly true. Williams and Hickey, Jr., instead of paying the Yorkville Company and Standish & Hickey, Ltd., for the lumber and machinery, were to pay the bank for the benefit of the bank and Standish, both being creditors of the Yorkville Company. The contract expressly provided that the bank (to whose rights Hickey has been subrogated) and Standish should be paid by Williams and Hickey, Jr. The contract was therefore expressly for their benefit and may be enforced by them. § 1559, Civil Code. But the contract was more than an ordinary third party creditor beneficiary contract. As already pointed out, there was a contract between Standish and Hickey and the Yorkville Company by which the latter expressly agreed, for the protection of the former, that the bank and Standish should have an interest for security purposes in the consideration to be paid by Hickey, Jr., and Williams, and by necessary implication agreed that such security interest should attach to the property in case of default by Hickey, Jr., and Williams.

[6-8] The respondent argues that if Standish and Hickey were third party beneficiaries of the 1936 contract, the contracting parties have rescinded, which they may legally do, without the consent of the third party. Section 1559 of the Civil Code does provide that a third party beneficiary may enforce the contract "at any time before the parties thereto rescind it." It is argued that this section recognizes the right of the contracting parties to rescind prior to attempted enforcement by the creditor beneficiary. The theory of respondent is that when Hickey, Jr., and Williams failed to complete the contract there was, in effect, a rescission, which terminated the rights of the bank and Standish as third party creditor beneficiaries. If it be assumed, as contended by respondent, that the contracting parties may rescind any time before the creditor beneficiary brings suit, there was no rescission in the instant case. A default by a conditional buyer and repossession by the seller is not a rescission. Moreover, for reasons already stated, this was not an ordinary creditor beneficiary contract. In addition, there was a contract between the Yorkville Company and Standish and Hickey that in the event of default the bank and Standish should have a security interest in the repossessed property. The default by Hickey, Jr., and Williams was the very event which brought this implied term of the contract into operation. Even a formal rescission would not affect that provision.

[9] Respondent also urges that under the allegations of their cross complaint appellants may not recover except on the theory of pledge, and that such theory is unsound. The theory of the cross complaint is that when the Yorkville Company ceased operations in 1934 Standish and Hickey went into possession of the land and equipment; that when the 1936 contract was made, Hickey, Jr. and Williams, besides being conditional buyers, were pledgeholders of the equipment as security for the debts of the Yorkville Company to the bank and Standish; that when Mannon went into possession in 1937 he did so as pledgeholder; that he sold the property as pledgeholder. This theory is quite artificial, and we agree with respondent that it was properly rejected by the trial court. It is not urged by appellants on this appeal. The fact that appellants pleaded an erroneous theory, however, does not bar them from recovery, if they also pleaded facts to support a proper theory of recovery. The answer and cross complaint of the Yorkville Company alleges that that company owns and is entitled to the possession of the machinery and the proceeds from its sale. In their answer to this cross complaint appellants deny these allegations. The contract of 1936 is pleaded as an exhibit to the pleading of appellants. Respondent was clearly informed that that contract formed the basis of appellants' claim. If, on any theory, that contract gives appellants any right to the proceeds of the sale (as we have already held it did), appellants are entitled to urge that theory.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concur.

CALIFORNIA EMPLOYMENT COMMISSION v. LOS ANGELES DOWN TOWN SHOPPING NEWS CORPORATION.

Civ. 14077.

District Court of Appeal, Second District, Division 2, California.

June 29, 1943.

Hearing Granted Aug. 26, 1943.

1. Master and servant 🔑5

The test by which to determine whether a person is acting as an "independent contractor" or as an "employee" involves question of control whether that right be exercised or not.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Taxation 🔑59

Where defendant had right to control and exercised control over minor carriers of free paper devoted to advertising retail merchandise, carriers were defendant's "employees" and not "independent contractors" and were in "employment", and defendant was liable for contributions to the unemployment fund for carriers. St. 1935, p. 1226.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

3. Constitutional law ⚿70(1)

Although courts in proper circumstances interpret doubtful expressions of the legislature, they may not add to or alter the statute or depart from the manifest legislative intent.

4. Taxation ⚿59

Where Unemployment Insurance Act did not make exceptions relieving defendant from liability for contributions to unemployment fund for minor paper carriers, and some carriers were earning sufficient from other work to make them eligible for present benefits, defendant was not relieved from liability for the contributions on ground that the carriers did not come within the act because they were not earning enough to enable them to obtain the benefits thereof. St.1935, p. 1226; p. 1228, § 7(d).

◆

Appeal from Superior Court, Los Angeles County; O. K. Morton, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against Los Angeles Down Town Shopping News Corporation, for unemployment fund contributions. From a judgment for plaintiff, defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher, Henry F. Prince, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen. (Forrest M. Hill and Doris H. Maier, both of Sacramento, of counsel), for respondent.

W. J. WOOD, Justice.

Defendant has appealed from a judgment enterd in favor of California Employment Commission for the amount of contributions due to the unemploymen fund for the period from January 1, 1936, to and including December 31, 1938. The statute of limitations barred recovery for any earlier period. Defendant does not dispute the amount of the judgment, but it contends that its carrier boys were not in such "employment" as is defined by the California Unemployment Insurance Act, Chapter 352, Statutes of 1935, p. 1226, as amended. It contends that the carriers in question were independent contractors and not employees.

Since 1922 defendant corporation has been engaged in the publication and distribution of a paper known as Los Angeles Down Town Shopping News, devoted to the advertising of retail merchandise. The paper had no subscribers, free delivery being maintained throughout the city of Los Angeles, and approximately 1,000 carriers were employed by defendant at wages varying from $2 to $2.50 per week. Most of the carriers were persons under the age of 18 years who attended school and were required to obtain permits to do the work. The compensation of each carrier was based upon the number of papers he delivered and the character of his route. The papers were required to be delivered by 8 a. m. on Wednesday and by 9 a. m. on Saturday but at times "specials" were to be delivered and for this purpose the carriers were permitted to employ helpers. The carriers themselves were hired directly by defendant. They had no personal interest in their routes and could not sell them. The routes could be changed and realigned as the defendant saw fit.

The papers were delivered by a company truck to a specified place on the carrier's route usually his home, early in the morning of the delivery date or in the previous evening. The carriers placed the papers in bags furnished by defendant and started on their routes. Inspectors employed by the company checked on the time the carriers started and the number of papers received. Upon completion of their routes the carriers returned to the specified location and signed check-out sheets stating the number of papers brought back or the number short. The bags were then deposited. If complaints were made concerning delivery of the papers the carriers were required to remedy the situation.

Carriers received both oral and written instructions. They were required to fold the papers and leave one at each single dwelling. At flat buildings, double houses and bungalow courts a folded paper was required to be placed behind the door knob. Carriers were required to return unused papers to the inspector and to sign reports concerning their work. They were instructed not to deliver papers to vacant premises or at any house under construction or at premises which had signs requesting no advertising. They were not allowed to walk across lawns or flower beds and were prohibited from taking dogs with them. They were not allowed to use automobiles, motorcycles, bicycles or roller skates on the routes. Carriers were required to have social security numbers.

[1, 2] The important test by which to determine whether a person is acting as an independent contractor or as an employee involves an answer to the question whether the person is subject to the orders and control of another party. The important element is the right of control, whether that right be exercised or not. Baugh v. Rogers, 138 P.2d 757, filed in this court June 16, 1943; Chapman v. Edwards, 133 Cal.App. 72, 24 P.2d 211; Hillen v. Industrial A. C., 199 Cal. 577, 250 P. 570. In the instant case defendant had the right of control and in fact exercised control. Instructions were given by defendant and followed by its carriers as to how, when and where the papers were delivered. The carriers were required to check in and out, to make reports concerning their work and were subject to discharge if the instructions of the employer were disobeyed. The evidence is ample to sustain the finding of the trial court that defendant "had the right of potential and actual control over said carriers as to the manner and means of the performance of their work".

Defendant cites cases in which a number of those who are usually called "newsboys" were held to be independent contractors. But the facts in the cases cited are distinguishable from the facts of the present case, particularly in the circumstances that the newsboys bought the papers from the publishers and sold them for their own account. Bohanon v. James McClatchy Publishing Company, 16 Cal.App.2d 188, 60 P.2d 510; Batt v. San Diego Sun Publishing Co. Ltd. 21 Cal.App.2d 429, 69 P.2d 216. A case more nearly in point is Globe Indemnity Co. v. Industrial A. C., 208 Cal. 715, 284 P. 661, where the carrier was held to be an employee under circumstances which were more favorable to those contending for the relationship of independent contractor than are the circumstances in the instant case.

Plaintiff presents the additional contention that in determining whether the carriers were in "employment" under the provisions of the Unemployment Insurance Act the rules fixing the status of an employee and of an independent contractor as used in proceedings before the Industrial Accident Commission and in tort actions are not applicable. Reference is made to section 7 of the Act, as originally enacted, which provides: "An 'employment,' means any employment by an employer who is subject to this Act * * * under any contract of hire, express or implied, oral or written, * * *". Plaintiff points to the absence in the Act of the definitions of employee and independent contractor which appear in the Labor Code and argues that the question whether an employee was at a given time under the complete control of the employer is immaterial in view of the general purpose of the Act to promote the general welfare and alleviate the evils of unemployment. Since we are holding that the carriers were under the complete control of their employer, it is unnecessary to pass upon this additional contention.

[3, 4] To be entitled to unemployment benefits at the time involved in this action a person must have earned in the preceding year not less than $156. It is argued by defendant that the carriers did not come within the terms of the Act for the reason that they were not earning sufficient sums to enable them to obtain the benefits of the Act. Some of the employees were, however, earning sufficient sums from other work to make them eligible to receive present benefits under the Act. It is the duty of the state treasurer to conserve the funds collected for use as need might arise, which might be at some date far in the future. The Act makes no exceptions which would relieve defendant from making the payments, the only exception for minors being found in section 7 subd. (d) of the Act, which exempts from "employment" services performed by a child under the age of 21 in the employ of his father or mother. In effect defendant asks the court to read into the statute an exception which was not placed therein by the legislature. Although the courts in proper circumstances interpret doubtful expressions of the legislature they may not add to or alter the statute or depart from the manifest legislative intent.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

KERR v. SMITH et al.

Civ. 14044.

District Court of Appeal, Second District, Division 2, California.

July 1, 1943.

Rehearing Denied July 19. 1943.

Hearing Denied Aug. 26, 1943.

1. Corporations ⚿171

Evidence supported finding that plaintiff was not a stockholder of reorganized corporation or old corporation so as to be entitled to maintain on behalf of corporations action to require transferee of old corporation's assets to return such assets to corporations on ground of fraud.

2. Corporations ⚿212

In action by alleged stockholder of old corporation on behalf of reorganized corporation and old corporation to require transferee of old corporation's assets to return such assets to corporations on ground of fraud, plaintiff was required to establish that corporations had suffered some legal wrong and that corporations if they were plaintiffs could secure redress.

3. Corporations ⚿206(1)

If corporation fails to proceed upon stockholder's demand for a legal wrong suffered by corporation, stockholder may maintain an action on behalf of corporation.

4. Corporations ⚿212

Evidence sustained judgment refusing to require transferee of old corporation's assets to return such assets to old corporation, and reorganized corporation, on ground of transferee's fraud.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Wiley J. Kerr against Horace J. Smith and others on behalf of corporations, in which plaintiff allegedly is a stockholder, to have various funds and properties returned to the corporation. From a judgment for defendants, plaintiff appeals.

Affirmed.

Joseph D. Taylor, of Los Angeles, for appellant.

A. L. Abrahams and Frank H. Love, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

In his complaint plaintiff alleges that he is a stockholder in defendant corporations and that the corporations have been defrauded by the acts of the individual defendants. He alleges that "this action is brought by plaintiff for and on behalf of said corporations and its stockholders after demand was made upon the corporation to bring the action". He asks that various funds and properties be returned to the corporations and that he be allowed attorney fees in the sum of $20,000. He is prosecuting this appeal from a judgment in favor of defendants.

[1] The trial court found that plaintiff is not and was not at the time of the commencement of the action, the owner of any stock in the corporations. This finding is supported by substantial evidence.

A gas heater business which had been conducted by Eva A. Sproat was in 1930 purchased by one Henry H. Nelson, who is not a party to this action, for the sum of $75,000. Plaintiff had been employed in the business and continued as an employee after the purchase by Nelson. In July, 1930, plaintiff and Nelson entered into written contracts wherein it was provided that Nelson should pay to plaintiff the sum of $100 per week for his services for the period of three years. Provision was made for submission of differences to arbitration. The business was conducted under the name of Ward Heater Co., Ltd., a corporation. In one of the contracts between plaintiff and Nelson it was provided that Nelson should set aside 4,000 shares of the capital stock of the corporation, being 20% of the total shares, to be issued in the name of plaintiff and endorsed by him in blank and placed in escrow for delivery to plaintiff whenever Nelson should receive the sum of $75,000 with interest from the net profits of the business. It was also provided in the contracts that if Nelson desired to sell his stock, plaintiff should have the right to purchase it on the same terms as would be offered by any other party and that if plaintiff failed to purchase the stock, Nelson could at his election sell not only his own stock but the stock of plaintiff, provided the price and terms upon which plaintiff's stock be sold should be identical per share with the price and terms upon which Nelson's stock should be sold. Plaintiff agreed "not to sell his shares or transfer any interest therein or the right to receive said shares or any benefit thereof to any person whomsoever until said shares are released from the escrow and the party of the first part has been repaid the sum of Seventy-five Thousand Dollars ($75,000.00), with interest as hereinabove provided."

Nelson discharged plaintiff from the service of the corporation on January 13, 1931. The differences between plaintiff and Nelson were submitted to arbitration in accordance with the terms of their contract and thereafter plaintiff commenced an action in the superior court against Nelson for the enforcement of the award of the arbitrators. In the judgment in that action plaintiff was awarded a sum of money for his wrongful discharge. In its judgment the court ordered that the corporation stock mentioned in the contracts between plaintiff and Nelson be impounded with the clerk of the court and be "delivered to said plaintiff upon order of the court when said Henry H. Nelson shall have received from the net proceeds of the Ward Heater Company, Ltd., as provided in said contract, Exhibit A, the sum of * * * $75,000.00 * * * with interest at * * * 6% per annum from January 16, 1930, or until the dissolution of the Ward Heater Company, Ltd., and the cancellation of said stock, * * *". The court also enjoined Nelson from disposing of the stock "during said time". The judgment was dated July 7, 1932. An appeal having been taken, the judgment was affirmed. Kerr v. Nelson, 7 Cal.2d 85, 59 P.2d 821.

On the day this judgment was rendered Nelson sold all of his stock in the corporation to defendant Smith. On the following day Nelson and Smith entered into an agreement wherein the judgment of the superior court dated July 7, 1932, was mentioned. By this agreement Nelson transferred all of his right, title and interest in and to the 4,000 shares of stock that had been impounded, together with the right to receive delivery of the stock whenever it should be released by the court. When plaintiff became aware of the sale by Nelson to Smith, he commenced another action in the court in which he alleged that Nelson had breached his contract with the plaintiff and in which he sought damages in the sum of $60,000. This action came on for trial resulting in a finding by the court that the consideration given by Smith for the stock transferred was of the value of $6,000 and no more. The court held that the plaintiff had failed to establish any damages and rendered judgment in favor of Nelson. This judgment became final long before the filing of the present action.

The corporation became indebted to Horace J. Smith in the sum of $33,618.89, and in consideration of the cancellation by Smith of this indebtedness and the assumption by him of the liabilities of the corporation all of the business and assets of the corporation were in 1937 transferred to Smith. Ward Heater Company, Ltd., was then dissolved and a new corporation was organized. It was stated in the application for a permit to issue stock in the new corporation that the new corporation was in law and fact a reorganization of the old corporation. No stock in the new corporation was issued to plaintiff. It is conceded that Nelson did not receive the sum of $75,000 from either corporation or from any individual and that there is no possibility that he ever will receive it.

[2, 3] In his brief plaintiff states that he "was frozen out by acts of the majority stockholders, and directors and officers of the corporation". In this action he does not sue to be reinstated as a stockholder or to recover damages for himself because of the acts of the officers of the corporation. In the present litigation he has chosen to file an action in which it must be established that the corporation itself has suffered some legal wrong and in which the corporation, if it were plaintiff, could secure legal or equitable redress. If the corporation fails to proceed, upon demand the law permits a stockholder to begin and maintain such an action on behalf of the corporation. Turner v. Markham, 155 Cal. 562, 102 P. 272.

[4] The trial court made findings adverse to plaintiff's contention of fraud on the part of defendants. The court specifically found that the individual defendants "at all times acted in good faith, in a lawful manner and faithfully represented the interests of said corporation, its creditors and stockholders"; that the acts of which complaint is made were not fraudulent; and that the agreement between Smith and Ward Heater Co., Ltd., was made for a valuable, fair and adequate consideration and in the best interest of the corporation. Circumstances were shown in evidence which, with such

inferences as the court could reasonably deduce therefrom, give support to these findings. Plaintiff complains in particular of the amount of the consideration paid by Smith for the assets of the corporation and of the fact that the board of directors had, prior to the transfer to Smith, authorized payments to certain employees in the aggregate sum of $15,000. Evidence was introduced, however, from which the court could reasonably conclude that the debts of the corporation, including the indebtedness to Smith, amounted to a sum greater than the value of the total assets of the corporation; and that the employees had returned to the corporation the sums which had been allowed them as bonus. It thus appears that even if it be assumed that plaintiff was a stockholder and in position to file the action, the judgment must nevertheless be affirmed.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

59 Cal.App.2d 445

In re ABDALE'S ESTATE.

DEPARTMENT OF INSTITUTIONS v. BROWN.

Civ. 14130.

District Court of Appeal, Second District, Division 2, California.

June 28, 1943.

Hearing Denied Aug. 26, 1943.

1. Executors and administrators 🔑24

The public administrator of county has duty to administer estates of persons in cases where others are not given priority by law.

2. Executors and administrators 🔑17(4)
Insane persons 🔑34

The purpose of statute relating to appointment of Department of Institutions as guardian of estate of incompetent or as administrator of estate of deceased incompetent is to place the state in position to reimburse itself, for maintenance of incompetent, from property of the incompetent. St.1941, p. 2506, § 6660.

3. Executors and administrators 🔑17(4)

Provision of Probate Code empowering court to appoint guardian of incompetent person as administrator of estate of deceased relative does not authorize court to appoint any person or institution not having legal capacity to act as administrator. Probate Code, § 426.

4. Executors and administrators 🔑17(4)

Since the Department of Institutions did not have legal capacity to act as guardian of deceased relative of incompetent who was inmate of state hospital, provision of Probate Code empowering court to appoint guardian of incompetent as administrator of estate of a deceased relative of incompetent did not authorize appointment of the department as administrator of relative's estate. St.1937, pp. 1154–1159, §§ 6650–6664; St.1941, p. 2506, § 6660; Probate Code, § 426.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of William Abdale, deceased, wherein applications for letters of administration were filed respectively by the Department of Institutions of the State of California and Ben H. Brown, Public Administrator of Los Angeles County. From an order appointing the public administrator, the Department of Institutions appeals.

Affirmed.

Robert E. Hatch, of San Francisco, for appellant.

J. H. O'Connor, Co. Counsel, and William E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

William Abdale died while a resident of the county of Los Angeles and was survived by Alfred Abdale, an incompetent, an inmate of the Sonoma State Hospital. The appellant, Department of Institutions of the State of California, is the guardian of the estate of Alfred Abdale under appointment by the superior court of the city and county of San Francisco. Ben H. Brown, the respondent, is the public administrator of Los Angeles county. Applications for letters of administration of the estate of William Abdale were filed respectively by the appellant and the respondent. The superior court ordered that letters of administration issue to the public administrator and from this order the department has appealed.

Appellant bases its claim to letters of administration upon section 426 of the Probate Code, which provides as follows: "If a person otherwise entitled to administer is a minor or an incompetent person, letters may be granted to his or her guardian, or any other person entitled to letters, in the discretion of the court". Appellant argues that since it has been appointed guardian of the estate of Alfred Abdale it has the right under the provisions of this section to letters of administration of the estate of the deceased uncle of its ward.

[1] The respondent public administrator is the official whose duty it is to administer the estates of deceased persons in cases where others are not given priority by law. This official should be appointed as administrator unless statutory authority is found for the appointment of the Department of Institutions. It is argued that this authority is found in section 6660 of the Welfare and Institutions Code of the State of California, St.1941, p. 2506.

[2-4] Article V of the Welfare and Institutions Code contains 15 sections numbered from 6650 to 6664, St.1937, pp. 1154–1159, as amended. All of these sections deal with the subject of the property and support of inmates of state institutions. Section 6660 provides that the Department of Institutions may apply to a court of competent jurisdiction to be appointed guardian of the estate of an incompetent person committed to the home for the feeble minded if such incompetent person has no guardian. The department is also authorized by this section to act as administrator of the estate of an incompetent who dies while an inmate of such institution, leaving an estate but having no relatives at the time residing within the State of California. It is apparent that the purpose of section 6660 is to place the state in position to reimburse itself from the property of its wards and for this reason the department is authorized to act, under given circumstances, as guardian of the estate of the ward or as administrator of the estate of a deceased ward. Nothing is contained in the section in question which gives the department the right to act as administrator of the estate of a deceased relative of one of its wards. Nor is such power implied in order to carry out the purposes of the section. Although section 426 of the Probate Code impowers the court to appoint the guardian of an incompetent person as administrator of an estate of a deceased relative, the court is not authorized to appoint any person or institution not having the legal capacity to act as administrator. Since the department did not have legal capacity to act as guardian of the deceased relative of an inmate it follows that the court did not err in denying its petition for letters of administration.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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59 Cal.App.2d 557

TUCKER v. TUCKER.

Civ. 14069.

District Court of Appeal, Second District, Division 1, California.

July 1, 1943.

1. Judgment 🔑142

The words "personally served" in Code section, providing that when from any cause the summons in an action has not been personally served on defendant, court may allow such defendant at any time within one year after rendition of any judgment in such action to answer to merits of original action, mean personal service of summons and complaint upon a defendant within the State of California, and do not include personal service of summons and complaint upon defendant without the state. Code Civ.Proc. § 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Personally Served".

2. Process 🔑83

Service of summons and complaint upon a defendant without the state is only an incident to "constructive service" and in lieu of the publication required by Section 413. Code Civ.Proc. §§ 413, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Service".

3. Judgment 🔑138(3)

The right of a defendant who has not been personally served with summons and complaint, to have a default judgment against him set aside, is not an absolute right but the granting of such an order is committed to the sound discretion of the trial court. Code Civ.Proc. §§ 413, 473a.

4. Judgment 🔑138(3)

On motion of defendant not personally served with summons and complaint to set aside judgment, his opponent may show that movant had actual notice of action in time to have entered an appearance and presented a defense and that failure to do so was owing to his neglect or to his consent to the judgment, in which event a case arises for the exercise of discretion of the court, which must determine whether the laches is of such character as to preclude relief. Code Civ. Proc. §§ 413, 473a.

5. Divorce 🔑161

Denial of motion of dependent wife not personally served with process within state, to set aside interlocutory order of divorce entered almost a year before after personal service in State of Oklahoma, was not an abuse of discretion. Code Civ.Proc. §§ 413, 473a.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Chaley Glen Tucker against Alice B. Tucker for divorce wherein an interlocutory judgment of divorce was entered on personal service without the state. From an order denying defendant's motion to vacate and set aside the default judgment, the defendant appeals.

Order affirmed.

Dailey S. Stafford, of Los Angeles, for appellant.

Richard C. Fildew, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff filed his complaint for divorce in the Superior Court of this state August 31, 1941. The defendant was a nonresident of California. Order for publication of summons was made August 19, 1941. The residence of the defendant being known, summons and complaint were personally served upon her in the State of Oklahoma August 28, 1941. By order of the court default of the defendant was entered December 23, 1941. On the same date, the case was tried as a default matter, and interlocutory judgment of divorce was made and entered.

December 9, 1942, the trial court denied a motion by the defendant to vacate and set aside the default judgment. This motion was presented in accordance with the provisions of section 473a of the Code of Civil Procedure. It was based upon the affidavit of the defendant, dated November 27, 1942, a proposed answer to be filed by the defendant, and the records, files and papers in the case. There was no counter-showing on the part of the plaintiff. Defendant has appealed from the order denying said motion.

Section 473a of the Code of Civil Procedure is short, and it is just as well to quote it in full: "(Answer of defendant not served). When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

The last part of section 413, Code of Civil Procedure, provides: "When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication."

The defendant was personally served in the State of Oklahoma with summons and complaint, in accordance with this provision of section 413, Code of Civ.Proc. Was she "personally served" so as to bring her within the purview of section 473a, Code of Civ.Proc., and entitled to an order vacating and setting aside the default judgment?

To attempt to reason logically from the premise that defendant knew of the pendency of the action and was therefore personally served would not be proper because in such cases as Palmer v. Lantz, 215 Cal. 320, 9 P.2d 821, and Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279, mailing a copy of the complaint and summons is held not to be personal service.

[1, 2] The question can be settled by keeping in mind the fact that the apparent conflict in the application of these two sections of our code has to do with two entirely different legal concepts. One has to do with constructive service of process by which a court acquires jurisdiction of parties and subject-matter in a legal action; the other is that branch of our law having to do with relief from the terms of a judgment in proper cases. To make one rule equally applicable to both of these concepts would be to set up an impossible legal Procrustean bed. So it is that in this case, in which the court acquired jurisdiction over the defendant by substituted service, the mere fact that the defendant was personally served without the State does not defeat her right to have the default judgment set aside. The words "personally served" as used in section 473a of the Code of Civil Procedure mean personal service of summons and complaint upon a defendant within the State of California; they do not include personal service of summons and complaint upon a defendant without the State of California. The latter service is but an incident to constructive service and in lieu of the publication required by section 413, Code of Civil Procedure. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 434, 137 P. 21; Zobel v. Zobel, 151 Cal. 98, 90 P. 191; Nahas v. Nahas, 1939, 59 Nev. 220, 90 P.2d 223, 92 P.2d 718; Kane v. Stallman, 1941, 209 Minn. 138, 296 N.W. 1; and see note in Ann.Cas.1916B, p. 565. The Nevada and Minnesota cases of Nahas v. Nahas, supra, and Kane v. Stallman, supra, are directly in accord with the view herein expressed.

[3, 4] But the right of a defendant who has not been personally served with summons and complaint to have a default judgment against him set aside is not absolute and unconditional. The granting of such an order is committed to the sound discretion of the trial court. As was said in Boland v. All Persons, 160 Cal. 486, 490, 117 P. 547, 548: "But his opponent may show in opposition to the application that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief."

This principle was applied by our Supreme Court in the most recent case of this kind, Hiltbrand v. Hiltbrand, 218 Cal. 321, 23 P.2d 277. That was a divorce case wherein the action was instituted July 7, 1930; there was constructive service upon the defendant who was residing in Switzerland. She received by mail a copy of the complaint and summons July 24, 1930. November 7, 1930, her default was entered and on the same day the interlocutory decree was entered. Nothing was done to set aside the default judgment until May 15, 1931. Under such circumstances, the law which we are required to follow is stated: "We are therefore led to the conclusion that there was in the instant case a sufficient showing to sustain the action of the court below in that enough appeared from the facts to justify the conclusion that, having received knowledge of the existence of the proceeding in the courts of California, the defendant was guilty of inexcusable delay and neglect in not earlier presenting her defense. In making this holding we are not unmindful of the fact that this court has in Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, and on various other occasions, shown its solicitude for the ordinance of marriage and to that end has held that the showing to set aside a default in a divorce action may rest upon slight evidence. But here the question in the first instance was one within the discretion of the court below, and we are unable to say as a matter of law that such discretion was not properly exercised." Hiltbrand v. Hiltbrand, supra, 218 Cal. at page 324, 23 P.2d at page 278. In the Hiltbrand case, the time elapsing from the interlocutory judgment until an effort was made to set it aside was shorter than in the pending case.

[5] In the presnt case, the trial court in the exercise of its discretion denied the motion to vacate and set aside the default judgment, and, as in the Hiltbrand case, after a careful review of the record, we are unable to say as a matter of law that such discretion was not properly exercised.

The order is affirmed.

YORK, P. J., and DORAN, J., concur.

59 Cal.App.2d 652

CITY OF SAN MATEO v. MULLIN.

Civ. 12373.

District Court of Appeal, First District, Division 1, California.

July 12, 1943.

Hearing Denied Sept. 8, 1943.

1. Attorney and client 🔑28

A municipality, unless prohibited by statute, has right and power to impose license taxes on attorneys at law, not for purpose of regulating conduct of their practice, but for revenue.

2. Municipal corporations 🔑592(3)

The requirement of State Bar Act that attorneys pay annual fees for privilege of practicing law does not preclude imposition of municpal license taxes on attorneys conducting business of practicing law.

3. Licenses 🔑7(1)

A license measure, which is unreasonable, uses arbitrary yardstick, or fails to define sufficiently the subject of license tax, is unconstitutional.

4. Licenses 🔑7(3)

The constitutionality of license measure must be established by demonstrating that classification therein is not oppressive against persons or classes.

5. Licenses 🔑7(3)

A difference in method of conducting a business is generally sound basis for classification in license tax measure, particularly if tax is fixed in proportion to amount of business, which may be determined by different, but reasonable, methods.

6. Attorney and Client 🔑28

An association of persons in practice of law furnishes reasonable basis for varying amount of license taxes imposed on them for privilege of conducting such business.

7. Licenses 🔑7(3)

A method of business operation resulting in superior or more convenient service furnishes reason for distinct and separate classification thereof for license tax purposes.

8. Licenses 🔑7(3)

The power to license a business for purpose of revenue involves right to make distinctions between essentially different methods of conducting same general character of business.

9. Licenses 🔑7(3)

The amount of a business license tax may be graded according to number of persons employed, used or engaged in conduct of the business.

10. Attorney and client 🔑28

While state certificate of right to practice law is prerequisite to such practice, the actual practice is a "business," and license tax imposed by city ordinance for privilege of engaging in such business is on the business, not on persons engaged therein, whether individually or as partners or employers and employees.

See Words and Phrases, Permanent Edition, for all other definitions of "Business."

11. Attorney and client 🔑28

A city ordinance, imposing license taxes for privilege of practicing law, is not unconstitutional as discriminating against single individual engaged in such practice because of provision that where two or more persons are associated as partners or employer and employee, additional tax in smaller amount shall be paid for each additional person after the first one. Const.Cal. art. 1, § 11.

12. Licenses 🔑7(1)

The designation of license tax, whether imposed on property or on exercise of personal rights and privileges, is not controlling in determining its constitutionality.

13. Constitutional law 🔑70(3)

The exemption of some employers or employees from payment of license tax for privilege of engaging in business is peculiarly a question for legislative decision.

14. Attorney and client 🔑28

A city ordinance, imposing annual license tax of $15 for privilege o practicing law in city, *held* not invalid as in "restraint of trade" or against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy" and "Restraint of Trade".

15. Licenses 🔑7(3)

The power to license for purposes of regulation and revenue involves right to make distinctions between different trades and essentially different methods of conducting same general character of business or trade.

16. Licenses ⟹7(1)

Legislatures have greatest freedom in classification for license tax purposes.

17. Licenses ⟹7(1)

Where terms of city license ordinance may be capable of several constructions, its constitutionality should be upheld.

18. Constitutional law ⟹229(1), 283

Neither "due process of law," nor "equal protection of law", imposes any rigid rule of equality of taxation. Const. Cal. art. 1, § 11; U.S.C.A. Const.Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Equal Protection of Law".

19. Taxation ⟹42(1), 193

Inequalities, resulting from singling out one particular class for taxation or exemption therefrom, infringe no constitutional limitation.

20. Taxation ⟹42(1)

A legislature is not bound to tax every member of class or none of them, but may make distinctions of degree on rational basis, and such distinctions, when subjected to judicial scrutiny, must be presumed to rest on such basis, if there is any conceivable state of facts supporting it.

◆

Appeal from Superior Court, San Mateo County; Ernest D. Wagner, Judge.

Action by the City of San Mateo against Hugh F. Mullin Jr., to collect a license fee for the practice of law. Judgment for defendant, and plaintiff appeals.

Reversed.

Ernest A. Wilson, City Atty., of San Mateo (Kirkbride & Wilson, Frank B. Ingersoll, Jr., and Arthur J. Harzfeld, all of San Mateo, of counsel), for appellant.

F. E. Hoffmann, of San Mateo, and J. W. Coleberd, of South San Francisco, for respondent.

WARD, Justice.

This is an action by plaintiff city against defendant, a practicing attorney-at-law, for the collection of a license tax fee due under the provisions of an ordinance of the City of San Mateo for a period from July 1, 1936, to June 30, 1940. Based upon a finding and conclusion of law that the tax was unconstitutional, judgment was rendered for defendant. The city appeals from the judgment.

In June, 1932, the city council of the City of San Mateo passed and adopted ordinance No. 373 entitled "San Mateo Business License Ordinance", which in brief provides that persons engaged in businesses, trades, callings or professions, including that of attorney-at-law, shall pay an annual license tax. The ordinance was amended in April, 1936, to provide that where two or more persons of like businesses, trade, calling or profession are associated as partners, or as employer and employee, then an additional license tax in a less amount shall be paid for each additional person after the first.

The trial court declared "That section 8.25 of ordinance number 373 of the City of San Mateo, as amended, requires a license tax to be paid by attorneys at law, engaged in the practice of law in plaintiff city, unequal in amount, and that said section of said ordinance is discriminatory and that the provisions thereof are, by reason of inequality and lack of uniformity, with respect to the license tax required to be paid by such attorneys, in conflict with section 1 of Article XIV of the [Amendments to the] Constitution of the United States, and section 11 of Article I of the Constitution of the State of California and are therefore void."

[1] In the imposition of the tax herein—a municipal affair—the municipality, unless prohibited by statute, has the right and power to impose the tax, not for the purpose of regulating the conduct of defendant's practice, but for revenue. West Coast Adver. Co. v. San Francisco, 14 Cal. 2d 516, 95 P.2d 138; In re Nowak, 184 Cal. 701, 195 P. 402; Hill v. City of Eureka, 35 Cal.App.2d 154, 94 P.2d 1025.

[2] It is the rule that the requirement of the State Bar Act of payment of an annual fee for the *privilege* of practicing law does not preclude the imposition of a municipal license tax on attorneys who conduct the *business* of practicing law. In re Galusha, 184 Cal. 697, 195 P. 406; In re Johnson, 47 Cal.App. 465, 190 P. 852. The above ordinance provides that unless he pays a license tax it shall be unlawful for

an attorney to carry on his profession in the municipality.

[3, 4] When a license measure is unreasonable, or an arbitrary yardstick is used, or there is a failure to define sufficiently the subject of the tax, the courts have been prompt to declare it unconstitutional. In City of Los Angeles v. Lankershim, 160 Cal. 800, 118 P. 215, the court held an occupational license tax upon the owner of a building containing thirty office rooms for rent, and exempting the owner of a similar building of twenty-nine rooms, to be an unlawful discrimination. A health measure completely exempting one class imposes a burden upon a selected class of merchants. Justesen's F. S. Inc. v. City of Tulare, 12 Cal.2d 324, 84 P.2d 140. A tax upon a business, which gives a preference to those within the confines of a municipality, unless based upon a reasonable distinction, is invalid. Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884. A tax imposed upon those engaged in the same business, variable in amount according to the volume of business done, estimated in any reasonable way, is valid, though a tax upon slot vending machines, which provides a different rate for those ejecting or delivering raisins, is invalid. Matter of Application of Richardson, 170 Cal. 68, 148 P. 213. An ordinance which fails to define adequately the subject of the tax has been disapproved. Barker Bros., Inc., v. Los Angeles, 10 Cal. 2d 603, 76 P.2d 97. Many other instances might be mentioned, but the requirement of constitutionality must in each case be met by demonstrating that the classification is not oppressive against persons or classes. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590, 125 A.L.R. 1383.

[5-9] A difference in the method of conducting a business is generally a sound basis for classification, particularly if it appears that the tax was fixed in proportion to the amount of business, which may be determined by different but reasonable methods. Ex parte Lemon, 143 Cal. 558, 77 P. 455, 65 L.R.A. 946. The method of conducting one business may not furnish basis for a reasonable classification, whereas in another it may. As an instance: in a grocery concern the association of several partners may result in divided responsibility, but a material increase in business does not necessarily follow as in the case of a business association furnishing personal services. An association, as such, of chiropractors, osteopaths or physicians and surgeons in their respective capacities, or as employer and employee, should ordinarily result in a greater volume of business than where one individual practices alone. The practice of the law by an association of persons results in certain economy to them through the joint use of library, stenographic facilities, etc., and to the client as the result of opportunity for conference among the associates, and the ability to obtain advice and assistance from one associate in the absence of another. The activities of the group constitute but one business although each member thereof renders individual services, and such association furnishes a reasonable basis for varying the amount of the taxes. Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527. The method of operation resulting in superior or more convenient service furnishes a reason for a distinct and separate classification. The power to license a business for the purpose of revenue involves the right to make distinctions between essentially different methods of conducting the same general character of business. In Ex parte Haskell, supra, it was held that the manner of conducting a business, in one instance as a traveling salesman, and in a second as a merchant in a fixed place of business, is distinctive for the purpose of taxation. In Continental B. Co. v. City of Escondido, 21 Cal.App.2d 388, 69 P.2d 181, it was held that the fact that bakeries within the city paid ad valorem taxes while those without did not, furnished sufficient justification for a greater license fee imposed upon the latter. In Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, a larger license fee for real estate brokers than salesmen was upheld. The association of a broker and salesman in the same business under one name or title is of such common practice that courts may take judicial cognizance of such fact. In Ware Shoals Mfg. Co. v. Jones, 78 S.C. 211, 58 S.E. 811, the court held that there is an advantage in the corporate form of organization which justified a different tax treatment. In State v. Razook, 179 N.C. 708, 103 S.E. 67, an auctioneer's license ordinance exempted those who did not use the auction method more than one day in six months. A butcher, and a farmer selling meat as an incident to his business, may, in a scheme of taxation, be in different classes. Davis v. Mayor and Council of Macon, 64 Ga. 128, 37 Am.Rep. 60. A classification

of theatres based upon price of admission has been held valid. Metropolis Theatre Co. v. Chicago, 228 U.S. 61, 33 S.Ct. 441, 57 L.Ed. 730. The amount of a license tax may be graded "according to the number of persons employed or used." Ex parte Lemon, supra, 143 Cal. at page 562, 77 P. at page 456, 65 L.R.A. 946. It is possible that four persons used in the conduct of a business may do less work and bring in less financial return than a business conducted by two, but the legislative body is permitted "to take a practical view of the question, and legislate accordingly." Ex parte Sisto Li Protti, 68 Cal. 635, 637, 10 P. 113. In Ferran v. City of Palo Alto, 50 Cal.App.2d 374, 122 P.2d 965, this method of estimating the amount of business is recognized though at page 382 of 50 Cal. App.2d, at page 970 of 122 P.2d the court said: "When we speak of the size of the plant and adopt as the measure the number of employees therein, we are not speaking of mere physical dimensions of buildings, or the like, but of the size of the group employed, which is very definitely related to the volume of business done, in that productive labor produces quantity or volume of output and affects the amount of business done in terms of dollar and cent value." The court held, however, that a license fee could not be similarly computed based upon the number of employees in a plant outside of the municipality.

The number of persons used in the conduct of a business may not be a perfect way of determining the amount of a license fee, but "it is *one* way of doing so, and, for aught we know, the safest way. * * * But it is fair to presume that no more persons are employed in such establishments than are necessary to the performance of the work, and, as a consequence, that the amount of business done by such establishments is in proportion to the number of persons employed therein." Ex parte Sisto Li Protti, supra, 68 Cal. at page 636, 10 P. at page 113. In Bramman v. City of Alameda, 162 Cal. 648, 653, 654, 124 P. 243, 245, the court said: "Within the rule of the authorities, as the classification may be accomplished in a variety of ways, any gradation will be sustained which is reasonable and fair and equally affects all within the class to which it is applied. And among the varying standards which may be adopted, certainly it cannot be objected to as unfair or unreasonable that as to a business class a reasonable distinction between members of the class cannot be based upon the number of vehicles and animals which are used in the prosecution of the business. This, as in the case of distinguishing a class *by the number of persons engaged in the conduct of the business,* is a method of gauging the amount of business done or the capital employed therein and imposing a license tax upon the occupation under such gradation. Such a classification is recognized as a proper one in Dillon on Municipal Corporations, § 1410, vol. 4 (5th Ed.), p. 2473. See, also, Wilson et al. v. City of Lexington, 105 Ky. 765, 49 S.W. 806, 50 S.W. 834." (Italics added.)

In Ex parte Lemon, supra, and Ex parte Sisto Li Protti, supra, the language is—persons employed or used. If it is fair and reasonable to fix the license fee in accordance with the number of persons employed, it may with equal force and effect be said that the number "used" or "engaged" in the conduct of the business gives a sounder basis for determining the fair amount of the license fee. The number of employees may vary to a greater extent than the number of employers. If the employers are "used" or "engaged" in producing or contributing to the output or the results of the business, it does not appear that it is unfair or unreasonble to group employer workers and listed employees. They all tend to increase the size of the business and the financial returns.

[10-13] Respondent contends that there is discrimination against him by reason of the fact that in the conduct of his profession he is taxed $15 while some of the associates of law firms pay only $5 for the same privilege. There may be some confusion in differentiating between the right to practice law, evidenced by a certificate issued by the state, and the privilege of conducting a legal business in a municipality. While the state certificate is a prerequisite to practice, the actual practice is a business. In re Galusha, supra. The tax is levied upon the business and not the person. Whether that business is conducted by one, or more than one, associated as partners or as employer and employee, it is still in the class of business as that word is used in the ordinance. If a firm of legal associates paid less than respondent as an individual, he might be aggrieved, but when each "business" individually or as a firm pays the minimum tax of $15, respondent

cannot justly claim discrimination. There may seem to be a discrimination between an individual and an individual plus an employee, or a firm of associated or employee attorneys, but such a discrimination, if it existed, would not be a matter in which the individual respondent would be aggrieved, and, as we have herein held, such method of fixing license taxes has been approved. An employer and an employee may be taxed and the employer actually pay or be held responsible for the tax, and the designation of the tax, whether imposed upon property or upon "the exercise of personal rights and privileges," is not controlling in determining its constitutionality. Carmichael v. Southern Coal Co., 301 U.S. 495, 508, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327. The exemption of some employers or employees "is peculiarly a question for legislative decision." Carmichael v. Southern Coal Co., supra, 301 U.S. at page 511, 57 S.Ct. at page 873, 81 L.Ed. 1245, 109 A.L.R. 1327.

[14-20] The amount of the tax is not in restraint of trade and not against public policy. In reaching the conclusion that the license tax herein is not unconstitutional, we have been guided by the rules set forth by the Supreme Court of this state and the Supreme Court of the United States. In Ex parte Haskell, supra, 112 Cal. at page 417, 44 P. at page 725, 32 L.R.A. 527, the court said: "The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades, and between essentially different methods of conducting the same general character of business or trade." "* * * legislatures possess the greatest freedom in classification." Madden v. Kentucky, supra, 309 U.S. at page 88, 60 S.Ct. at page 408, 84 L.Ed. 590, 125 A.L.R. 1383. Where the terms of a license ordinance may be capable of several constructions, its constitutionality should be upheld. Edwards v. City of Los Angeles, 48 Cal.App.2d 62, 119 P.2d 370. In Carmichael v. Southern Coal Co., supra, involving a tax upon employers and employees, the court said (301 U.S. at pages 509, 510, 57 S.Ct. at page 872, 81 L.Ed. 1245, 109 A.L.R. 1327): "It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. See Bell's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237, 10 S.Ct. 533, 33 L.Ed. 892; Lawrence v. State Tax Comm'n, 286 U.S. 276, 284, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 87 A.L.R. 374. This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. [citing cases]

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. [citing cases]

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

In Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595, involving the State Unemployment Reserves Act, Stats.1935, p. 1226, the court said (7 Cal.2d at page 759, 62 P.2d at page 1044, 108 A.L.R. 595): "The employers so classified are those who are subject to the payroll tax imposed by the federal government, namely, employers having eight or more employees, with employees in certain lines of employment exempted. Obviously the charge that the whole plan of federal-state unemployment insurance as outlined in the two statutes is unworkable would seem to have more merit if it were made to apply to employers of every sort without regard to the nature of the employment or the number of employees. The difficulties of enforcement and administration might thus be so greatly multiplied as to destroy the plan entirely. It is well established that the matter of classification is primarily one for legislative determination, and no argument has been advanced which would compel the conclusion that in its taxing features the classifications laid down are so arbitrary or unreasonable as to require judicial condemnation."

The judgment is reversed.

PETERS, P. J., and KNIGHT, J., concur.

59 Cal.App.2d 590

MINNER et al. v. SADLER et al.

Civ. No. 3081.

District Court of Appeal, Fourth District, California.

July 7, 1943.

Rehearing Denied Aug. 5, 1943.

Hearing Denied Sept. 1, 1943.

1. Mines and minerals ⚷9

Where application was filed with General Land Office Commissioner for power project on public lands and no application was filed to restore such land for relocation purposes, and neither the Commissioner nor Congress had directed that such land was not reserved from location, attempted location of unpatented lode mining claims thereon was void. Federal Water Power Act § 24, 16 U.S.C.A. § 818.

2. Mines and minerals ⚷9

Under statute providing that public lands included in power projects shall be reserved from location, the filing of an application for a power site automatically withdraws the affected land from mineral location. Federal Water Power Act § 24, 16 U.S.C.A. § 818.

3. Appeal and error ⚷1010(1)

Trial court's finding supported by substantial evidence cannot be disturbed on appeal.

4. Mines and minerals ⚷20(1)

Both the discovery monument and the discovery shaft must be on open, unappropriated ground, and cannot be within the confines of some other person's previously located claim.

5. Mines and minerals ⚷38(14)

To recover a mining claim, plaintiff being out of actual possession must prove a valid location.

6. Mines and minerals ⚷34

An agreement under which defendant promised to sell a specified percentage of his mining claims to plaintiff for a specified consideration to be paid before a specified date was "unilateral" and where the agreement was canceled by defendant before the specified consideration had been tendered, plaintiffs had no interest thereunder to the claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Unilateral Agreement".

7. Contracts ⚷19

A mere offer, as such, is subject to revocation by the offerer at any time prior to acceptance.

Appeal from Superior Court, Fresno County; Hon. Ernest Klette, Judge.

Action by W. A. Minner and others against Joe Sadler and others in ejectment and to recover possession of an unpatented lode mining claim, to quiet title thereto and for damages, wherein a cross-complaint was filed and later dismissed upon cross-complainants' motion. From an adverse judgment, plaintiffs appeal.

Affirmed.

Claude F. Baker and Harvey, Johnston & Baker, all of Bakersfield, for appellants.

Clyde C. Triplett and Philip C. Jones, both of Los Angeles, for respondents.

GRIFFIN, Judge.

This is an action in ejectment and to recover possession of a certain mining claim, to quiet title thereto, and for damages (1) for loss of use of the area contained therein; (2) for mineral wrongfully removed therefrom; and (3) for trespassing upon the property. The complaint alleges generally that plaintiffs are and have been, since October 2, 1940, the sole owners of and entitled to the exclusive possession of the Daisy No. 1 unpatented lode mining claim situated in Fresno County; that the defendants claim an unfounded interest in the area contained therein adverse to plaintiffs; that on February 10, 1941, the defendants, knowing that the area covered by that claim belonged to and was in the possession of plaintiffs, trespassed thereon and ousted plaintiffs therefrom and thereafter excluded them from that area; and that they did wrongfully extract and remove valuable minerals therefrom. Judgment for possession and to quiet title was sought, together with damages in the sum of $200,000. Defendants Tungstore Mines, Inc., and C. A. Rasmussen answered, denied generally the allegations of the complaint, and by way of cross-complaint claimed a prior right to the property by virtue of a contract of sale from defendant Joe Sadler, who claimed title and right of possession by virtue of a previous location of a claim known as Lobo No. 1, covering portions of the area within the boundaries of the Daisy location. By their cross-complaint they sought possession of and asked that title be quieted in them to the area described in the Lobo No. 1 claim. Actual damages in the sum of $1,000 was sought therein.

It is defendants' contention that the Daisy claim was located subsequent to the location of the Lobo claim and that the westerly portion of the Daisy claim overlapped the easterly portion of the Lobo claim. Plaintiffs answered the cross-complaint and denied generally its allegations. They claimed that Sadler's title was without right and alleged the execution of an option to sell executed by Sadler to plaintiffs Minner and Middleton, Sr., by which instrument they claimed to have acquired a 49 per cent interest in the Lobo claim and asked that specific performance of the contract be enforced. Defendants Joe Sadler and Harriet Sadler answered plaintiffs' complaint and denied generally its allegations, set up their claim of title by virtue of a prior location, and alleged that plaintiffs had attempted to jump the Lobo claim by subsequently filing their overlapping claim known as Daisy No. 1. Other defendants, by way of answer, denied generally the allegations of the complaint. Before trial, over objections, but by consent of the court, the defendants amended their answers and set forth as a separate defense that "none of the area covered by the said Daisy No. 1 * * * was, at any time mentioned in the plaintiffs' complaint, a part of the public domain, open to mineral location, but, on the contrary, all of said area was, pursuant to the terms and provisions of section 24 of the Federal Water Power Act of June 10, 1920, 41 Stat. 1075 [16 U.S.C.A. § 818], on February 11, 1921, withdrawn and reserved from mineral location of any kind or character and ever since has been and now is withdrawn and reserved from mineral location". Cross-complainants then moved to dismiss their cross-complaint for the reason that it was their belief that under the facts stated, and the provisions of the Water Power Act above mentioned, they would also be unable to establish title to either claim. No objection was offered and the cross-complaint was dismissed. Upon these pleadings the case proceeded to trial.

The court found generally that it is true that the defendant Joe Sadler did, on September 20, 1940, attempt to locate a certain lode mining claim known as Lobo No. 1, and that notice of location covering the same was recorded on September 25, 1940; that plaintiff D. P. Middleton, Sr., did, on October 2, 1940, attempt to locate Daisy No. 1, and did record notice of location thereof on October 3, 1940, and that as so located Daisy No. 1 overlapped the easterly end of Lobo No. 1 as it was attempted to be located, and that the discovery monument and discovery shaft of Daisy No. 1 were at all times within the boundaries of Lobo No. 1; that it is not true that Sadler moved or changed the boundaries of Lobo No. 1 or any of the monuments of that claim after they were delineated or erected; that the separate defense alleged in the several answers, i. e., that the area covered was not open to location at the time, is true; that it is not true that the plaintiffs were ever the owners of or entitled to possession of any of the area within the boundaries of Lobo No. 1, including that portion of the easterly half of Lobo No. 1 which was overlapped by Daisy No. 1; that it is true that defendant Tungstore Mines, Inc., carried on mining operations, in good faith, on the area covered by Lobo No. 1 and on the easterly portion of that claim which was overlapped by Daisy No. 1, and that the value of the ore removed by said mining operations was less than the cost of mining the same, and that none of the defendants except Joe Sadler derived any gain or profit from said mining operations or from the extraction of ores from any of said property; that the allegations contained in paragraphs III and IV of the answer of Tungstore Mines, Inc., are true; that it is not true that any of the plaintiffs in the action were in actual possession of any of the area covered by Daisy No. 1 between November 1, 1940, and the time of the trial of the action. The court then concluded that none of plaintiffs ever had any right, title or interest in any of the land covered by Lobo No. 1 mining claim and never had any right, title or interest in the easterly portion of said claim which was overlapped by Daisy No. 1 claim, and gave judgment that plaintiffs take nothing by the action and that defendants recover their costs. Plaintiffs offered certain proposed findings in their favor but they were refused. A motion for new trial was denied. This appeal followed.

[1] The evidence fully supports the finding that on Feb. 11, 1921, the San Joaquin Light & Power Corporation filed with the General Land Office Commissioner an application for a power project under the provisions of the act of June 10, 1920, 41 Stats. p. 1075, affecting the land here involved. It further shows that neither plaintiffs nor defendants nor anyone else made application to restore said lands for location purposes. Under section 24 of said act the lands here involved were, from the date of the filing of the abovementioned application of the power company, reserved from entry or location until otherwise directed by the commissioner or by Congress. There is no showing that the Commissioner or Congress directed otherwise. In re Nevada Irrigation District, 52 L.D. 371, 377. Another and more recent decision of the Land Department is In re John Roberts, 55 L.D. 430, decided December 19, 1935. The applicant there filed an application for patent which was denied. The claims were located in 1927 and the Commissioner held they were void because they were within Power Site Withdrawal No. 661. The Federal Power Commission, however, on July 24, 1931, pursuant to section 24 of the act, conditionally restored the land to the public domain for the purpose of location and entry. The Commissioner held that the subsequent restoration under section 24 of the act did not validate mining claims located in 1927 and 1930 because those claims, under the first portion of section 24 of the act, were *void*. The evidence supports the conclusion that at the time plaintiffs and defendants in the instant case attempted to locate their claim the area here involved was not then open to location and any attempted location thereon was void.

[2] In Coeur d'Alene Mining Company, 53 L.D. 531, 533, cited by plaintiffs, it was held that under a similar state of facts the subsequent claim locator acquired no rights by the location of his lode because the property was included within the prior Power Site Withdrawal and that section 24 of the Federal Water Power Act reserved that property from entry location or other disposal. It therefore appears from the decisions quoted and cited that the filing of an application for a power site under section 24 automatically withdraws the affected lands from mineral location.

Plaintiffs contend and argue at length that even as trespassers they were in possession of the ground within the limits of the purported Daisy No. 1 claim and that because of their possession no one except the Land Department or the Power Company could dispute their title, and that hence their rights as against defendants are just the same as though the property had been open to entry and location, citing Hubbard v. Barry, 21 Cal. 321; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas.1913C, 1093; Corey v. Struve, 170 Cal. 170, 149 P. 48; Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23.

[3] The trial court found, upon sufficient evidence, though conflicting, that the plaintiffs were not in actual possession of any of the area here involved between November 1, 1940, and the time of the trial. It further found, upon the same evidence, that defendants did not oust plaintiffs from possession. The evidence was conflicting in reference to the established boundary lines of Lobo No. 1 claim and was also in dispute as to its attempted location in point of time compared to that of the attempted location of Daisy No. 1 claim. There is substantial evidence supporting the court's finding in this respect. It therefore will not be disturbed on appeal.

A question was raised in Holdt v. Hazard, 10 Cal.App. 440, 102 P. 540, respecting possession under a void location claim. It was there said, at page 444 of 10 Cal.App., at page 541 of 102 P.: "The question involved here is the right of possession between two contesting locators, and it may be conceded, as contended by appellants, that at the time defendants entered upon and took possession of the claims plaintiffs were not in the actual possession thereof. Such being the case, plaintiffs' rights must rest upon the finding of the court to the effect that at the time of defendants' entry plaintiffs had made a *valid location of the claims,* in accordance with the provisions of section 2324 [of the Revised Statutes of the United States (30 U.S.C.A. § 28)] * * *." (Italics ours.)

[4, 5] In the instant case the court expressly found that the plaintiffs did not make a valid location; that the area involved was not open to location; and that the discovery monument and the discovery shaft of Daisy No. 1 were both within the boundaries of Lobo No. 1. It is elementary that both must be on open and unappropriated ground, and cannot be within the confines of some other person's claim previously located. Lindley on Mines, vol. 2, § 337, p. 778. Even assuming that there is merit to plaintiffs' contention, plaintiffs, at the time of the filing of the action and prior thereto, being out of actual possession, would be bound, therefore, by the rule that in order to recover possession of a mining claim the plaintiffs, being out of actual possession, must prove a valid location. Belk v. Meagher, 104 U.S. 279, 26 L.Ed. 735; Holdt v. Hazard, supra; 17 Cal.Jur. §§ 17 and 18, p. 301, et seq.; Garthe v. Hart, 73 Cal. 541, 15 P. 93; Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777.

[6, 7] The only other claim of plaintiffs to participation in any of the proceeds from the mining operations must be based upon their claimed rights under the so-called option agreement above set forth. It will be noted therefrom that Sadler promised to sell 49 per cent of his interest in his mining claims to Middleton, Sr., and Minner for $200, to be paid before October 10, 1940. This is clearly a unilateral writing, without reciting a consideration therefor, and was canceled by Sadler before the consideration referred to therein had been paid or tendered. Such a canceled agreement did not confer upon plaintiffs any interest in or to the claims here involved nor was it subject to specific performance. A mere offer, as such, is subject to revocation by the offerer at any time prior to acceptance. Roth v. Moeller, 185 Cal. 415, 197 P. 62; Levy v. Lyon, 153 Cal. 213, 94 P. 881; Christy v. Drapeau, 22 Cal.App.2d 582, 71 P.2d 940; North Confidence Mining & Development Co. v. Morrice, 56 Cal.App. 145, 204 P. 851.

The determination that the attempted locations of the claims here involved were void sufficiently disposes of the many other questions presented on the appeal. The evidence supports the findings and the findings, as signed, while in part are not happily worded, sufficiently dispose of the issues presented.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

59 Cal.App.2d 585

PEOPLE v. THOMAS et al.

Cr. 3667.

District Court of Appeal, Second District, Division 3, California.

July 7, 1943.

Rehearing Denied July 16, 1943.

Hearing Denied Aug. 5, 1943.

1. Criminal law ⚷200(1)

Convictions may be had for more than one offense committed by a single act or series of acts where there is an element of one crime not found in the other and in a prosecution for either offense there could not have been a conviction of the other. Pen.Code, §§ 687, 1023; Const. art. 1, § 13.

2. Criminal law ⚷199

In prosecutions for crimes of personal violence involving assault and additional elements, conviction of the greater offense is the equivalent of conviction of all included offenses and bars further prosecution under rule that the major offense cannot be split up so as to allow separate prosecutions for each included offense and the included offenses cannot be split up as a basis for separate prosecutions. Pen. Code, §§ 687, 1023; Const. art. 1, § 13.

3. Criminal law ⚷200(1)

While a culprit is protected from double punishment, he is not allowed to commit two separate and distinct offenses for the price of one merely because they have some minor common element. Pen.Code, §§ 687, 1023; Const. art 1, § 13.

4. Criminal law ⚷200(2)

Conviction under plea of guilty of assault by force likely to produce great bodily injury did not bar prosecution for robbery for same series of acts on ground that simple assault was included in each felony. Pen.Code, §§ 687, 1023; Const. art. 1, § 13.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Lincoln Sherwin Thomas and others were convicted of assault by means of force likely to produce great bodily injury and of robbery, and they appeal from the conviction of robbery.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Defendants Thomas, Johnson, and Hernandez were jointly charged by information with the crimes of robbery (Count I) and assault by means of force likely to produce great bodily injury (Count II). These separate offenses were committed in the course of the same series of acts, which consisted of a beating administered to a soldier in an alley close by a cafe and bar frequented by Negroes, in which the soldier had been treating the defendants to beer until the place closed at about 2 a. m. After knocking their victim down and fracturing his jaw and nose, thereby rendering him unconscious, the defendants left him in the alley and shortly thereafter divided among themselves $10 which one of them had taken from the soldier's pocket while he lay unconscious. Defendants pleaded guilty to the charge of assault by means of force likely to produce great bodily injury (Count II), and not guilty to the charge of robbery (Count I). When placed on trial for the latter crime they interposed a plea of once in jeopardy and at the conclusion of their trial moved to dismiss the robbery charge, upon the grounds of former conviction and former jeopardy. The motions were denied, defendants were found guilty of robbery and were sentenced for each crime, to state prison for the crime of robbery and to the county jail for the assault, the sentences to run concurrently. All of them have appealed from the conviction of robbery.

The sole ground urged for reversal is that the pleas of guilty to the charge of assault by means of force likely to produce great bodily injury were a bar to the prosecutions for robbery. The contention is that because the crime of simple assault is necessarily included in each of said felonies, a conviction or acquittal of one would bar prosecution for the other. No authority is cited which supports this proposition and it clearly is not the law. The State Constitution, section 13, Article I, provides that no person shall be twice put in jeopardy for the same offense, and sections 687 and 1023 of the Penal Code provide in substance that one who has been convicted or acquitted may not be prosecuted again for the offense first charged or an offense necessarily included therein.

By the first count of the information it was charged that defendants forcibly took from the person and immediate presence of the victim $10, and that the robbery was accomplished by means of force used by the defendants upon the victim and also by then and there putting him in fear. We may therefore assume, without deciding, that upon this count defendants could have been convicted of simple assault. People v. Driscoll, 1942, 53 Cal.App.2d 590, 593, 128 P.2d 382. Had they gone to trial on the second count they could also have been convicted of simple assault.

[1] It is the settled law of California that convictions may be had for more than one offense committed by means of a single act or series of acts, where there is an element of one crime not found in the other and where in a prosecution for either one of the offenses there could not have been a conviction of the other. People v. McIlvain, 1942, 55 Cal.App.2d 322, 327, 328, 329, 130 P.2d 131; People v. Warren, 1940, 16 Cal.2d 103, 111, 104 P.2d 1024; People v. Venable, 1938, 25 Cal.App.2d 73, 76 P.2d 523; People v. Zimmer, 1937, 23 Cal.App.2d 581, 586, 73 P.2d 923; People v. Coltrin, 1936, 5 Cal.2d 649, 660, 55 P.2d 1161; In re Application of O'Connor, 1927, 80 Cal.App. 647, 651, 252 P. 730; People v. Day, 1926, 199 Cal. 78, 86, 89 248 P. 250; People v. Parker, 1925, 74 Cal.App. 540, 549, 241 P. 401; People v. Brannon, 1924, 70 Cal.App. 225, 233 P. 88; People v. Ciulla, 1919, 44 Cal.App. 725, 187 P. 49; People v. Devlin, 1904, 143 Cal. 128, 76 P. 900; People v. Bentley, 1888, 77 Cal. 7, 18 P. 799, 11 Am.St.Rep. 225; People v. Majors, 1884, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295.

The two felonies charged to appellants, having different essential elements, are separate and distinct offenses within the rule stated in the foregoing cases. Neither offense is included within the other and appellants in a prosecution for one of the offenses could not have been convicted of the other. Appellants' contention is not that they have been convicted twice of the same offense or that either of the offenses of which they have been convicted is included in the other. They say only that they might have been convicted of simple assault in either prosecution, which is correct, but they overlook the important fact that in neither prosecution were they adjudged guilty only of the offense of simple assault. After appellants had pleaded guilty to the aggravated assault charged in the second count, they could not have been convicted of simple assault in a prosecution under Count I, because simple assault is an offense necessarily included within the aggravated assault charged. And if they had pleaded guilty to simple assault under Count II, they could not have been convicted of simple assault under Count I, because that would have been a second conviction of the identical offense to which they had pleaded guilty. But as the case stands, appellants have not been convicted twice of the same offense nor have they been convicted under Count I (robbery by the use of force upon their victim) of an offense necessarily included, or included at all, within the offense charged in Count II (assault by means of force likely to produce great bodily injury).

[2] Appellants' argument amounts only to this: That in prosecutions for two distinct and different felonies, each involving an element of criminality not found in the other, and each involving the act of assault constituting the offense of simple assault, there can be a conviction of one or the other of the major crimes but not convictions of both. There is no constitutional or statutory law which supports this argument, nor have our courts ever so held. In prosecutions for crimes of personal violence involving the act of assault, but one or more additional elements, conviction of the greater offense is legally the equivalent of a conviction of all included offenses and bars further prosecution, under the familiar rule that the major offense cannot be split up so as to allow a separate prosecution for each included offense. People v. Mendoza, 1942, 55 Cal.App.2d 625, 131 P.2d 622; People v. McDaniels, 1902, 137 Cal. 192, 69 P. 1006, 59 L.R.A. 578, 92 Am. St.Rep. 81. No more can any of the included offenses be split up as a basis for separate prosecutions. Acquittal operates in the same way. No such double prosecution has occurred in the cases of appellants. They stand convicted of two felonies, each involving an act of assault upon the person of their victim, but each involving an element distinguishing the major offense from the offense of simple assault. They would have us hold that they have been convicted twice solely of the offense of simple assault, which is true only in the sense that the plea of guilty in the one case or the conviction in the other would have barred further prosecution for the offense of simple assault or any other included offense. But all that has happened is that they have been convicted of two felonies committed in the course of a continuous series of acts, which offenses have the common element of assault on the person of the victim constituting the offense of simple assault.

[3, 4] While the law jealously protects a culprit from double punishment, it does not allow him to commit two separate and distinct offenses for the price of one merely because they have some minor common element. Here the defendants assaulted their victim with great violence, rendering him unconscious, and while he was unconscious they robbed him; they might just as well have robbed him or attempted to rob him first and attacked him afterwards, as was the case in People v. Bentley, supra, 1888, 77 Cal. 7, 18 P. 799, 11 Am.St.Rep. 225. It would be wholly illogical to say that in either case one of the major crimes must go unpunished because, perchance, appellants in each felony prosecution might have been, although they were not, convicted only of the offense of simple assault. Of course, as we have said, two convictions of simple assault could not stand. A plea of guilty to simple assault in one case and a conviction of simple assault in the other, would be an acquittal of the greater offenses charged and would eliminate the elements which distinguish each of the major offenses from the other and from the offense of simple assault. But the judgments here establish the existence of those distinct elements as realities and they cannot be ignored. Appellants are subject to punishment for the offense of assault by means of force likely to pro-

duce great bodily injury and for the offense of robbery, because these are separate and distinct offenses, neither of which is necessarily included within the other. Although the act of assault is involved in each, in neither case can it be said that defendants are suffering punishment for the mere offense of simple assault and they are therefore not suffering double punishment.

We do not intend that anything we have said should be construed as applying to a hypothetical situation where the defendants had pleaded guilty to simple assault under Count II and had later been prosecuted for robbery under Count I. We do not have that situation. We agree with appellants' contention only thus far, that if defendants, after their plea of guilty under Count II, had been convicted of simple assault under Count I, the conviction could not stand. But we do not have such a case.

The judgments are affirmed.

PARKER WOOD, J., and SHAW, Justice pro tem., concur.

59 Cal.App.2d Supp. 845

PEOPLE v. BILLINGSLEY.

Cr. A1957.

Appellate Department, Superior Court,
Los Angeles County, California.

June 29, 1943.

1. Criminal law 🔑37

If a crime is committed at accused's suggestion, the "entrapment" doctrine is not applicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Entrapment".

2. Criminal law 🔑45

If an officer, or some one acting under his direction induces or persuades accused to commit crime which he would not have committed without such inducement, the law will not punish accused.

3. Criminal law 🔑330

Defense of "entrapment" is a positive defense imposing on accused the burden of showing that he was induced to commit the act for which he is being prosecuted and invocation of the defense necessarily assumes that acts charged as a public offense were committed.

4. Criminal law 🔑814(8)

In prosecution for violating city ordinance prohibiting offering, trial court properly refused to instruct on entrapment under the evidence.

5. Criminal law 🔑564(3)

Direct evidence is not necessary to prove venue but it may be established by inferences from the evidence.

6. Criminal law 🔑564(1)

Evidence established that the crime was committed within the city so as to sustain conviction for violating city ordinance prohibiting offering.

7. Criminal law 🔑1001

Under statute providing that the court may impose any or all of specified terms of probation, accused is not deprived of the right to refuse probation, which right is a necessary safeguard against the possibility that the conditions of probation may be more onerous than the sentence. Pen.Code, § 1203.1.

8. Criminal law 🔑1001

"Probation" was never intended to be a device for making punishment more severe than that prescribed by the legislature, but is an act of grace and clemency which may be granted by the court to a seemingly deserving accused whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. Pen.Code, § 1203.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Probation".

9. Criminal law 🔑1001

A court has power of its own motion to order a probation investigation. Pen. Code, § 1203.

10. Criminal law 🔑977(3)

Where municipal court on its own motion and over accused's objection continued the cause to a date 14 days after conviction for hearing on probation and sentence, without a waiver by accused of time for sentence, the municipal court had jurisdiction to pronounce judgment and sentence on day to which cause was continued. Pen. Code, § 1449.

11. Criminal law ⚿**1001**

Election to serve sentence rather than to accept probation must be timely made or probation will be deemed to have been accepted. Pen.Code § 1203.01.

12. Criminal law ⚿**1001**

Where accused within the proper time rejected probation, trial court improperly suspended execution of sentence and placed accused on probation, since accused was not required to accept probation and accused should have been imprisoned under her original sentence. Pen.Code, § 1203.01.

13. Criminal law ⚿**1023(3)**

An order continuing the cause and referring the matter to the probation department was not an "appealable order" and attempted appeal therefrom was dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

◆

Appeal from Municipal Court of City of Los Angeles; Arthur S. Guerin, Judge.

Alice Billingsley was convicted of violating a city ordinance prohibiting offering, and she appeals.

Order in accordance with opinion.

Jerrell Babb and Richard H. Cantillon, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SWAIN, Judge.

On April 1, 1943, the defendant was convicted of violating section 41.05 of Ordinance 77000 of the City of Los Angeles (offering). Her motion for a new trial was denied on April 5, 1943. On the same day the court on its own motion, and over the objection of the defendant, continued the cause to April 15 for hearing on probation and sentence, without a waiver by the defendant of time for sentence. The court thereupon referred the case to the Probation Department for investigation and report. On April 15 the court sentenced the defendant to 180 days in jail, suspended the execution of judgment and sentence, and granted probation for two years on condition that the defendant serve 120 days in jail, leave the State of California within 48 hours after her release from jail and remain out of the state during the rest of her period of probation. On that day before sentence was pronounced, the defendant again moved for a new trial on the ground that sentence had not been pronounced within the time prescribed by law. Penal Code, § 1449. This motion was denied. The defendant appeals from the order of April 5 denying her motion for a new trial, from the order of April 5 continuing sentence to April 15, from the order of April 15 denying her motion for a new trial and from the judgment and sentence.

Entrapment. In her appeal from the judgment on the merits she claims that the trial court erred in refusing to give the instruction, which she requested, on the law of entrapment. No question is raised as to the correctness of the form of the proposed instruction. The only question is whether there is any evidence under which the doctrine of entrapment is applicable. It is undisputed that the complaining witness, police officer Gunn, then in plain clothes, met the defendant in the cocktail lounge of a certain hotel. That Gunn and the defendant went to his room in that hotel where, shortly thereafter, the defendant was arrested by two other police officers. The evidence is conflicting as to who suggested going to Gunn's room and as to what happened in the room. Gunn testified that, after they reached his room, the defendant demanded and he gave her $50 to have intercourse with him. Defendant denied that there was any talk of intercourse or that Gunn paid her any money. The arresting officers testified to defendant's state of undress and to finding under her pocketbook the $50, which had previously been marked.

[1-4] The only evidence as to who suggested sexual intercourse is found in the testimony of Officer Gunn, which is to the effect that the defendant suggested it. If a crime is committed at the suggestion of the defendant, the doctrine of entrapment is not applicable. In People v. Lee, 1935, 9 Cal.App.2d 99, at pages 108, 109, 48 P.2d 1003, at page 1007, the court said: "The defense of entrapment is recognized as a valid defense available to a person charged with the commission of a public offense under certain circumstances. The essential and important element which renders the

defense available is the fact of inducement. If an officer or some one acting under his direction induces or persuades a person to commit a crime which he would not have committed without such inducement, the law will not punish the person thus lured into commission of the offense. * * * It is our understanding that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted. The invocation of the defense necessarily assumes that the act charged as a public offense was committed." The court did not err in refusing to instruct the jury on entrapment, for there was no evidence to support such a defense.

The other grounds which the defendant urges for a reversal are: (1) the prosecution failed to prove that the crime was committed in the City of Los Angeles; (2) the court had no authority to refer the cause to the Probation Department on its own motion, and, therefore, its order continuing sentence to April 15 and the pronouncing of sentence on that day, which was more than five days after the verdict was returned, was error.

[5, 6] Venue. There is no direct testimony that the crime was committed in the City of Los Angeles. But direct evidence is not necessary to prove venue; it may be established by inferences from the evidence. People v. Aggie, 1940, 37 Cal.App.2d 110, 98 P.2d 806. There is an abundance of evidence from which the inference may be drawn that the crime was committed in the City of Los Angeles.

[7-12] Probation and Sentence. The appellant contends that in the absence of an application by the defendant for probation, the court has no power to grant probation or to postpone pronouncement of sentence for more than five days after the verdict. She bases this conclusion, in part, on the premise that she is not required to accept probation. The point is of sufficient importance to require a review of the authorities both on appellant's premise and on her conclusion. In discussing the subject of pardon, the Supreme Court said, in Re Peterson, 1939, 14 Cal.2d 82, 84, 92 P.2d 890: "It has long been held that consent by the prisoner is a prerequisite to the validity of a conditional pardon because its terms may be more objectionable than the punishment fixed by the sentence." (page 85 of 14 Cal.2d, page 891 of 92 P.2d) "Section 1168 of the Penal Code, which defines the rights and duties of the board, and empowers it to parole prisoners upon such conditions as it may deem proper, does not authorize the board to require the prisoner to accept a parole ordered by it, and * * * the consent of the petitioner is a prerequisite to his release upon parole." (Section 1168 of the Penal Code was amended in 1941 (Stats. of 1941, Chap. 106, § 13), and that portion defining the rights and duties of the Board of Prison Terms and Paroles is now found in Sections 3020 to 3065 inclusive of the Penal Code.) The same reasoning applies to probation and the rule is the same unless the language of Penal Code, section 1203.1, "The court may impose *and require* any or all of the above mentioned terms * * *" (italics ours) deprives the defendant of the right to refuse probation. There is nothing in this language which says the defendant must accept probation. The right of a defendant to refuse probation is a necessary safeguard against the possibility that the conditions of probation may be more onerous than the sentence. The power of the court to impose conditions of probation is very great. For instance, in People v. Blankenship, 1936, 16 Cal.App.2d 606, 61 P.2d 352, it was held that a condition of probation that the defendant submit to a vasectomy was valid. Probation was never intended to be a device for making the punishment more severe than that prescribed by the legislature. As the court said in People v. Hainline, 1933, 219 Cal. 532, 534, 28 P.2d 16, 17, "'Probation' is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." That the defendant is allowed to refuse probation and serve the original sentence if she deems probation too onerous is borne out by the statement of the court in People v. Blankenship, supra, 16 Cal.App.2d page 610, 61 P.2d page 353: "In conclusion, it may be remarked that appellant was not compelled by the condition which the court imposed to submit to an operation whose effect would be to foreclose him from procreation. He was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline to submit to the operation and accept the penalty which the law provides as punishment for his offense." We, therefore, agree with

appellant that she does not have to accept probation, but it does not follow from this that the court lacks the power to order a probation investigation on its own motion. On the contrary, it is well settled that a court does have such power. Penal Code, § 1203; People v. Wilson, 1929, 101 Cal. App. 376, 281 P. 700; In re Phillips, 1941, 17 Cal.2d 55, 63, 109 P.2d 344, 132 A.L.R. 644. When the question of probation is being considered, the Municipal Court has the power to postpone sentence for twenty days. Penal Code, § 1449. This section makes no distinction between cases in which the defendant herself applies for probation and cases in which probation is considered on the court's own motion. So the court had jurisdiction on April 15 to pronounce judgment and sentence. Doubtless election to serve the sentence rather than accept probation must be timely made or probation will be deemed to have been accepted. In the case at bar, the appellant has, within proper time, exercised her election by a rejection of probation, and she should be imprisoned under her original sentence. The order suspending the execution of sentence and placing the defendant on probation subject to terms should be revoked. It therefore becomes unnecessary to decide whether the court had power as a condition of probation to order the defendant to leave the state after her release from jail.

[13] The order of April 5 continuing the cause to April 15 and referring the matter to the Probation Department is not an appealable order; the attempted appeal therefrom is dismissed.

The judgment and sentence and all orders appealed from, other than said order of April 5, are affirmed, with directions that the order suspending execution of judgment and sentence and granting probation be revoked.

FOX, Acting P. J., and KINCAID, J., concur.

22 Cal.2d 402

LOS ANGELES WAREHOUSE CO v. AMERICAN DISTILLING CO.

S. F. No. 16878.

Supreme Court of California.

June 30, 1943.

1. Internal revenue ⚿1751

An internal revenue bonded warehouse, which contracted to receive distilled spirits from owner for storage, and which under a bond was required by government to pay the tax on spirits when they were destroyed in transit, could recover amount of tax from owner. 26 U.S.C.A. Int.Rev. Code, § 2800(a) (1), (c).

2. Bailment ⚿11

If bailed article is destroyed or damaged without bailee's fault, loss must fall on bailor.

3. Internal revenue ⚿1751

The federal laws and regulations governing imposition and collection of tax on liquor did not determine right of internal revenue bonded warehouse, which contracted to receive liquor from owner for storage and which was required by government to pay the tax on liquor destroyed in transit, to recover amount of tax from owner. 26 U.S.C.A. Int.Rev.Code, § 2800 (a) (1), (c).

4. Internal revenue ⚿1732

Inherently the tax on bonded liquor is imposed on the goods, and so far as persons dealing with liquor are concerned, tax follows the property as a necessarily included part of the value thereof, and hence payment of tax becomes an obligation of owner as an incident of ownership payable on removal from bond. 26 U.S.C. A. Int.Rev.Code, § 2800(a) (1), (c).

5. Money paid ⚿1

Where owner of liquor suggested to internal revenue bonded warehouse, to which liquor was sent for storage when it was destroyed, that warehouse should obtain remission or cancellation of liquor tax, and warehouse in making such unsuccessful attempt expended money for legal fees and premium on bond, owner was liable to warehouse for such expenditures. Gen. Laws 1937, Act 9059, § 27; Civ.Code, § 1856.

TRAYNOR, J., GIBSON, C. J., and EDMONDS, J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by the Los Angeles Warehouse Company against the American Distilling Company to recover certain sums of money originally paid out by plaintiff for the use and benefit of defendant whose bonded liquor was destroyed in transit to plaintiff. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 130 P.2d 192.

Norman A. Eisner, of San Francisco, for appellant.

Sherman Anderson, of Los Angeles, for respondent.

SCHAUER, Justice.

This is an action by a bailee to recover from the bailor-owner moneys expended by the former in payment of an excise tax on the latter's property. The judgment in favor of the plaintiff-bailee must be sustained.

The property involved was 2,092.5 gallons of gin; exclusive of the tax it was worth 28 cents per gallon. The tax was the United States Internal Revenue excise on distilled spirits; it was imposed at the rate of $2.25 a gallon. Under the law, Int.Rev.Code, § 2800(a) (1) and (c), 26 U.S.C.A. Int.Rev.Code, § 2800(a) (1), (c), such tax attached to the gin "as soon as this substance [came into] existence as such." Obviously, therefore, the gin, as soon as it came into "existence as such," represented an invested value of $2.53 a gallon. (The possibility of abatement of the tax upon destruction of the gin under some circumstances need not be considered, as such contingency did not arise here.) Any owner of the gin necessarily had to consider its value as including the $2.25 a gallon tax inasmuch as such tax had to be paid.

Notwithstanding the fact that the tax attached to the gin simultaneously with its coming into existence, the actual payment of the tax could be deferred so long as the gin was kept in an internal revenue bonded warehouse (up to eight years). Defendant was the distiller and owner of the gin here involved; the tax on such gin had not been paid. Defendant was also the proprietor of a government bonded warehouse located in Sausalito, California.

Plaintiff was engaged in the business of conducting a similar government bonded warehouse, situated at Los Angeles, California, and as a part of its business on occasion caused distilled spirits to be transported in bond from bonded warehouses other than its own to its bonded warehouse at Los Angeles. Prior to October 11, 1938, defendant received from one of its customers a verbal purchase order for the gin here involved, together with directions that the gin be delivered to plaintiff's warehouse at Los Angeles for storage, title to pass after delivery in Los Angeles. On approximately October 11, 1938, defendant notified plaintiff of such order. In order to secure permission from the United States Internal Revenue Department to transport the gin from defendant's warehouse to that of plaintiff it was necessary for plaintiff to make application to the department, designating the carrier by which the gin was to be transported, and also to file a "Transportation and Warehousing Bond" to insure the payment of the tax on the gin. Plaintiff filed such bond with the department and designated the Evans Freight Lines, Inc., as the carrier. The gin was received by the designated carrier, but while it was in transit from the warehouse of defendant to that of plaintiff it was destroyed by fire, through no fault (so it was stipulated) of either plaintiff or defendant. The parties agree that ownership of the gin remained in defendant at all times and "that under the laws of the United States of America distilled spirits being transported in bond from one bonded warehouse to another are deemed from the time the same leave the discharging warehouse to be in the custody of the receiving warehouse."

Thereafter, at defendant's request, plaintiff filed with the Internal Revenue Department a claim for remission of the tax on the gin. The claim was rejected, and on March 29, 1939, the Collector of Internal Revenue demanded of plaintiff the payment of the tax in the sum of $4,708.13. Plaintiff notified defendant by letter of the demand, and asked for defendant's check with which to make payment. Defendant did not furnish such check, but in a reply letter to plaintiff, dated April 3, 1939, the president of defendant distilling company stated, among other things: "I suggest you use every means possible to have the Department remit or cancel this charge, and after that is definitely settled and the money is paid then we can go further into the matter." On April 7, 1939, plaintiff filed with the Collector of Internal Revenue a written claim for abatement of the tax, and in connection therewith was required to post a bond, which it did at a premium expense of $105.93. In June, 1939, plaintiff filed a supplemental claim. Fees paid by plaintiff for an attorney's assistance in the matter amounted to $100.

In July, 1939, the claim was rejected, and in August, 1939, plaintiff paid the tax and accrued interest thereon, in the total sum of $4,809.21. Plaintiff promptly demanded reimbursement from defendant for the tax, the bond premium, and the attorney's fees. Defendant refused to pay and plaintiff brought suit, and recovered judgment for the total of the three sums. From such judgment defendant has appealed.

It seems scarcely more than a truism to observe that when property is destroyed without negligence or other fault of any person the loss falls upon the owner. Yet that simple fact, in the final analysis, determines this litigation.

[1, 2] Defendant contends that the Internal Revenue Code and regulations of the Department of Internal Revenue place primary (and inferentially ultimate) responsibility upon plaintiff for payment of the tax, and that to hold the distiller liable therefor would place upon the latter an impossibly burdensome contingent liability should gin distilled by it be destroyed after such gin had passed out of its control. It is not as the distiller, however, but rather as the owner of the gin that defendant here must reimburse plaintiff. The owner of the liquor lost it when it burned, and he must bear the loss of its total value, which, as we have seen, includes the tax which had attached. If title had passed from defendant company to its customer, then such loss, in the absence of some other controlling circumstance, would have been upon the customer rather than upon defendant. The rights of the respective parties, had the loss been occasioned through some fault of plaintiff, need not concern us here, inasmuch as the parties have stipulated that "the destruction and loss of said gin was in no manner caused or contributed to by the plaintiff or [the] defendant." As stated in 4 California Jurisprudence 22, § 13, "If the subject of the bailment perishes or is lost, or is destroyed or damaged by accident, without any fault on the part of the bailee, the loss must fall on the bailor." See Hirshfield v. Central Pac. R. R. Co., (1880) 56 Cal. 484, 485; Rodgers v. Bachman, (1895) 109 Cal. 552, 557, 42 P. 448; Wolfe v. Willard H. George, Inc., (1930) 110 Cal.App. 532, 535, 294 P. 436.

[3, 4] The federal laws and regulations governing the imposition and collection of the tax do not determine the rights between the parties under the circumstances here depicted. The requirement that plaintiff furnish a transportation bond and the fact that the federal government looked primarily to plaintiff and only secondarily to defendant for payment of the tax are wholly immaterial in this case, to which the government is not a party and which involves no question of primary liability to the government but only that of ultimate liability as between a bailor and a bailee. The law and regulations imposing a primary and direct liability on the bailee-warehouse in favor of the government and requiring a bond from it constitute merely a scheme of procedure adopted by the government for the convenient and certain collection of the tax by it and for the accommodation and convenience of the distiller and subsequent owners in the free transfer of title to the liquor while it remains in bond, up to a period of eight years, without the actual advancement of the money for the tax. Such procedure helps the manufacturer and subsequent purchasers in that it brings the payment of the tax closer to the consumer who ultimately, in effect, pays it; i. e., the tax does not have to be paid to the government until the liquor is removed from the bonded warehouse presumably for distribution through retailers to the consumers, provided such removal is delayed not longer than eight years. Such procedure obviously does not purport to fix ultimate responsibility for the tax upon a bailee-warehouse in respect to its relationship with a bailor-owner. Liability of the distiller of the liquor, or of its bailee, to the government for payment of the tax is essentially different from responsibility for loss of the property (including ultimate responsibility for the tax) as among parties dealing with the liquor. Inherently the tax is imposed on the goods, not on the manufacturer or the bailee or any subsequent owner or consumer. So far as persons dealing with the liquor are concerned the tax follows the property as a necessarily included part of the value thereof and hence, its actual payment being merely deferred, it becomes an obligation of the owner, as an incident of ownership, payable on removal from bond.

[5] The gin was in the constructive custody of plaintiff as the receiving warehouse at the time it was destroyed, and such destruction was tantamount to removal from bond. Under the terms of its transportation bond plaintiff thereupon became liable to the United States Government for the immediate payment of the tax, and, at the demand of the Collector of Internal Revenue, advanced such tax. Plaintiff also advanced the money to pay the obligations it incurred for bond premium and attorney's fees in seeking abatement of the tax pursuant to defendant's request. Under the provisions of section 27 of the Warehouse Receipts Act, Stats.1909, p. 437; 2 Deerings' Gen.Laws, 1937, Act 9059, p. 4218, a warehouse is given a lien for "all lawful claims for money advanced * * * in relation to * * *" goods in its custody. It is also provided, in section 1856 of the Civil Code, that "A depository for hire has a lien for * * * advances * * * incurred at the request of the bailor." For the tax, the bond premium, and the attorney's fees advanced, plaintiff-warehouse is entitled to recover from the owner of the goods.

The judgment is affirmed.

SHENK, CURTIS, and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting in part).

I concur in the result reached in the majority opinion but do not agree that the federal excise tax on distilled spirits is a property tax, that the tax follows the property "as a necessarily included part of the value thereof," or that it "becomes an obligation of the owner, as an incident of ownership." To employ property law concepts in the solution of problems like the present one can lead only to confusion.

The issue turns not upon who had title to the liquor that was destroyed, but upon whose tax liability was discharged by plaintiff when it paid the tax after the destruction of the liquor. Defendant contends that plaintiff paid its own debt, on the ground that the liquor was being transported under the plaintiff's bond at the time it was lost. Plaintiff contends that it paid defendant's debt, and that the provisions requiring it to post a bond guaranteeing the payment of the tax in the event the liquor was withdrawn from bond are designed, not to impose a new or substituted tax, but merely to insure collection of a tax already imposed. The determination of this issue rests upon the proper interpretation of the federal statutes and regulations with respect to the federal excise tax on distilled spirits.

Section 2800(a) (1) of the Internal Revenue Code, 26 U.S.C.A. § 2800(a) (1), provided, at the time here pertinent: "There shall be levied and collected on all distilled spirits (except brandy) in bond or produced in or imported into the United States an internal revenue tax at the rate of $2.25 (and on brandy at the rate of $2.00) on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond." Section 2800(c) provided: "The tax shall attach to distilled spirits * * * as soon as this substance is in existence as such * * *." Section 2800(d) provided: "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

These provisions impose an excise tax on distilled spirits measured by the quantity distilled. United States v. Singer, 82 U.S. 111, 11 Wall. 111, 121, 21 L.Ed. 49; see Patton v. Brady, 184 U.S. 608, 22 S.Ct. 493, 46 L.Ed. 713. Liability for the tax rests upon the distiller as soon as the liquor is in existence and until the tax is paid. If the tax were a property tax it would have to be apportioned among the states according to population. U.S.Const. art. 1, sec. 2; see Bromley v. McCaughn, 280 U.S. 124, 50 S. Ct. 46, 74 L.Ed. 226; Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759.

Recognizing that liquor is frequently held several years before sale or resale, Congress provided for the postponement of the payment of the tax, not to exceed eight years, under conditions insuring payment. Thus section 2879(b) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 2879(b), provides: "The tax on all distilled spirits hereafter entered for deposit in internal revenue bonded warehouses shall be due and payable before and at the time the same are withdrawn therefrom and within eight years from the date of the original entry for deposit therein; and warehousing bonds hereafter taken under the provisions of the internal revenue laws shall be conditioned for the payment of the tax on the spirits as specified in the entry before withdrawal from the internal revenue bonded warehouse, and within eight years from the date of said entry." Subdivision (c) of section 2879 provides: "The Commissioner shall prescribe the form and penal sums of bonds covering distilled spirits in internal revenue bonded warehouses and in transit to and between such warehouses: Provided, That the penal sums of such bonds covering distilled spirits shall not exceed in the aggregate $200,000 for each such warehouse." Pursuant to this provision the commissioner required each receiving warehouse to post a bond to insure payment of the tax when liquor was in transit to or in possession of the receiving warehouse. The bond posted by plaintiff expressly guaranteed payment of the tax by plaintiff in the event the liquor was destroyed while in transit to plaintiff.

While plaintiff's obligation was ancillary to and by way of security for the payment of the distiller's obligation, it did not supersede that obligation. Plaintiff discharged the tax liability that rested upon defendant until the tax was paid, and may recover from defendant under the established principle that "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct." Restatement: Restitution, § 76, p. 331; see cases cited in 17 Cal.Jur. 587 et seq.; see, also, Brooks Wharf and Bull's Wharf Co., Ltd. v. Goodman Bros., (1937) 1 K.B. 534.

GIBSON, C. J., and EDMONDS, J., concur.

22 Cal.2d 454

SOUZA et al. v. CORTI et al.

S. F. 16866.

Supreme Court of California.

July 8, 1943.

1. Automobiles 🔑192(1)

Statute imposing upon owner liability for negligent operation of automobile with owner's permission defines owner's liability in cases where principle of respondeat superior is inapplicable and makes owner liable for negligent operation by any person to whom owner expressly or impliedly gave permission to operate automobile, though it was operated without express authority and not in owner's business. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles 🔑192(1)

An automobile driven by a friend at direction of one having permission to use it so that permittee could ride in girl companion's automobile was being "used" with owner's permission within statute imposing on owner liability for negligent operation of automobile by any person using or operating it with owner's express or implied permission, though owner had instructed permittee not to lend automobile to anyone else. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Use".

3. Automobiles 🔑197(5)

A friend driving automobile at direction of one having permission to use it in order that permittee might ride in girl companion's automobile acted as permittee's "agent", so that his negligence in operating automobile was imputable to permittee as principal.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

EDMONDS, J., dissenting and TRAYNOR, J., dissenting in part.

◆

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Theresa Souza and others against John Corti, Joseph Gigli and another to recover for injuries sustained in automobile collision. Plaintiffs recovered judgment against defendant Corti, driver of one of the automobiles, and from that portion of the judgment which denied plaintiffs relief against the other defendants, plaintiffs appeal.

Judgment denying relief against such defendants reversed.

For prior opinion, see 129 P.2d 729.

Van A. Neher and Phillips & Munck, both of Oakland, for appellants.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondents.

SHENK, Justice.

This is an action for damages for personal injuries resulting from an automobile collision. Judgment was entered in favor of each of the plaintiffs against the defendant John Corti and in favor of the defendants Joseph and Arthur Gigli, father and son. The plaintiffs appealed from the judgment in so far as it is favorable to the defendants Gigli.

The appeal involves the construction, as applied to the undisputed facts, of section 402 of the Vehicle Code, St.1937, p. 2353, the pertinent part of which is as follows: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner * * *."

Joseph Gigli was the owner of a Dodge sedan. He housed the car in the garage at his home where he and his family, including Arthur and a younger son, resided. The keys were left in the car and members of the family were permitted to use it. The son Arthur conducted a service station at San Leandro. He had general permission to use his father's car and had used it on an average of twice a week for a year and a half. On the evening of Saturday, July 6, 1940, Arthur loaned his own car to the younger brother. At a later hour Arthur desired to go out with his friend, the defendant John Corti, so he sought and obtained permission from his father to use the Dodge car. The father testified that Arthur asked him for the use of the car on that evening and that he granted permission to use it but with the admonition: "Don't lend the car to anyone else." Arthur took the car and in company with Corti stopped at Rocca's, a liquor dispensing establishment and dance hall. From there the two proceeded to a night spot known as Bruno's where they met two girls with whom they had not theretofore been acquainted. Later they decided to return to Rocca's and dance. Arthur suggested that the four go in the Dodge car. Arthur's girl objected because she had a new Plymouth coupe with her and did not want to leave it behind. Neither did Arthur wish to leave his father's car. In order to get the two cars to Rocca's and to make sure the girls would show up, Arthur decided to ride with his girl in the Plymouth. Accordingly he handed the keys of the Dodge to Corti who agreed to take the other girl in that car and "follow" the Plymouth car to Rocca's. The collision in which the plaintiffs were injured occurred on the return trip to Rocca's when the Dodge car, driven by Corti, collided with the plaintiff's car at the intersection of East 14th Street and Dutton Avenue in San Leandro. The negligence and liability of Corti is not disputed. The principal question is whether Joseph Gigli, the owner of the Dodge car, is liable in damages for the injuries sustained by the plaintiffs pursuant to the statute above quoted. He contends that he is not liable because he had not given express permission to Corti to drive the car and that permission so to do may not be implied for the reason that he instructed his son Arthur not to lend the car to anyone else

[1] The portion of the statute now under consideration was enacted in 1929 and was then included in section 1714¼ of the Civil Code. Stats.1929, p. 566. Its constitutionality is not questioned. See Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521, O'Neill v. Williams, 127 Cal.App. 385, 15 P.2d 879. The statute defines the owner's liability in cases where the principle of respondeat superior is inapplicable, in order to make him liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car, and thereby prevent him from escaping liability by saying that his car was being used without express authority or not in his business. Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608; Plaumbo v. Ryan, 213 App.Div. 517, 210 N.Y.S. 225.

By a New York statute adopted in 1924 (New York Highway Law, 1924, ch. 534, § 282-e) liability was imposed on the owner similar to that prescribed by section 402 of our Vehicle Code. In Feitelberg v. Matuson, 124 Misc. 595, 208 N.Y.S. 786, 789, the defendant owner permitted one Mishkin to use his car. The accident occurred while Mishkin and some of his friends occupied the car. The driver was not Mishkin but one of his party. After upholding the constitutionality of the statute the court said: "The defendant also claims that the plaintiff cannot recover for the reason that the person to whom the car was loaned did not drive the car. The statute says, however, that the owner shall be liable for the acts of any person legally 'using or operating the same.' The words are used disjunctively. The Legislature drew a distinction between 'using' and 'operating.' To 'operate,' as distinguished from 'use,' signifies a personal act in working the mechanism of the car. Witherstine v. Employers' Liability Assur. Corporation, 235 N.Y. 168, 172, 139 N.E. 229, 28 A.L.R. 1298. As there stated: 'The driver operates the car for the owner, but the owner does not operate the car unless he drives it himself.' What was the purpose of adding the word 'use' unless it was meant to include the person who had the actual, though not physical, control of the car, and who was constituted by the owner its master ad hoc. If the liability of the owner were limited to the acts of the operator, the statute would become a dead letter in most cases. Its evasion would be an easy matter. The statute must be interpreted in harmony with its verbiage. We cannot hold that 'using' and 'operating' are interchangeable or synonymous words. If the owner chooses to intrust his car to another person, he invests such person, so long as he uses the car, with the same authority in regard to the management of the car which the owner has. That authority includes the right to select the operator. The statute so provides in unmistakable language." The court in that case also said: "Of course, the liability of the owner ceases when the borrower, in turn, gives the use of the car to a third party without the owner's consent." That statement was obiter, and in making it the court was merely emphasizing the distinction, under the New York law, between use and operation.

In Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650, 54 A.L.R. 845, Carucci, an employee of the defendant owner, was in charge of a truck as driver, accompanied by a salesman. He permitted the salesman, who was neither experienced, competent nor licensed as a driver, to operate the vehicle, while the driver rode on the running board. An accident occurred resulting in damage to the car of a third party. The defendant owner was held liable, first, on the common law liability for the negligence of the owner's authorized representative. On a second ground the court, speaking through Cardozo, then Chief Judge, said at page 164 of 245 N.Y., 156 N.E. at page 652, 54 A.L.R. 845: "Passing from common law to statute, we find the owner's liability not merely continued, but extended. By Highway Law, § 282-e: 'Every owner of a motor vehicle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner.' 'Use' as well as 'operation' may thus fasten liability upon the owner under the provisions of the statute. Fluegel v. Coudert, 244 N. Y. 393, 155 N.E. 683. This truck was intrusted by the defendant to Carucci, his driver, to be 'used' in the transportation of persons and property to and from a stated point. It was in use for that purpose and no other when the accident occurred. The defendant expected, to be sure, that Carucci would operate the truck as well as use it. None the less, use without more would entail liability for negligence. The statute may be said in a general way to have brought about the same results as had been attained in some other jurisdictions without reference to any statute by the so-called doctrine of 'the family automobile'. Fluegel v. Coudert, supra; Ferris v. Sterling, 214 N.Y. 249, at page 252, 108 N.E. 406, Ann.Cas.1916D, 1161. Only a narrow construction would permit us now to say that an owner placing a car in the care of members of his family to be used for their pleasure or for the family business would escape liability if wife or son or daughter should give over the wheel to the management of a friend. The ruling has been more liberal whenever the question has come up. Kayser v. Van Nest, 125 Minn. 277, 146 N.W. 1091, 51 L.R.A.,N.S., 970; Thixton v. Palmer, 210 Ky. 838, 276 S.W. 971, 44 A.L.R. 1379; Ulman v. Lindeman, 44 N.D. 36, 41, 176 N.W. 25, 10 A.L.R. 1440. Carucci did not abandon the car or its use when he surrendered to another the guidance of the wheel. He was still in charge of the truck, and was using it with the permission of the master, and even in the master's business. He did not cease to use it, and use it with permission, though the method of operation may have been illegal or forbidden. We think the effect of the statute is to read into our law the rule of liability laid down in Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N. W. 611, 45 L.R.A.,N.S., 382. The owner is now liable, though the negligence of the substitute may have been 'sudden and unexpected' (Ricketts v. Tilling, supra) if the act of negligence occurs during the life of the permitted use. Carucci was delinquent, but he was still the director of the enterprise, still the custodian of the instrumentality confided to his keeping, still the master of the ship."

A law similar to the New York statute and to our own has been in effect in Michigan since 1915, Pub.Acts 1915, No. 302, § 29. A proviso contained therein "that the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner," has been upheld and construed in harmony with our present conclusion. Kerns v. Lewis, 246 Mich. 423, 224 N.W. 647; see also Kieszkowski v. Odlewany, 280 Mich. 388, 273 N.W. 741. The court in the case of Kerns v. Lewis declined to read into the statute the restriction that the particular driver must be known by and his driving consented to by the owner. In Hawkins v. Ermatinger, 211 Mich. 578, 179 N.W. 249, the provision of a statute declaring that the consent of the owner of a car to its use will be conclusively presumed when the same is driven by an immediate member of his family was held constitutional as within the police power of the state.

In the absence of statutory liability in the State of Washington the courts have adopted the "family use" doctrine to hold the parent responsible when a third person was driving even though the parent gave specific instructions that the third person should not drive the car. King v. Cann, 184 Wash. 554, 52 P.2d 900.

The courts of this state have not recognized the distinction made in such cases as Owen v. Gruntz, 216 App.Div. 19, 214 N.Y.S. 543, and Stapleton v. Hertz Drivurself Stations Inc., 131 Misc. 52, 225 N.Y.S. 661, where the car was turned over to a third person by the permittee. In the case of Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447, the defendant gave the use of a car to his son who was attending university, with the instruction not to permit anyone else to drive it. The son violated the instruction, and permitted another student to take the car and drive it for his own purposes. An accident occurred while the car was so being driven. The District Court of Appeal relied on several cases in this and other jurisdictions, including Grant v. Knepper, supra, in arriving at the conclusion that an owner is liable for the negligence of a person to whom his permittee has entrusted the automobile temporarily.

In Bayless v. Mull, 50 Cal.App.2d 66, at page 72, 122 P.2d 608, at page 612, in a discussion of the general principles, it was said "that the legislature did not intend by the language it used to permit an owner to show any and all restrictions he may have placed on the use of his car and thus escape liability." And again on page 75 of 50 Cal.App.2d, 122 P.2d at page 613, the view of many courts was stated to the effect that "as the owner can avoid the liability by refusing to permit the use of his motor car by another or procure insurance to protect him, he should not be permitted to avoid the consequences of the operator's negligence and escape liability therefor by secret restrictions limiting the right to use the motor vehicle."

The cases of Boland v. Gosser, 5 Cal.App.2d 700, 43 P.2d 559, and Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, involved third party drivers, and the owner was held not liable. But in each of those cases the permittee was not given the general use of the vehicle. He had the car or truck to make certain repairs or tests, but turned it over to another for the purpose under circumstances which indicated that such delegation was not contemplated by the owner. However, if it may be said that there is anything stated in those cases which is not in harmony with the views expressed herein, it is necessarily disapproved.

[2] In the present case the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission. Liability of the defendant owner in this case pursuant to section 402 of the Vehicle Code is therefore established. Cases such as Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581, were concerned with violations of restrictions placed on the borrower as to the purpose for and the time within which the car was to be used. Further consideration need not now be given to those cases for the reason that we have here no question concerning the use of the car for the purpose or the period for which it was borrowed.

[3] As to the liability of the defendant Arthur Gigli, the record shows that defendant Corti took possession of the Dodge car for the use, benefit and accommodation and under the direction of Arthur and for the purpose of taking it to Rocca's for Arthur. Under these circumstances Arthur was the principal and Corti was his agent. The negligence of the latter was therefore imputable to Arthur. Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218.

The judgment in favor of the defendants Gigli is reversed.

GIBSON, C. J., and CURTIS and CARTER, JJ., concurred.

SCHAUER, Justice (concurring).

I concur in the judgment of reversal as to both Joseph Gigli and Arthur Gigli. In my opinion the evidence fails to support the finding that John Corti, in the operation of the automobile, was not the agent of Arthur Gigli. If John Corti was operating the car as the agent of Arthur Gigli, then the *use* of the car was that of Arthur Gigli. Regardless of the asserted admonition by Joseph Gigli (the father) to Arthur (his son) not to permit anyone else to *drive* it, he did consent to its *use* by Arthur. The situation is substantially the same as though the father had admonished the son not to operate the vehicle negligently. As Arthur was "using" the car at the time of the accident, its use was within the consent given by the father, even though Arthur had disobeyed his father's instruction not to permit another to operate it.

If Arthur had assumed to loan the vehicle to John for John's personal usage, as distinguished from that of Arthur, we should have a different question, for which I suggest no answer here.

When a person to whom an automobile has been entrusted embezzles it, and converts it to his own use in derogation of the title of the owner, I think the owner should not be held fictionally to have consented to usage which he did not in fact consent to, either expressly or impliedly. But when the usage which the bailee makes of a borrowed vehicle does not amount to a conversion of it, his mere disobedience of admonitions as to his personal conduct in the operation of the automobile within the scope of the authorized use should not exculpate the owner from the liability otherwise imposed by the statute.

In this case, Joseph Gigli consented to the use of the car by his son, and such consent covered the time and place in question. The father, therefore, is liable for negligence in its operation *while it was being so used* even though he had forbidden his son to allow another to operate it and his son had disobeyed such instruction. In the eyes of the law, by reason of the agency relationship, *John Corti's operation* of the automobile was *Arthur Gigli's use* of it. The consent of Joseph Gigli to such *use* (that is, use by Arthur) is all that is necessary to fasten liability upon him for negligence in its operation. As long as the vehicle was being *used* by Arthur, whether personally or through his agent, Joseph cannot avoid responsibility for negligence in its operation.

TRAYNOR, Justice (dissenting and concurring).

Under section 402 of the Vehicle Code the owner of a motor vehicle is not liable for an injury resulting from the negligence of another unless the latter was using or operating the vehicle with the express or implied permission of the owner when the injury occurred. It is settled that the owner does not become liable under this section merely by entrusting control of the vehicle to another, for if he qualifies his permission by specifying that the vehicle is to be used for a limited time, for a particular purpose, or in a particular locality, and such limitations are substantially violated, the permission terminates. Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051; Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; see Bowerman v. Sheenan, 242 Mich. 95, 219 N.W. 69, 61 A.L.R. 866; Heavilin v. Wendell, 214 Iowa 844, 241 N.W. 654, 83 A.L.R. 878; 112 A.L.R. 416; 136 A.L.R. 481. When the owner grants permission, however, he cannot insure its termination upon the occurrence of an injury and thus defeat the purpose of the statute, by specifying that the vehicle is not to be used in a manner that could lead to injuries. It would be an obvious circumvention of the statute if permission could terminate upon violation of a general instruction that the vehicle was not to be operated negligently or in any manner that would violate the Vehicle Code. It would be just as much a circumvention if the owner gave permission to use the vehicle subject to particular restrictions that would free him from the risks of injury that normally attend use of a motor vehicle.

There is no circumvention of the statute, however, when an owner imposes restrictions to protect himself against undue risks, as when he restricts the use of the vehicle to certain times, places, or purposes. The object of such qualifications is to limit the use of the vehicle, not to free the owner from the risks that attend its use. The same object motivates the qualification that the one who receives permission to use a vehicle must not allow any one else to use it. It is more likely that this qualification would be made than any other, for an owner would hardly accord the privilege of using the vehicle except to someone in whom he had confidence. When he takes the precaution to restrict the privilege to a single person, he refuses his consent to the use of the vehicle by others and cannot properly be regarded as liable for injuries that might result from such a use under a statute that predicates the owner's liability on his consent to the use or operation of the vehicle. A qualification that forbids the operation of the vehicle by others also restricts the use of the vehicle by the person entrusted with it. He is precluded not only from lending the vehicle to anyone else, but from using it in any way himself that would involve its operation by another except as compelled by emergencies or the exigencies that arise in the normal use of a motor vehicle. Thus in the present case, the owner's qualification applied not only to Corti's use of the vehicle to transport himself and the girl that accompanied him to Rocca's but to Arthur Gigli's use of it by thus having it brought to him at Rocca's. I therefore dissent from the judgment of reversal as to the owner, Joseph Gigli.

I concur in the judgment of reversal as to Arthur Gigli. There is no conflict in the evidence that while Corti used the vehicle for his own purposes, he operated it at the same time on behalf of Arthur Gigli in getting the vehicle to Rocca's for him. He was thus Arthur Gigli's agent regardless of the accomplishments of his own purposes. Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 462, 191 P. 894; Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945; see Restatement, Agency, § 236, California Annotations—171; Mechem on Agency, 2d Ed., § 1895.

EDMONDS, Justice (dissenting).

I can see no basis recognized in law for enlarging the vicarious liability of an automobile owner to the extent stated by my associates. In my opinion, they have adopted a construction of section 402 of the Vehicle Code which ignores its express language and is directly contrary to all former decisions of the California appellate courts. The conclusion now reached not only changes the rule as to the owner in the present case, but also, in effect, imposes a retroactive liability upon the respondents and other persons who have loaned their automobiles in reliance upon the former interpretation of the statute. And even more startling is the reversal of a judgment based upon findings of fact which, in turn, are supported by substantial evidence.

Indeed, the essential facts are not disputed. It appears that for the preceding 18 months, Joseph Gigli had loaned his Dodge sedan to his son on an average of twice each week, and when left in the garage at their home, the keys were not taken out of it. On the evening the accident occurred, Arthur asked his father to allow him to use the automobile. The father gave his consent, but, according to his testimony, told Arthur "not to loan the car to nobody else." He also said he had directed Arthur "Not to leave anybody else use it" and to "Let nobody else drive it." These answers followed the form of the questions. But on cross-examination he was asked whether all that concerned him was "that he didn't lend the car to somebody else," "No it is not," was the reply. "What were you concerned with?" counsel continued. Mr. Gigli answered: "Leave nobody drive it." This was followed by the question: "Which is true, that you told him not to lend the car to somebody else and nothing else, or that you told him more than that?" Mr. Gigli replied: "I told him not to leave anybody else drive the car."

Following this conversation, Arthur took the automobile and with his friend, John Corti, went to Bruno's Inn, where they made the acquaintance of two girls. The four subsequently agreed to go to Rocca's Inn, another roadhouse, to dance. Arthur suggested that they go in his father's sedan, but his newly-found companion objected upon the ground that she did not want to leave her new Plymouth coupe at Bruno's. Arthur objected to leaving his father's car there. Corti then asked Arthur to give him the keys to the Dodge, saying that he and the other girl would follow the coupe to Rocca's. Arthur consented and rode with his girl in her Plymouth. The accident occurred on the way to Rocca's.

The trial court found that the accident was caused solely by the negligence of Corti, but that he was, at the time of the accident, operating the automobile without the knowledge and without the permission, express or implied, of its owner, Joseph Gigli. In addition, the court found that "at the time and place of the collision * * * John Corti was not acting as the agent, servant or employee of either or both of the defendants Arthur Gigli and Joseph Gigli."

In considering the legal position of Joseph Gigli as the owner of the automobile, it is necessary first to determine the nature of the express condition which he imposed when he loaned the car. The only restriction placed upon the use of the car, assert the appellants, was, according to the father's testimony, "not to loan the car to nobody else." And the son, they insist, did not *loan* the car to anyone else but allowed John Corti to drive it for his benefit and accommodation. Assuming, however, that some of the evidence affords a basis for such a distinction, other testimony amply supports the trial court's conclusion as to the terms of the loan. Considering the entire record, it clearly appears to have been Joseph Gigli's intention that Arthur should allow no one else to drive the car, a condition which Arthur fully understood.

By the terms of section 402 of the Vehicle Code, "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner * * *." There is no ambiguity in these words; the owner is liable only if the injury was occasioned by the negligent operation of the person who is using or operating the motor vehicle with the permission of the owner. And the courts of California and of other states in considering this statute and similar legislation, have uniformly held that, when an owner allows another to use his car but limits the use of the vehicle by the permittee, the latter is not "using or operating the same with the permission, express or implied, of such owner" when he exceeds those limitations. (See, in general, annotations in 135 A.L.R. 481, 486-490; 112 A.L.R. 416, 421-424; 83 A.L.R. 878, 881-883; 61 A.L.R. 866, 872, 873). Thus, in California, the courts have, without exception, upheld restrictions upon the time, place or purpose of the permittee's use, and as to who may drive the automobile. Time: Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581. Place or purpose: Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051; cf. reasonable deviation from place of operation where no express restriction as to locality in Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608. Person: Bradford v. Sargent, 135 Cal.App. 324, 326, 27 P.2d 93; Boland v. Gosser, 5 Cal.App.2d 700, 43 P.2d 559; Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453; Helmuth v. Frame, 46 Cal.App.2d 381, 115 P.2d 852.

Assuming that, as stated in the majority and concurring opinions, the trier of facts acted unreasonably in concluding that Corti was not driving the car as the agent of Arthur Gigli, although the use of the car at the time of the accident may have been the use of Arthur, the question still remains, under the statute, whether that use by Arthur is a permitted one. For, as pointed out by this court very recently: "The fact of permission is just as important as is the fact of ownership. If either is absent the statute does not operate." Krum v. Malloy, 22 Cal.2d 132, 137 P.2d 18, 19.

It has been held that where the owner gives his express permission for the use of the car for a certain purpose without restriction as to who is to operate it in order to effect that purpose, the authority of the permittee may impliedly include the right to select the operator to carry out the permitted use (Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447; Pohle v. Bolinas Beach R. Co., 130 Cal.App. 704, 20 P.2d 730; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521), although the circumstances may be such as to negative such authority. Howland v. Doyle, supra; and see Engstrom v. Auburn Auto Sales Corp., supra; see annotations in 112 A.L.R. 416, 424, 425; 83 A.L.R. 878, 884; 61 A.L.R 866, 873-875. But obviously, an expressed intention always supplants an implied one (Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 824, 129 P.2d 383; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051; Cliffe Co. v. Du Pont Eng. Co., D.C., 298 F. 649, 651; and see 5 Williston on Contracts, Rev.Ed.1937, § 1293 n. 1., p. 3682), and for that reason consent may not be implied when it is expressly withheld.

The factors required for a finding of either express permission or of implied consent have been stated in many cases. One of these is Bradford v. Sargent, supra, which presented the same question as is now before the court. It was there shown that the owner of the car causing injury had instructed his son that no one other than a specified person should be allowed to drive it. The son allowed another boy to drive the automobile and an accident resulted. A judgment against the owner was reversed. In determining that no permission contemplated by the statute had been given, the court said [135 Cal.App. 324, 27 P.2d 96]: "Express permission would necessarily include prior knowledge of the intended use and an affirmative and active consent to it. An implied consent would indicate a sufferance of use or a passive permission deduced from a failure to object to a known past, present, or intended future use under circumstances where the use should be anticipated. Knowledge of some act or intended act on the part of the user by the owner should be necessary before consent to use should be implied." This decision, directly in point, is not discussed in either the concurring opinion or that of the majority, although this court denied a petition for hearing.

And compare the conclusions upon which the judgment in the present case is reversed with Howland v. Doyle, supra, 6 Cal.App.

2d at page 315, 44 P.2d at page 455, where the District Court of Appeal held: "Permission to drive a motor vehicle, implied as well as express, such as is necessary to bring the case within section 1714¼ [the predecessor of the statute now being considered], can only exist when the owner had knowledge or at least reason for believing that the vehicle would be driven by the person with whose negligence it is sought to charge him." Again a petition for hearing was denied by this court. It also denied a petition for hearing after the decision in Boland v. Gosser, supra. And both Howland v. Doyle and Bradford v. Sargent were expressly approved by this court in Engstrom v. Auburn Auto Sales Corp., supra, and Henrietta v. Evans, supra. The majority opinion, in attempting to distinguish Boland v. Gosser, supra, and Howland v. Doyle, from the present case says that, in those cases, the permittee "had the car or truck to make certain repairs or tests, but turned it over to another *for the purpose* under circumstances which indicated that such delegation was not contemplated by the owner." (Italics added.) But how may it be said that the delegation to Corti was contemplated by the owner when Joseph Gigli had expressly forbidden any such delegation, and it is an uncontradicted fact that Arthur Gigli had never before allowed another to drive his father's car?

The majority opinion also declares that in the case of Haggard v. Frick, supra [6 Cal.App.2d 392, 44 P.2d 448], the owner of an automobile was held liable although his son violated the father's instruction not to permit anyone else to drive it. But in that case it appears that the father merely expressed the wish to his son that he "would rather he would not let any other person drive" the car. In holding Frick, the owner, liable the court pointed out that he had "delivered the car to his son without direction or restriction as to its use other than the expressed wish that he would not let any one else drive it. It was given, however, with the intention and understanding that the son should have the exclusive use and control of the car throughout the college year, at a place more than 400 miles from appellant's home." Such precatory words do not constitute a limitation upon the authority of the permittee and the decision is simply one in accord with the rule which places within the authority of a permittee without restriction the right to select an operator to drive the car, with consequent liability upon the owner for negligent operation within the field of the permitted use. Yet this is the sole authority, so far as the cases in this state are concerned, upon which a majority of the court relies for a reversal of the judgment in the present case. And, in quoting from the case of Bayless v. Mull, supra [50 Cal.App.2d 66, 122 P.2d 612], their opinion ignores the fact that "there were no express restrictions or limitations" concerning the use of the automobile which caused injury and the court placed its decision upon that ground.

No logical distinction may be made between restrictions upon the purpose, time or place for which an automobile may be used and a limitation upon who may drive it. Indeed, the owner of an automobile may be principally concerned about the operator, for the skill and driving habits of a proposed borrower are usually of much more importance in determining whether one should be entrusted with an automobile than the length of time for or the purpose of the proposed use. Yet in considering a restriction upon time, "* * * it is undisputed," said this court in the Engstrom case "that the only permission given Herndon to use the car was that he might have it for a particularly specified period. The accident happened a day after this time expired. To hold that Herndon was then driving the car with either the express or implied consent of the owner would require us to disregard the plain agreement of the parties." [11 Cal.2d 64, 77 P.2d 1062.] The facts of the present case are much more compelling in favor of the owner, for the undisputed evidence is that at no time did he give permission to Corti to use the car, and permission certainly may not be implied when he gave positive instructions to the contrary.

The record in Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, 1052, showed "a case of an original permission for a limited use, the scope of which was exceeded; and the question is whether the original express consent terminated prior to the accident by reason of the violation of the limitation." The owners entrusted their automobile to one Evans for the sole purpose of driving the car to Beaumont to consummate its sale there. Evans, however, continued on through Beaumont to Colton, where the collision occurred. "There is no evidence," said the court, "to show authorization to use the car for any other purpose or to drive it to any other place; on the contrary, the only testimony in the record is to the effect that any other use was expressly prohibited. * * * The cases uniformly hold that, where the permission is granted for a limited *time*, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. * * * On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, in so far as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission." The owners were held not liable.

Nor do the cases from other jurisdictions, cited in the majority opinion, support the conclusions there reached. Following the rule adopted in California, they hold that consent to the use or operation of the motor vehicle by one person, may, in the absence of any express restriction as to the operator, include consent to the operation of the car for the permitted use by another. This is all that was decided in Feitelberg v. Matuson, 124 Misc. 595, 208 N.Y.S. 786, 789, but, the court added, "Of course, the liability of the owner ceases when the borrower, in turn, gives the use of the car to a third party without the owner's consent." Also the facts stated in Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650, 652, 54 A.L.R. 845, clearly show that there was no express restriction by the owner of the truck upon the method of operation of the vehicle. As the court there said, although the driver had surrendered to another the guidance of the wheel, he remained on the truck and "was still the director of the enterprise, still the custodian of the instrumentality confided to his keeping, still the master of the ship."

In the case of Stapleton v. Hertz Drivurself Stations, 129 Misc. 772, 222 N.Y.S. 579, strongly relied upon by the appellants, the trial court held an owner liable although his permittee had signed a lease by the terms of which he expressly agreed not to allow or permit any other person to operate the automobile. In violation of the covenant, he allowed another to drive the automobile, through whose negligence the accident occurred. Upon appeal, the judgment was reversed, the court holding that the use by a third person was not authorized by the owner. Stapleton v. Hertz Drivurself Stations, 131 Misc. 52, 225 N.Y.S. 661; accord: Owen v. Gruntz, 216 App. Div. 19, 214 N.Y.S. 543.

In Kerns v. Lewis, 246 Mich. 423, 224 N.W. 647, no express limitation was imposed by the owner of the vehicle as to who should drive it. But that case is not authority upon the question of the owner Corti's liability for a more fundamental reason. Unlike the California legislation which imposes liability for the negligent operation of a motor vehicle "by any person using or operating the same with the permission, express or implied, of such owner," the Michigan law makes the owner liable if the "motor vehicle is being driven by the express or implied consent or knowledge of such owner." In commenting upon this provision, the court said at page 425 of 246 Mich., 224 N.W. at page 648: "Does the essential consent mentioned in the statute relate to the *driver*, or to the vehicle 'being driven'? The statute makes the owner liable if the 'motor vehicle is being driven with his or her express or implied consent or knowledge,' and we cannot read into it the restriction that the particular driver must be known by and his driving consented to by the owner. The statute may be drastic, but we cannot render it less so by any permissible construction."

The only case from a foreign jurisdiction, cited by the appellants or by the majority opinion, in which any express restriction upon the person who might drive was imposed by the owner is King v. Cann, 184 Wash. 554, 52 P.2d 900, 901. In that case, the court observed, "There was also some testimony to the effect that Mrs. Cann had told young Holt [the driver of the car at the time of the accident] that she 'would prefer that he did not drive the car.'" Thus the case is very similar to that of Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447, 448, where the father merely expressed the wish to his son that he "would rather he would not let any other person drive" the car. In addition, however, liability in the King case was predicated, not upon any such statute as is here involved, but in accordance with the doctrine of *respondeat superior*. In the words of the Washington court, "When a member of the family has permission to use the car from the parents, as owners, in so unrestricted a manner as in the instant case, they must be held liable under the principle of agency, or *respondeat superior,* even though the member of the family turned the driving of the car over to another who proved incompetent or negligent."

And I can see no reasonable basis for characterizing the limited permission given by the owner of an automobile in connection with its use "secret restrictions." To hold that an owner may not qualify his permission and restrict it to a specified use of his automobile, modifies the statute in an important particular and makes him liable for consequences regardless of the terms imposed by him and accepted by the borrower of the automobile. It also takes from the trier of fact the right to determine whether, under the particular circumstances shown, the negligent driver was operating the automobile at the time of the accident with the permission, express or implied, of the owner.

The argument of the majority opinion against the recognition of what are termed "secret" restrictions upon the use of a motor vehicle (see Bayless v. Mull, supra, 50 Cal.App.2d at page 72, 122 P.2d at page 611), as I view the matter, is based upon a misconception of the liability established by section 402 of the Vehicle Code. One is not bound by "secret" restrictions when he has been induced to act through reliance upon the apparent or ostensible authority with which a principal has clothed his agent. See Civ.Code, § 2334. But, obviously an injured plaintiff did not allow the accident to occur through reliance upon the fact that the negligently operated vehicle was being used with rather than without the permission of the owner. And, in any event, the victim is not informed by the operation of an automobile, whether it is being driven by a permittee or a thief. Moreover, a limitation upon the purpose or extent of the permitted use is just as "secret" as is a restriction upon the person who may drive the car.

Much of the confusion in the consideration of the question of restrictive use under such statutes as section 402 of the Vehicle Code, and the classification of some restrictions as "secret" or "unreasonable," undoubtedly has arisen through the reluctance of the courts to recognize such limitations as those upon excessive speed or careless driving. But the wording of the statute, which makes the owner responsible for the "negligence in operation" of his motor vehicle, affords a more satisfactory basis for the exclusion of restrictions upon the manner of driving than a judicially created one dependent upon what a particular court may deem reasonable. For the Legislature has taken from the owner the right to limit the extent of his permission under the statute to a non-negligent operation by express restrictions upon his permittee to drive only in a safe, careful, or lawful manner. So long, therefore, as the owner, either expressly or impliedly, has consented to the purpose and extent to which the car may be used and its operation by the person who is driving at the time of the accident, he is responsible for the negligence of that driver occurring while the car is being operated within such prescribed limits, regardless of any directions as to the manner of operation.

Also, in my judgment, the majority and concurring opinions have unduly extended the meaning of the word "operation" as used in the statute. In order to impose liability upon Joseph Gigli, the negligent "operation" must have been that of Arthur, as he was "the person using or operating" the car with the qualified permission of the owner. The word "operation," although broadly construed to hold that the permittee may be operating the car although not at the wheel so long as he remains in the car and retains supervision and control over the manner of driving, has not been extended to include a situation where the permittee is no longer in the car and therefore not in a position to "direct or superintend" the operation of the vehicle. See Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788; Armstrong v. Sengo, 17 Cal.App.2d 300 61 P.2d 1188; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521; Grant v. Knepper, 245 N.Y. 158, 156 N.E. 650, 54 A.L.R. 845; Feitelberg v. Matuson, 124 Misc. 595, 208 N.Y.S. 786; Owen v. Gruntz, 216 App.Div. 19, 214 N.Y.S. 543; Stapleton v. Hertz Drivurself Stations Inc., 131 Misc. 52, 225 N.Y.S. 661. It is therefore clear that under the rule of these decisions, the "negligence in the operation" of the Gigli machine was not that of Arthur, who was riding in another automobile.

In the foregoing discussion, I have assumed the correctness of the conclusion in the majority and concurring opinions that no evidence, or inference from the evidence, justified the trial court in finding that Corti was not the agent of Arthur Gigli at the time of the accident. As I read the record, it would support a conclusion by the trial court that the agency relation existed, in view of the fact that Arthur did not want to leave his father's car behind and also because he and Corti had decided that one of them should ride with the girls, as otherwise they might not "show up" at Rocca's. But, the testimony shows, it was Corti's suggestion that he drive the car. He was very insistent in his demand for it, and wished to use it as a means of transportation for his girl and himself. Certainly this evidence is entirely consistent with the finding of the trial court that Corti, at the time of the accident, was not driving the Dodge car as the agent of either the father or the son.

Section 402 of the Vehicle Code imposes a liability upon the owner which did not exist at common law. It may be said with much reason that, in the interests of public policy, the owner of an automobile should be responsible for its negligent use regardless of who may be operating it at the time of the injury. But that is a matter for legislative and not judicial concern, and the statute here in controversy imposes liability only when the vehicle is being operated at the time of the accident with the consent of the owner. Whether in a given case the driver at fault had such permission is a question of fact. The trier of fact is not bound to believe the testimony of an owner as to the restrictions imposed by him upon the use of his car by the permittee, even though it be uncontradicted (Prickett v. Whapples, 10 Cal.App.2d 701, 703–705, 52 P.2d 972), and many times this court has affirmed judgments in favor of the plaintiffs upon testimony as meagre as that which supports the court's findings in the present case. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868. The application of the rule announced in those cases that any reasonable doubt should be resolved in favor of the conclusion by the trier of fact should not be limited to but one party to an action under that statute and, in my opinion, compels agreement with the finding that Corti was not the agent of Arthur Gigli. Of course, if Corti was not the agent of Arthur, then obviously the former's use of the car at the time of the accident was not Arthur's use, and the entire structure upon which the majority and concurring opinions are predicated collapses, as under no theory of construction, could Corti's use then be said to be the one to which Joseph Gigli had consented.

For these reasons I believe that the judgment should be affirmed as to both Joseph Gigli and Arthur Gigli.

59 Cal.App.2d 679

EWING et al. v. OTOKICHI HAMADA.

Civ. 13845.

District Court of Appeal, Second District, Division 3, California.

July 13, 1943.

1. Appeal and error ⇨979(2)

An order granting a new trial upon ground of insufficiency of evidence must be affirmed unless order constituted an abuse of discretion.

2. Appeal and error ⇨1015(1, 3)
New trial ⇨13, 72

If it appears to trial judge that verdict was against weight of evidence and that interests of justice would be promoted by new trial, trial judge must grant motion for new trial, and, if there is any reasonable basis for his so believing, his determination will be deemed conclusive on appeal.

3. New trial ⇨70

Trial judge's discretion in granting motion for new trial on ground of insufficiency of evidence is exceedingly broad.

4. Appeal and error ⇨1015(3)

If evidence would have sustained a verdict in favor of plaintiffs, order granting them a new trial on ground of insufficiency of evidence should be affirmed.

5. New trial ⇨72

In action arising out of intersectional collision by automobile guests and their husbands against driver of other automobile, where it could be found from evidence that automobile in which guests were riding entered intersection first and entered intersection from defendant's right, trial judge did not abuse his discretion in granting plaintiffs' motion for new trial upon ground of insufficiency of evidence, following verdict and judgment for defendant. Vehicle Code § 550, St.1937, p. 619.

◆

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Action by Lee K. Ewing and Dorothy Ewing, husband and wife, and Frank Prescott and Dorothy Prescott, husband and wife, and others, against Otokichi Hamada, for damages arising out of an automobile collision. From an order granting named plaintiffs a new trial, following a verdict and judgment for defendant, the defendant appeals.

Affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

In this action for damages arising out of an automobile collision, defendant Hamada appeals from an order granting certain of the plaintiffs a new trial upon the ground of insufficiency of the evidence, following a verdict and judgment for defendant.

Two of the plaintiffs who were granted new trials were guests in a car driven by Grace Gerstenkorn at the time it collided with defendant's truck. The other plaintiffs who were granted new trials were the respective husbands of the women guests.

[1-4] The correctness of the order granting a new trial upon the ground of insufficiency of the evidence is to be judged under well established rules. The order must be affirmed unless it constituted an abuse of discretion. If it appeared to the trial judge that the verdict was against the weight of the evidence and that the interests of justice would be promoted by a new trial, it was his duty to grant the motion, and if there was any reasonable basis for his so believing, his determination, being one of fact, will be deemed conclusive on appeal. His discretion is exceedingly broad. If the evidence would have sustained a verdict in favor of the plaintiffs, the order granting them a new trial should be affirmed. Brininstool v. Pacific Elec. Ry. Co., 1924, 66 Cal.App. 445, 449, 226 P. 410; Butler v. Miller, 1924, 69 Cal.App. 586, 587, 231 P. 1007.

A brief statement of some of the material facts in evidence will disclose that there was a sound basis for the order. There was testimony which, if believed, was sufficient to establish the following, as facts: That Grace Gerstenkorn, driving north on Barrington Avenue, entered the intersection of Goshen Street and in attempting to cross the latter street had traveled to the middle of the intersection, where the left rear side of her car was struck by the right front of defendant's truck, which was travelling east. The Gerstenkorn car continued on toward the northeast corner of the intersection and turned over. It was travelling at about 15 or 20 miles per hour when it was from 25 to 35 feet south of the intersection, at which point the driver saw defendant's truck approaching from the west at a distance of about 100 feet from the intersection and at a speed which she estimated at from 25 to 30 miles per hour. As she neared the middle of the intersection she saw the truck close upon her, tried to speed up her car, and turned it sharply to the right. The trial judge had ample reason to believe that the Gerstenkorn car entered the intersection first, and it admittedly entered from defendant's right. If it entered first, or the two entered at the same time, defendant was required to yield the right of way. Vehicle Code, sec. 550, St.1937, p. 619. Defendant testified that when his car was 100 feet west of Barrington he could see for a distance of from 50 to 70 feet south on Barrington; that he was travelling about 20 or 25 miles per hour; that he did not see the Gerstenkorn car until he, defendant, was about 15 feet from the intersection, and that the other car when he first saw it was 35 or 40 feet south of the southerly curb line of Goshen. He did not give any explanation of his failure to look toward the south or to see traffic approaching from that direction before he reached the point 15 feet from the intersection.

[5] The mere statement of these facts discloses good reason for granting a new trial. A most reasonable conclusion from defendant's testimony would be that he failed to exercise ordinary care as he approached the intersection. His view was not obstructed and his failure to look or to see what was in plain sight was convincing evidence of his negligence. And in

addition, the court might have believed that defendant did not see the other car at all before the collision. His account of the accident was sharply contradicted by other testimony and by the physical facts in evidence, for it is obvious that had the Gerstenkorn car been 35 or 40 feet away from the intersection when defendant's car was no more than 15 feet from the intersection, the cars could not have come together as they did and might not have collided at all. The evidence of defendant's negligence was so strong as to leave no doubt that the trial judge properly and wisely exercised his discretion in granting the new trial. The appeal is utterly devoid of merit.

The order is affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.

59 Cal.App.2d 613

LANDE v. JURISICH.

Civ. 13607.

District Court of Appeal, Second District,
Division 3, California.
July 9, 1943.

1. Assignments 🔑3

The statute regulating assignments of wages, being "remedial", must be liberally construed, and its interpretation does not so much depend upon the technical definition of the terms used therein as upon the sense in which they were used, and the statute manifests an intent to protect wage earners and salaried workers against the possibility that they may go too far in sacrificing the future to the needs or desires of the present and their remedy ought not to be defeated by judicial construction if that result can reasonably be avoided. St.1937, p. 202, § 303.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial Statute".

2. Statutes 🔑236

A remedial statute must be liberally construed so as to effect its object, and, although due regard will be given to the language used, such statute will be construed, when it is doubtful, so as to suppress the mischief at which it is directed and to advance the remedy provided and bring within the law every case which comes clearly within its spirit.

3. Assignment 🔑11

The mere imposing of a lien on unearned wages is not an "assignment" of them.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment".

4. Equity 🔑23

Where a contract has been voluntarily, understandingly, and fairly entered into and is free from any circumstance justifying equitable relief, an equity court must give full effect to such contract and that for one of the parties the contract was unwise or that its enforcement is harsh, when it was so intended, is immaterial.

5. Equity 🔑1

While an equity court may exercise broad powers of applying equitable remedies, it may not create new substantive rights under the guise of doing equity.

6. Assignments 🔑3

The statute regulating "assignment" of or "order" for wages by use of quoted words manifests an intent to reach every form of instrument which would impound a wage earner's wages before he received them. St.1937, p. 202, § 303.

The term "order" has no fixed legal meaning.

See Words and Phrases, Permanent Edition, for all other definitions of "Order".

7. Assignments 🔑12

Where contract granting a lien to defendant on plaintiff's unearned wages to secure note, if valid, passed to defendant a new interest in plaintiff's future wages, contract "assigned" an interest to defendant, and, where the agreement would result in an order of court for payment of wages to defendant to extent of his lien, contract was an "order" within statute prohibiting assignment of and order for unearned wages, and the contract was not valid under statute authorizing agreements to create liens upon after acquired or nonexistent property. St.1937, p. 202, § 303; Civ. Code, § 2883.

See Words and Phrases, Permanent Edition, for all other definitions of "Assign".

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Declaratory judgment action by C. J. Lande against George Jurisich. From an adverse judgment, plaintiff appeals.

Reversed.

Joseph A. Zahradka, Jr., of Los Angeles, for appellant.

L. J. Styskal and Sarah B. Danning, both of Los Angeles, for respondent.

Robert W. Kenny, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for amicus curiae on behalf of appellant.

SHAW, Justice pro tem.

Plaintiff appeals from the judgment in an action for declaratory relief. He sought a declaration that a specific part of a contract set up in his complaint is invalid and therefore not binding upon him; the trial court declared it to be valid. The facts are not in dispute. The answer admitted all of the complaint except some conclusions of law, the parties stipulated to the facts so admitted and the court made findings accordingly.

The material facts are as follows: On October 15, 1940, the plaintiff, to evidence a loan to him of $1,000 by defendant, made his promissory note to defendant for that sum, with ten per cent interest, payable in installments of $50 and interest on the 15th day of each month until paid. When this action was brought two of these installments were delinquent and the defendant had, pursuant to the terms of the note, declared the entire amount of the note immediately due and payable. At the time of execution of, and as security for, this note, plaintiff executed and delivered to defendant a paper headed "Assignment of and Lien Upon Wages and Other Compensation," which described the note, assigned to defendant all wages theretofore earned by plaintiff under his employment with a named employer and authorized defendant to collect those wages. This paper contained the following provision, which is the subject of this action: "The undersigned hereby agrees to pay the lender, his successors and assigns, the amount of the promissory note aforesaid in installments as above set forth, upon the terms and conditions contained in said promissory note, from and out of the amount or amounts hereafter to be earned by the undersigned as wages, commissions and other compensation for services in the employ of the employer above named, and as security for such payment, the undersigned hereby grants unto the lender, his successors and assigns, a lien upon said wages, commissions and other compensation, which lien shall be enforceable by an appropriate action in a Court of Equity, but only after default in the making of the installments aforesaid or any thereof." Plaintiff contends that so much of this provision as purports to grant to defendant a lien on plaintiff's unearned wages is void, whereas defendant claims it is valid and threatens to take legal proceedings against plaintiff and his employer to enforce the lien. We think plaintiff's contention must prevail.

Defendant rests his claim of validity on section 2883 of the Civil Code, which provides: "An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest." In the absence of any other applicable statutory provision, there seems no doubt that section 2883 would be applicable to the present case and that under it the agreement here in question would be valid. Cox v. Hughes, 1909, 10 Cal.App. 553, 102 P. 956; Walker v. Rich, 1926, 79 Cal.App. 139, 144, 249 P. 56.

But in 1913 the legislature enacted a statute regulating assignments of wages, adding it to the Civil Code as section 955 (Stats. 1913, p. 537). In 1937 this statute was removed from the Civil Code and placed in the Labor Code (Stats.1937, p. 202), and at the same time was divided into five sections numbered from 300 to 304 inclusive. In 1941 these five sections were again combined into one, as section 300 of the Labor Code, and somewhat amended. Stats. 1941, p. 1851. Ever since its first enactment this statute has contained a provision, always the same in substance, upon which plaintiff relies to show the invalidity of the contractual provision here in question. Since such invalidity depends only upon the statute in force when the contract was made, in 1940, we quote the provision as it then stood, being section 303 of the Labor Code: "No assignment of or order for, wages or salary is valid, except for the necessities of life, unless at the time of the making thereof, such wages or salary have been earned. No assignment of, or order for, wages or salary made for the necessities of life, is valid except to the person furnishing such necessities directly, and then only for the amount needed to furnish such necessities." Defendant insists that the contract in question is not subject to this prohibition because it is not an assignment or order, but only "grants * * * a lien."

[1, 2] But this is a remedial statute, and as such it must be liberally construed. Reynolds v. Reynolds, 1936, 14 Cal.App.2d 481, 484, 58 P.2d 660; Berg v. Standard Light Co. of California, 1928, 89 Cal.App. 542, 545, 265 P. 369; In re Makings, 1927, 200 Cal. 474, 478, 253 P. 918. As stated in Reynolds v. Reynolds, supra, referring to the first statute on this subject, Civil Code, section 955, "The interpretation of the section under discussion does not so much depend upon the technical definition of the terms as upon the sense in which they were used by the legislature." In re Makings, supra, quoted with approval the following passage from 23 Cal.Jur. 801: "[A] remedial statute must be liberally construed, so as to effectuate its object and purpose. Although due regard will be given the language used, such an act will be construed, when its meaning is doubtful, so as to suppress the mischief at which it is directed, and to advance or extend the remedy provided, and bring within the scope of the law every case which comes clearly within its spirit and policy." The companion sections of the Labor Code, all of which were originally adopted as parts of a single statute in section 955 of the Civil Code and are now in section 300 of the Labor Code, provide that no assignment of wages or salary is valid unless it is in writing and has the consent of the assignor's spouse, if the assignor is married, or of his parent or guardian if he is a minor, and that any power of attorney to collect wages or salary is revocable at any time. Taking the statute as a whole, it manifests a legislative intent to protect wage earners and salaried workers against the possibility that, either from improvidence or under the stress of immediate necessity, they may go too far in sacrificing the future to the needs or desires of the present and leave themselves and their families without future means of support. Evidently the legislature had information, which is confirmed by such matters as come within judicial notice, that the evil thus to be guarded against was sufficiently prevalent to call for legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided.

[3] While it is doubtless true that, in strict legal parlance, the mere imposing of a lien on wages to be earned in the future is not an assignment of them (6 C.J.S., Assignments, § 1, p. 1045; In re Estate of Beffa, 1921, 54 Cal.App. 186, 189, 201 P. 616), we see little difference in the incidence of the two on the future condition of the worker and his family. Defendant argues at great length that there is such a difference because the creditor who holds an assignment may collect the assignor's wages as soon as they become due, whereas one holding only a lien must resort to proceedings in court to enforce it. But defendant also suggests that while these proceedings were going on an injunction could and would be had to prevent payment of the wages to the debtor who created the lien, and obviously without such a remedy the lien might prove futile. Such legal proceedings, if the lien is valid, would at once stop payment to the worker, would eventually result in application of his wages to the debt, just as in case of an assignment, and would also impose on the worker costs and expenses of suit, which would not follow an assignment, thus leaving him and his family ultimately in worse condition than if he had made an assignment.

[4, 5] It seems to be defendant's idea that, because the lien he claims is of the class commonly called equitable liens, and could be enforced only in a court of equity —which would take cognizance of it only because of the lack of any other remedy— therefore some sort of equitable adjustment or compromise could and would be made in the enforcement of the lien whereby the wage earner would be allowed to keep and use for the support of himself and his family so much of his future earnings, when they become due, as might be necessary for that purpose, or at least that he would be allowed something toward that end, and the surplus only would be applied to the debt. No authority is cited in support of this theory and we have

found none. The lien granted by the plaintiff, if valid, covers the whole of his future earnings, not merely a part thereof. We know of no rule of equity by which a court of equity, when called on to enforce a valid contract creating a lien on definite property, can except some part of that property from its decree of enforcement out of sympathy for the lienor or regard for the financial condition to which he might otherwise be reduced. On the contrary, the rule, as stated in 30 C.J.S., Equity, § 62, p. 411, is: "Where a contract has been voluntarily, understandingly, and fairly entered into, and is free from fraud, accident, mistake, or any other circumstance recognized as a ground for equitable relief, a court of equity must, when its jurisdiction is properly invoked, give full force and effect to such contract; it cannot ignore, disturb, or alter the rights created by it, or grant relief against their enforcement. * * * The mere fact that for one of the parties the contract was unwise or improvident, or that its enforcement is harsh when it was so intended to be, does not alter the rule * * *." A like statement of the rule is made in 10 Cal.Jur. 474, 475. See, also, Boyce v. Fisk, 1895, 110 Cal. 107, 112, 42 P. 473. "While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity." Rosenberg v. Lawrence, 1938, 10 Cal.2d 590, 594, 595, 75 P.2d 1082. The contract held by the defendant here is, therefore, as fully within the mischief at which the statute is aimed as is an assignment or any other form of agreement which deprives a wage earner of the use of his future wages.

[6, 7] The statute can be applied to it without greater liberality of construction than is permissible here, and we so apply it. By using the terms "assignment" and "order" the legislature obviously sought to reach every form of instrument which would result in the impounding of a wage earner's wages before he received them. While the agreement is not technically an assignment, it does, if valid, pass to defendant an interest in plaintiff's future wages which defendant did not have before and in a sense may be regarded as having transferred or "assigned" that interest to him. The term "order" has no fixed legal meaning; and since the agreement will result in an order of court for the payment of the wages to defendant to the extent of his lien, it may be regarded as an order, for the purposes of this statute.

Judicial precedent for such a construction of the statute appears in Nutt v. Knut, 1906, 200 U.S. 12, 26 S.Ct. 216, 50 L.Ed. 348. That case arose under section 3477 of the U. S. Revised Statutes, 31 U.S.C.A. § 203, which provided that: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, shall be absolutely null and void, unless they are freely made * * * after the allowance of such a claim." The defendant there had a claim against the United States and engaged the plaintiff to assist in its prosecution, by a contract which made the payment of plaintiff's compensation therefor "a lien upon the claim." This part of the contract was held void, the court saying, at 200 U.S. 20, 26 S.Ct. 219, 50 L.Ed. 348: "In giving that lien from the outset, before the allowance of the claim, and before any services had been rendered by the attorney, the contract, in effect, gave him an interest or share in the claim itself * * *. In effect or by its operation it transferred or assigned to the attorney, in advance of the allowance of the claim, such an interest as would secure the payment of the fee stipulated to be paid. All this was contrary to the statute; for its obvious purpose, in part, was to forbid anyone who was a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim * * *." This case was followed and approved in Calhoun v. Massie, 1920, 253 U.S. 170, 175, 40 S.Ct. 474, 64 L.Ed. 843, 846, and King v. Pons, 1919, 77 Fla. 383, 81 So. 519; and the same result was reached on a construction of the same statute in the earlier case of Manning v. Leighton, 1892, 65 Vt. 84, 26 A. 258, 260, 24 L.R.A. 684, 690. In Trottier v. Foley, 1920, 42 R.I. 422, 108 A. 498, it was held that a workman's agreement acknowledging receipt of a loan from his employer, "against which I pledge my wages until paid back," was an assignment of future wages within the terms of a statute making such assignments invalid against attacking creditors unless recorded and defining "assignment" to include "every instrument purporting to transfer an interest in or an authority to collect the future earnings of any person." The latter part of this definition is similar to the word "order" used in our statute.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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59 Cal.App.2d 660

PEOPLE v. RUSSELL.

Cr. 3692.

District Court of Appeal, Second District, Division 1, California.

July 12, 1943.

Hearing Denied Aug. 9, 1943.

1. Criminal law 🔑814(8)

In prosecution for assault with a deadly weapon, where the evidence established that defendant struck but one blow and ran away, refusal to instruct that a person in exercise of his right of self-defense not only had the right to stand his ground and defend himself when attacked, but that he might pursue his adversary until he had secured himself from danger, was not error.

2. Assault and battery 🔑96(3)

In prosecution for assault with a deadly weapon, court properly instructed on "self-defense" that a person assailed has the right to repel force with force and employ the right to defend himself from apprehended danger to any extent which to him was apparently necessary when he acts in a reasonable manner.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Defense".

3. Assault and battery 🔑96(3)

In prosecution for assault with a deadly weapon, jury was properly instructed that fact that complainant was not armed with any weapon at time of combat did not deprive defendant of his right to defend himself with that degree of force which to a reasonable man might have appeared necessary under the circumstances there present.

4. Criminal law 🔑1186(4)

In prosecution for assault with a deadly weapon, an instruction on self-defense was not prejudicially erroneous on ground that it applied to murder, manslaughter, and assault with intent to commit murder, which crimes were not involved, where jury could not believe from the evidence that the assault by defendant with a fingernail file was an attempt at murder. Const. art. 6, § 4½.

5. Criminal law 🔑1186(4)

The giving of instructions correct in the abstract but inapplicable to the issues raised by the pleadings or the evidence will not constitute a ground for reversal where no prejudice results. Const. art. 6, § 4½.

6. Criminal law 🔑1163(4)

The court cannot presume error from the mere giving of an instruction correct in the abstract but inapplicable to the evidence, and burden is upon appellant to show prejudice.

7. Criminal law 🔑1186(4)

The assumption is that an instruction having no application to the case as made by the pleadings and proof does not injure a defendant. Const. art. 6, § 4½.

8. Assault and battery 🔑91

Evidence supported finding that defendant did not act in self-defense in making an assault upon another with a fingernail file.

9. Assault and battery 🔑56

In determining whether an instrument not inherently "deadly" or dangerous assumes these characteristics, recourse may be had to the nature of the weapon, the manner of its use, the location on the body of the injuries inflicted, and the extent of such injuries.

See Words and Phrases, Permanent Edition, for all other definitions of "Deadly Weapon".

10. Assault and battery 🔑95

The question whether instrument used in making an assault upon a person on a particular occasion was a deadly weapon is a mixed question of law and fact for determination by the jury.

11. Assault and battery ⚷91, 95

Whether a fingernail file with which defendant assaulted another, resulting in a cheek wound requiring 11 stitches, was a "deadly weapon" was for the jury, and its finding as to its deadly character was justified.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Eunice E. Russell was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of assault with a deadly weapon. A jury found him guilty and this is an appeal by him from the judgment.

Defendant had been working as a "burner" at the California Shipbuilding Corporation in Los Angeles County and the complaining witness, Arthur Warner, was his foreman. On the morning of November 4, 1942, defendant and complainant became embroiled in a heated argument as to whether defendant would perform a certain type of work assigned to him by his foreman. When the defendant refused to perform the work assignment given him by the complaining witness he threatened to discharge the defendant, whereupon the latter applied a vile epithet to the foreman and demanded his wages. The two then went together to the company office to get defendant's pay for him. They both entered the office and defendant testified that the foreman cursed him and ordered him to leave the office. In any event, defendant made his exit and stood just outside the office door from which location, according to the complainant, the defendant continued to address vile and opprobrious names to the complaining witness. The latter testified that just as he stepped out of the office the defendant was standing in a "hunched position" and suddenly "turned and jumped and hit me". The complainant further testified that he struck the defendant "after he struck me, or at the same time he moved toward me, at the same time". As a result of this encounter the complaining witness received a jagged wound in his cheek, requiring eleven stitches, and which was admittedly inflicted by the defendant with the aid of a small, 2½ inch finger nail file which folded up like a jackknife. Another witness testified that he heard the defendant inviting the complainant to come out of the office, at the same time using foul and vile language and threatening "I will show you something, or I will beat you up, or words to that effect". Still another eye witness to the fracas testified: "Warner just stepped down off one step to the right and I saw Russell ahead of him, facing him, make one swing at him".

The defendant set up the plea of self-defense and after testifying to the disagreement between himself and the complainant with reference to the type of work defendant was asked to do, he testified that the complainant discharged him and told him to go to the office to get the wages due him; that they both entered the office, whereupon the complainant cursed the defendant and ordered him to get out of the office; that he complied with that request and stood "right outside the door"; that he was in a weakened physical condition, having received some 59 blood transfusions. That the complaining witness ran out of the office and struck him between the eyes. Defendant further stated that he fell upon the "burning table"; that he was excited and scared; that the complainant grabbed hold of him and again struck him. Defendant testified that he had the finger nail file in his hand during the melee and with it inflicted the injuries which gave rise to this prosecution.

[1-3] It is first contended by appellant that the court erred in refusing to give the following instruction: "The Court instructs the Jury that a person in the exercise of his right of self defense not only has a right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger". In refusing to give this instruction, the court did not err. Defendant himself testified: "I hit him and just ran, tried to get away from him". All of the testimony is in harmony with the conclusion that the defendant struck but one blow and ran away. There is not an iota of evidence that he attempted to or did "stand his ground" or "pursue his

adversary". The court fully and fairly instructed the jury on the law of self defense; that a person assailed has the right to repel force with force; that he may employ the right to defend himself from apprehended danger to any extent which to him is apparently necessary, when he acts in a reasonable manner. The jury was also admonished that though they found it to be a fact that the complainant was not armed with any weapon at the time of the combat, nevertheless, that did not deprive the defendant of his right to defend himself with that degree of force which to a reasonable man might have appeared necessary under the appearances and circumstances there present.

It is next urged that the court erred in giving the following instruction: "To justify a homicide committed by one in resisting or repelling an assault or battery committed or attempted to be committed upon his person by another, it must appear to the slayer as a reasonable man that the danger threatened, if any, was immediate and sufficient to excite the fears of a reasonable person that he was in danger of receiving death or great bodily harm, and that he acted under the influence of such fears and not in a spirit of revenge; and it must further appear that the degree of resistance was not clearly disproportionate to the nature of the injury offered or given—that the force used in repelling or resisting the assault or battery was not clearly greater than was apparently necessary".

[4-7] Appellant contends that the instruction, while being a correct statement of law in homicide cases, had no application to the case at bar wherein the defendant was not accused of murder, manslaughter or assault with intent to commit murder, and that the giving of such an instruction was prejudicial in that by it the court led the jury to believe that the defendant intended to murder the prosecuting witness. This claim is without merit. It would do violence to reason and challenge credulity to assume that the jury was at all impressed that in an assault committed with a finger nail file in the manner and under the circumstances which characterized this controversy that the defendant contemplated or attempted to slay his adversary. Over a long period of time it has been the established rule in this state that the giving of instructions, correct in the abstract, but inapplicable to the issues raised by the pleadings or the evidence in the instant case, will not constitute a ground for reversal where no prejudice results to the defendant. People v. Boggs, 12 Cal.2d 27, 37, 82 P.2d 368; People v. Soules, 41 Cal.App.2d 298, 313, 106 P.2d 639; People v. Hopper, 20 Cal. App.2d 108, 111, 66 P.2d 459; see, also, Section 4½, Article VI, Constitution of California. We can not presume error from the mere giving of such an instruction and the burden is upon the appellant to show prejudice, if any. The assumption, if not the presumption, is that an instruction having no application to the case as made by the pleadings and proof does not injure a defendant.

[8-11] Finally appellant asserts with great earnestness that the evidence is insufficient to support the judgment of conviction and that the verdict is against both the law and evidence. The gist of this argument rests upon the claim that the finger nail file utilized by the defendant in making the assault was not as a matter of law a deadly weapon; and in any event the same was lawfully used by the defendant while acting in necessary defense of his person from an unwarranted attack made upon him by the complaining witness. Upon the last mentioned issue of self defense the jury found against the defendant, and as such finding is supported by substantial evidence, we are not empowered to disturb it. That the weapon used in the case at bar may be said not to be inherently a dangerous or deadly one may be conceded, but nevertheless, it may become such a dangerous and deadly weapon if used in such a manner as to produce great bodily injury. It has long been the established rule that in determining whether an instrument, not inherently deadly or dangerous, assumes these characteristics, recourse may be had to the nature of the weapon, the manner of its use, the location on the body of the injuries inflicted and the extent of such injuries. When the question arises whether the instrument used was one such as would be likely to produce great bodily harm dependent upon the manner of its use, the portion of the body upon which it was used and the extent of the injuries inflicted, there is presented a mixed question of law and fact as to whether upon the particular occasion it was a deadly weapon. That question must be determined by the jury under appropriate instructions from the court. There-

fore, the determination as to whether under all the facts and circumstances present in the instant case, the instrument used was a deadly weapon, was for the jury. People v. Cook, 15 Cal.2d 507, 516, 517, 102 P.2d 752. We are persuaded that under the evidence before them the jury herein was entitled to find as they did that the character of the finger nail file as a deadly weapon, upon the occasion here in question, was established.

No prejudicial error appearing in the record herein, it is ordered that the judgment be affirmed.

YORK, P. J., and DORAN, J., concur.

59 Cal.App.2d 695

SINGH et al. v. FURUTA et al.

Civ. 6890.

District Court of Appeal, Third District, California.

July 16, 1943.

1. Appeal and error 🔑1012(1)

It is not the province of the District Court of Appeal to weigh the evidence, but court is limited to determining whether there is any substantial evidence to sustain finding of trial court.

2. Appeal and error 🔑989

In determining whether there is any substantial evidence to sustain finding of trial court, the evidence must be viewed in the light most favorable to appellee and conflict therein must be disregarded.

3. Appeal and error 🔑1008(1)

Trial court's finding that, at time of automobile collision, employee was on his way to report for work and that trip to one of the ranches owned by employer was not on employer's business nor pursuant to any instruction given by employer, was conclusive on appeal where supported by evidence.

4. Automobiles 🔑197(7)

A ranch hand in going from his home to his work was performing no service for his employer, and employer incurred no liability for automobile collision occurring while ranch hand was on his way to work.

◆

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Lachman Singh, also known as Lasho Singh, also known as Lasha Singh, and Don Singh, against James Furuta, Frank Poole, and another for personal injuries sustained in automobile collision. From a judgment against the defendant Furuta alone, the plaintiffs appeal.

Judgment affirmed.

Manwell & Manwell, of Marysville, for appellants.

Hewitt & McBride, of Yuba City, for respondents.

ADAMS, Presiding Justice.

Plaintiffs sued defendants Furuta and Poole for damages for personal injuries sustained by plaintiffs when the automobile in which they were riding collided with an automobile owned and driven by defendant Furuta, it being alleged that the said accident was due to the negligence of Furuta, and that, at the time of the accident, Furuta was "the duly authorized agent and employee" of defendant Poole and was "acting within the scope of his employment."

The action was tried by the court sitting without a jury, and at the conclusion of the trial findings were made in favor of plaintiffs as to all of the allegations of their complaint except that it was found "that at the time of said accident said defendant, James Furuta, was not acting as the agent of said Frank Poole nor was he acting within the scope of his employment by said Frank Poole."

[1, 2] Judgment was entered awarding damages to plaintiffs against Furuta alone, and plaintiffs have appealed, contending that the trial court erred in failing to hold defendant Poole also liable for the damages awarded. It is stated by appellants in their closing brief that as to the law, counsel for the respective parties are "more or less" agreed, and that the sole question is whether the facts justified the judgment of the court. It seems to be conceded that unless the evidence establishes that at the time of the accident Furuta was engaged in the business of his employer and in carrying out the orders of such employer, defendant

Poole incurred no liability. The question then seems to resolve itself into one of fact; and it is not within the province of this court to weigh such evidence, but merely to determine whether there is any substantial evidence to sustain the contested finding of the trial court, considering the evidence in the light most favorable to respondent and disregarding conflicts therein. We shall so consider the evidence produced in this case.

Defendant Poole owned and operated two peach orchards, one known as the "Home Ranch" and the other as the "Penny Ranch." Furuta was employed by Poole as a laborer. He lived at a home of his own, and drove to his work each day in his own automobile. He worked sometimes on the Home Ranch and sometimes on the Penny Ranch, as directed by his employer. On the day preceding the accident (a Saturday) he was engaged in thinning peaches on the Penny Ranch, and at the end of that day, according to his own testimony, was told by Poole that if it was a quiet day next day he would spray at the Home Ranch. On said following morning he left his home before six o'clock, on his way to the Home Ranch. Instead of going directly to the Home Ranch he went first to the Penny Ranch, and was proceeding thence to the Home Ranch when the accident occurred. He stated that the only reason he went to the Penny Ranch was because he thought he would go around that way to see what Dan (another of Poole's employees) thought about it being a clear day; and that he was going to the Home Ranch anyway; that he was due to report at the Home Ranch at 6:30; that he did not work at the Penny Ranch that morning, as he had seen that it was a quiet day and had decided to spray at the Home Ranch. He also testified that when traveling to and from work Poole's employees used their own cars, and when traveling between ranches, or on Poole's time, they used Poole's trucks for transportation; that he always had reported at the Home Ranch before going to work, and that he checked in there on the morning of the accident at seven o'clock. Defendant Poole testified that his records showed that Furuta reported at the Home Ranch on that day at seven o'clock; that his pay did not commence on any day until he started to work after so reporting; that all employees were required to report at the Home Ranch before going to work, and that if Furuta was to work at the Penny Ranch he was supposed to come first to the Home Ranch and obtain a truck to transport him to the Penny Ranch; that when traveling between the ranches employees used vehicles furnished by him. He did not recall telling Furuta the night before the accident that if it was quiet to spray on the Home Ranch, otherwise to thin on the Penny Ranch; but he stated that if Furuta was to work on the Penny Ranch he was supposed to come to the Home Ranch and get a truck to go over there, and that it was never the habit of employees to use their own cars to go back and forth between the ranches; that anyone going to work got his orders at the Home Ranch and then went to work; that the accident occurred on a Sunday morning, and that Furuta was not supposed to work on that day unless the wind did not blow, in which event he was to come to the Home Ranch. There was no contradiction of the testimony that Poole's employees were supposed to use his trucks when going to and from the two ranches during working hours and were supposed to report for work at the Home Ranch. Poole did not furnish gas for Furuta's car nor compensate him for its use, and Furuta's pay did not commence until he started work on the ranch, which was usually at 6:30 A.M.

[3] Appellant contends that the evidence shows that Furuta was acting on orders when he went first to the Penny Ranch; and that he went there to thin peaches and decided, after arriving there, to go to the Home Ranch instead; but the weight and sufficiency of the evidence, the construction to be put upon same and the inferences to be drawn therefrom were matters for the trial court, and that court found contrary to the construction of the evidence contended for by appellant. Since there is evidence to support the finding of the court it is conclusive here.

[4] Assuming then, as we must, that at the time of the accident Furuta was on his way to the Home Ranch to report for work, and that the trip to the Penny Ranch was not on the business of his employer nor pursuant to any instruction given by him, it is apparent that at the time of the accident, though he was going from the Penny Ranch to the Home Ranch, Furuta was in fact merely going to work and was not acting within the scope of his employment, which employment did not begin until he reported for work at the Home Ranch. In going from his home to his work he was performing no service for his employer,

and the latter incurred no liability. See Nussbaum v. Traung Label, etc., Co., 46 Cal.App. 561, 571, 189 P. 728; Adams v. Tuxedo Land Co., 92 Cal.App. 266, 267 P. 926; Mauchle v. Panama-Pacific International Exposition Co., 37 Cal.App. 715, 174 P. 400; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Postal Telegraph Cable Co. v. Industrial Accident Commission, 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460; Eby v. Industrial Accident Commission, 75 Cal.App. 280, 242 P. 901; New York Indemnity Co. v. Industrial Accident Commission, 87 Cal.App. 105, 261 P. 1106.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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59 Cal.App.2d 642

MONTALDO et al. v. HIRES BOTTLING CO.

Civ. 6895; Sac. 5567.

District Court of Appeal, Third District, California.

July 10, 1943.

1. Appeal and error 🔑544(2)

Where appeal is presented on judgment roll only, inquiry is limited to consideration of whether complaint states a cause of action, whether findings are within the issues, whether judgment is supported by the findings, and whether reversible error appears upon face of record.

2. Appeal and error 🔑907(3)

On appeal on judgment roll alone, findings should receive a liberal construction to uphold, rather than defeat, judgment.

3. Injunction 🔑126

In determining whether labor union was entitled to injunction to restrain employer from employing workmen other than union members as required by collective labor agreement, in absence of evidence court would assume that union's agents were not guilty of instigating sabotage as claimed by employer. St.1941, p. 2959.

4. Appeal and error 🔑907(2)

In absence of evidence, appellate court would assume that finding was supported by evidence.

5. Appeal and error 🔑909(1)

The findings that employer was justified in discharging employees, and that employees were not discharged or laid off because of sabotage, were not necessarily conflicting, but, in support of injunction restraining employer from violating collective labor agreement, appellate court might assume that employees were discharged because of lack of business or because they were unable to perform their duties. St. 1941, p. 2959.

6. Injunction 🔑60

Injunctive relief will be granted to prevent employer from violating collective labor contract whereby employer agrees to hire only union members so long as they are competent and available, when there is no intent to thereby injure members of other unions or to contravene public interests. St.1941, p. 2959.

7. Trade unions 🔑8

The suspension of charter of local union by national union did not constitute a "failure of consideration" for collective labor agreement executed prior to suspension whereby employer agreed to employ only union members, where parties did not contemplate affiliation with national union and local union was distinct from national union, and after suspension was engaged in business independently. Civ.Code §§ 1625, 1639; St.1941, p. 2959.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

8. Trade unions 🔑8

A collective labor agreement, requiring employer to employ only union members, to pay specified wages, and to abide by prescribed rules regarding hours of employment, is valid as against ordinary claims of lack of "consideration" or "want of mutuality". St.1941, p. 2959.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Want of Mutuality".

9. Appeal and error 🔑799

Where collective labor agreement provided that it was extended to May 15, 1944, in absence of notice for modification or termination served at least 30 days prior to May 15, 1943, and there was no evidence that such notice was given, it would be assumed that no such notice was given, and hence issues did not become "moot" so as to justify refusal of enforcement of injunctive relief because case was decided after May 15, 1943.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Issue".

10. New trial 🔑151

Denial of motion for new trial of action resulting in judgment enjoining employer from violating provisions of collective labor agreement, on ground of newly discovered evidence, was not an abuse of discretion in view of conflicting affidavits and counter affidavits.

11. New trial 🔑150(4)

The denial of motion for new trial on ground of newly discovered evidence was not an abuse of discretion, where movant's affidavit failed to show due diligence as an excuse for not presenting that evidence at the trial.

12. Appeal and error 🔑977(1)

Granting or refusal of new trial on ground of newly discovered evidence is so far within sound discretion of trial judge that his order will not be disturbed on appeal except for manifest abuse of discretion.

◆

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by John Montaldo and another against the Hires Bottling Company to enjoin defendant from violating provisions of a collective labor agreement. From an adverse judgment, defendant appeals.

Affirmed.

J. M. Inman, of Sacramento, E. R. Vaughan, of Los Angeles, and Downey, Brand & Seymour and Frederic R. Pierce, all of Sacramento, for appellant.

W. H. Metson, P. H. McCarthy, Jr. and F. Nason O'Hara, all of San Francisco, for respondents.

THOMPSON, Justice.

The defendant, Hires Bottling Company, has appealed from a judgment enjoining it from violating the provisions of a collective labor agreement which it entered into with Bottlers Local Union No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Branch No. 2, regulating the employment, wages, hours and services of workmen hired by the bottling corporation. The decree enjoins the defendant from employing workmen except through the agency of Bottlers Local Union No. 293, who are members of that union in good standing. The judgment also contains a mandatory injunction requiring the defendant to discharge all employees who were not hired through the agency of that union, and those who are not members thereof in good standing.

It is asserted the motion for new trial was erroneously denied. The appeal is presented on the judgment roll only. The evidence is not before this court, with the exception of the affidavits which were presented on the motion for new trial.

The appellant contends the collective labor agreement may not be enforced on account of a failure of consideration; that the contract is void because it was breached by the conduct of the business agent of the union in inciting defendant's employees to acts of disloyalty and sabotage; that the court erred in failing to adopt findings on a material issue, and that the contract terminated before the judgment was rendered.

Bottlers Local Union No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Branch No. 2, is an unincorporated union labor organization which was affiliated with the American Federation of Labor until October 6, 1941, when its charter was suspended. John Montaldo was the business agent of Local Union No. 293. The defendant is a corporation which is engaged in the business of bottling and marketing soft drinks. September 10, 1940, the defendant executed a written collective bargaining labor contract with the local Bottlers Union by the terms of which the defendant agreed to employ through the agency of that labor union only workmen who are members thereof in good standing. The defendant also agreed to pay specified wages and to abide by prescribed rules with respect to hours of service and employment. Among the stipulations contained in the contract it was provided that "No members shall be discriminated against or discharged for upholding Union principles." It was also provided that the agreement should remain in force until May 15, 1943, and to May 15, 1944, unless a notice of termination or modification thereof was served thirty days before the first-mentioned date.

The complaint for injunction is couched in four counts. It alleges that the defendant wrongfully discharged union labor workmen on or about April 4, 1941, contrary to the terms of the written agreement, for the reason that they were advocating and upholding union labor principles, and that the defendant hired other workmen who were not members in good standing of the Local Union No. 293. The answer admits the execution of the contract but denies the remaining material allegations of the complaint. The court adopted findings determining the validity of the contract; that the defendant did lay off and discharge employees hired through the agency of said Local Union, who were members of that organization in good standing, and employed other workmen who were not hired through the agency of the union; "that the discharge of the said employees of defendant was justified," but that it is not true the members of the union committed sabotage or "befouled said product with foreign * * * substance" or "slowed down production" as charged in the answer. As conclusions of law the court found that the defendant breached the terms of the collective labor agreement. Judgment was accordingly rendered directing the issuance of an injunction as previously stated. From that decree this appeal was perfected on the judgment roll alone.

[1, 2] Since the appeal is presented on the judgment roll only, and the evidence is not before this court, we are confined to a determination of the questions as to whether the complaint states a cause of action; whether the findings are within the issues; whether the judgment is supported by the findings and whether reversible error appears upon the face of the record. Carpenter v. Pacific Mutual Life Insurance Co., 13 Cal.2d 306, 316, 89 P.2d 637; Merron v. Title Guarantee & Trust Co., 45 Cal.App.2d 60, 113 P.2d 481; Lincoln v. Averill, 47 Cal.App. 2d 335, 338, 117 P.2d 913. The findings should receive a liberal construction to uphold rather than to defeat the judgment. Goldberg v. List, 11 Cal.2d 389, 394, 79 P.2d 1087, 116 A.L.R. 900.

[3, 4] We are of the opinion the complaint states a cause of action authorizing the issuance of an injunction as prayed for, that the findings support the judgment, that the findings adequately determine all of the essential issues of the pleadings, and that reversible error does not appear on the face of the record. The answer does allege that defendant's employees were discharged, or laid off, on account of their acts of sabotage consisting of retarding or slowing down production and befouling and damaging products by injecting therein foreign and noxious substances rendering them "unfit for human consumption." It will be observed the answer does not charge the Labor Union, or its agents, with instigating or encouraging such wrongful acts of sabotage or with polluting the products. If the agents of the union, acting within the scope of their authority, were guilty of such conduct it might constitute a breach of the contract which would justify rescission of the agreement. 63 C.J. 675, sec. 30; 31 Am.Jur. 976, sec. 288. The agents were not charged with that conduct, and, in the absence of the evidence, we must assume they were not guilty of instigating sabotage. If the employees were guilty of such conduct, we may assume it would justify their discharge on that account. But the court specifically found that "members of plaintiff union while in the employ of defendant" did not perform those acts of sabotage or pollution of the products. We must also assume that finding is supported by the evidence. It is true that the court further found "that the discharge of the said employees of defendant was justified." The court does not direct the defendant to reinstate them. On the contrary, the court specifically enjoins the plaintiffs from attempting to procure the reinstatement of those discharged workmen. The court, however, does find that the defendant employed workmen who were not hired through the agency of the Labor Union, and who are not members in good standing of that organization. The court then directed the defendant to discharge all such last-mentioned employees and to refrain from hiring other workmen contrary to the provisions of the collective labor agreement.

[5] The findings that the defendant was justified in discharging employees, and on the other hand that they were not discharged or laid off on account of their acts of sabotage or pollution of the products are not necessarily conflicting. In support of the judgment we may assume they were discharged on account of a lack

of business or because they were physically or otherwise unable to perform their duties, and not because they were guilty of sabotage.

[6] The trend of modern authorities authorizes the enforcement of injunctive relief to prevent an employer from violating the terms of a collective bargaining labor contract executed with a duly authorized labor union, in which instrument the employer agrees to hire workmen only through the agency of the labor union from its members who are in good standing, so long as they are competent and available, when there is no intent to thereby injure the members of other unions or to contravene public interests. Sec. 1126, Labor Code, enacted in 1941, St.1941, p. 2959; Ribner v. Racso Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132; Goldman v. Cohen, 222 App.Div. 631, 227 N.Y.S. 311; Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N.Y.S. 87; Roosevelt Amusement Corp. v. Empire State Motion Pictures Operators Union, 144 Misc. 644, 258 N.Y.S. 240; Leveranz v. Cleveland Home Brewing Co., 24 Ohio N.P.,N.S., 193; 95 A.L.R. 49, note; 31 Am.Jur. 879, sec. 118. Section 1126 of the Labor Code reads: "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

[7] The appellant challenges the validity of the collective labor agreement in this case on account of an alleged lack of consideration and for want of mutuality, chiefly because the charter by means of which the respondent union was affiliated with the American Federation of Labor was suspended October 6, 1941, after the execution of the contract in question. It is asserted that the principal consideration which passes to an employer from the labor union in a collective bargaining agreement is the promise of industrial peace and freedom from labor disturbances so as to increase the employer's prospect of conducting a successful business. It is contended that the suspension of the charter of the respondent union created a failure of consideration by depriving it of the ability to render the services necessary to a fulfillment of the contract. We must concede that an important consideration for collective bargaining with a labor union with respect to workmen, wages, hours and employment, is to secure freedom from labor disturbances. If the defendant contracted with Bottlers Local Union No. 293, with the mutual understanding that it was to thereby secure the cooperation of the American Federation of Labor, and the charter of the Local Union was thereafter suspended without fault on the part of the defendant, then that change of relationship might constitute a partial failure of consideration, provided it was shown to have been detrimental to the defendant.

No adequate showing of such failure of consideration appears in the present case. The collective labor agreement was not made with the American Federation of Labor. That organization is not mentioned in the contract. It does not appear from the agreement that the contracting parties contemplated the affiliation of the Local Union with the American Federation of Labor. That contract appears to have been confined solely to a relationship between the defendant and Bottlers Local Union No. 293 of the International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Branch No. 2. When a contract is reduced to writing the intention of the parties is generally ascertained from the writing alone. Sec. 1639, Civil Code. In the absence of fraud, the written contract supersedes all previous negotiations between the parties. Sec. 1625, Civil Code. Fraud on the part of the Local Union was neither alleged nor proved in this case. The respondent Local Union was and is an unincorporated labor union separate and distinct from the American Federation of Labor. The Local Union is still engaged in business independently of the American Federation of Labor. In its separate identity it had the authority to contract with the defendant upon the subject of union labor workmen's wages, hours and services to be performed according to the terms of the agreement. We are therefore of the opinion the suspension of the charter of the Local Union by the American Federation of Labor did not constitute a failure of consideration under the circumstances of this case.

[8] In the absence of particular detrimental acts, conduct or circumstances in violation of the terms of a collective labor agreement, it has been frequently held that contracts similar to the one which is in-

volved in this case are valid as against ordinary claims of lack of consideration or want of mutuality. Gates v. Arizona Brewing Co., 54 Ariz. 266, 95 P.2d 49; Rentschler v. Missouri Pac. R. R. Co., 126 Neb. 493, 253 N.W. 694, 95 A.L.R. 1; 31 Am.Jur. 875, sec. 104; Weber v. Nasser, Cal.App., 286 P. 1074; 95 A.L.R. 21, note.

It is true that the hearing before the Supreme Court, after decision by the District Court of Appeal, in the Weber case, supra, was dismissed on the ground that the issues became moot because the contract which was there involved expired before the Supreme Court was able to pass upon the hearing. Weber v. Nasser, 210 Cal. 607, 292 P. 637. We cite the opinion which was rendered in that case as it appears in the Pacific Reporter because it contains an excellent review by the late Presiding Justice Tyler of the cases showing the change which has taken place, as indicated by modern decisions, with respect to the application of injunctive relief to enforce the provisions of collective labor agreements between an employer and a union labor organization regarding the wages, hours and services of workmen. That opinion also considers the subjects of consideration and mutuality of the contracting parties, which issues are involved in this case. While it is true the Supreme Court neither approved nor disapproved the conclusions in that opinion, it is worthy of consideration. An excellent and exhaustive brief on nearly every issue which is presented on this appeal may be found in 95 A.L.R., page 10 to 56 thereof.

[9] We are of the opinion there is no substantial merit in appellant's contention that because the issues "will become moot before this case can be decided," since the written agreement provides that it may be terminated by the serving of a thirty day notice therefor prior to May 15, 1943, equity should not intervene. In support of that assertion the appellant cited the Weber case, supra. In that case the contract terminated on August 31, 1930. The hearing before the Supreme Court was submitted July 3, 1930. The Supreme Court was unable to reach that case for determination until October 30, 1930. In the meantime the contract expired. The court properly said that "any order we might make would be futile." That appeal was therefore dismissed on the ground that the issues had become moot.

The present case presents quite a different situation. The contract in the present case has not yet expired. Apparently it will not expire until May 15, 1944. Section 13 of the agreement provides that "It is hereby expressly agreed upon and understood that this agreement shall be, and it is hereby renewed and extended in full force and effect to the fifteenth (15th) day of May 1944," in the absence of a notice for modification or termination thereof, served at least thirty days prior to May 15, 1943. There is no evidence that such notice was given. It is not contended that notice was served. We must assume no such notice was given. The contract is therefore in full force and effect.

Under circumstances similar to those which exist in this case, it has been held that a collective labor agreement will be deemed to have been automatically renewed and extended to a specified date as provided by the contract, upon failure to give a specifically required notice of termination. Under such circumstances some affirmative showing is necessary on the part of the employer to terminate the contract. Leveranz v. Cleveland Home Brewing Co., supra; 95 A.L.R. 54, note; 31 Am.Jur. 875, sec. 103.

We therefore conclude that the issues of this case have not become moot, and that there is no reason on that account why the injunction may not be lawfully enforced.

[10, 11] We may not hold that the trial court abused its discretion in denying defendant's motion for a new trial. That motion was made chiefly on the ground of newly discovered evidence. It was presented on affidavits and counter-affidavits of the respective parties. On the issue of alleged acts of sabotage and pollution of the products by the defendant's employees, and alleged encouragement or inducement for such conduct on the part of the Local Union or its agents, the averments are conflicting. Moreover, we are of the opinion the appellant's affidavit in that regard fails to show due diligence as an excuse for not presenting that evidence at the trial of the case. 20 Cal.Jur. 84, sec. 59.

There is merit in the contention that, under proper circumstances, there might have been a failure of consideration for the contract when the charter of the Local Union in affiliation with the American Federation of Labor was suspended October 6, 1941, after the trial of this case was concluded. However, we are of the opinion the trial court properly assumed that was not a proper issue at the trial or on motion for new trial, because, as we have previously said, affiliation with the American Federation of Labor was not contemplated by the parties under the terms of the collective labor agreement.

[12] It has been uniformly held that the granting or refusal of a new trial on the ground of newly discovered evidence is so far within the sound discretion of the trial judge that the order of the court will not be disturbed on appeal except for a manifest abuse of discretion. Berkowitz v. Kiener Company, 37 Cal.App.2d 419, 427, 99 P.2d 578; 2 Cal.Jur. 906, sec. 534; 20 Cal.Jur. 81, sec. 58.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

59 Cal.App.2d 699

PEOPLE v. PARIS.

Cr. 1822.

District Court of Appeal, Third District, California.

July 16, 1943.

1. Infants 🔑20

Fact that evidence, in prosecution for lewd and lascivious acts with a child under age of 14, would have supported a charge of statutory rape, did not absolve accused from crime charged, and accused suffered no injury because information did not charge statutory rape. Pen.Code, § 288.

2. Criminal law 🔑1159(2)

Reviewing court, on appeal from conviction, may not disturb findings of triers of fact unless it clearly appears that on no hypothesis is there sufficient substantial evidence to support the conclusion reached in the lower court.

3. Infants 🔑20

Evidence sustained conviction of lewd and lascivious acts with a child under age of 14. Pen.Code, § 288.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

George Paris was convicted of an offense, and he appeals.

Affirmed.

Alphonse Matthews, of Sacramento (O. F. Meldon, of Sacramento, of counsel), for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appellant was charged with a violation of section 288 of the Penal Code, the charge being that on November 20, 1942, in Sacramento County, he did "willfully and unlawfully and feloniously place his hands upon and fondle the private parts of" a child of the age of seven years "with intent then and there of arousing, appealing to and gratifying the lust and passion and sexual desire of said George Paris," etc. He was found guilty as charged, and, his motion for a new trial having been denied, was sentenced to be imprisoned in the state prison for the term provided by law. On this appeal he contends that the verdict is entirely unsupported by the evidence in that the evidence shows that the crime committed was not that charged in the information but was in fact rape, that while rape is lewd and lascivious conduct it is not the kind of lewd and lascivious conduct charged, and that there was not only a failure of proof, but a fatal variance between the charge and the evidence.

A similar contention was made in People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939, where the defendant was charged with lewd and lascivious conduct under section 288 of the Penal Code, and, in a second count, with rape. On his conviction on both counts he was sentenced to San Quentin on the charge of violating section 288, but, because of a recommendation of the jury on the rape charge, was sentenced on that count to imprisonment in the county jail, the sentences to run concurrently. On appeal it was conceded that the evidence supported the conviction on the rape charge but it was contended that it was insufficient to support the other. There the victim of the offense was a child of the age of three years, and the proof that she had been raped and that defendant had committed the offense was physical evidence. The court said, page 669 of 11 Cal.2d, page 940 of 81 P.2d: "It is difficult to understand why the jury, having found defendant guilty of rape, could have made the recommendation it did. It is admitted that the evidence is sufficient to sustain that charge, but it is claimed there is no evidence tending to show that appellant violated section 288 of the Penal Code. In this connection it is claimed that the lewd and lascivious acts were part of and became merged in the rape charge, for which reason appellant could not be punished under the provisions of section 288 of the Penal Code. The fact that appellant was convicted upon the charge of rape does not necessarily prevent him from being punished under section 288 for any of the acts committed prior thereto. If any one of the antecedent acts of lewd and lascivious conduct was committed without the intent to commit rape, but simply to gratify appellant's lustful passion, and then later, emboldened by his success and further inflamed with passion, he conceived the further nefarious intent to penetrate the body of the child, the antecedent acts prior to the rape are punishable under the section involved." Citing People v. Parker, 74 Cal. App. 540, 241 P. 401; People v. Lind, 68 Cal.App. 575, 229 P. 990; People v. Bronson, 69 Cal.App. 83, 230 P. 213; People v. Agullana, 4 Cal.App.2d 34, 40 P.2d 848; People v. Meyer, 94 Cal.App. 696, 271 P. 751; People v. Piburn, 138 Cal.App. 56, 31 P.2d 470.

In the Parker case the court said that while under section 288 as it then read, defendant could not be punished for rape, it did not necessarily follow that he could not be punished under section 288 for the lewd and lascivious acts leading up to the rape.

In People v. Bronson, supra [69 Cal.App. 83, 230 P. 214], this court said that: "All that is required to complete the crime defined by section 288 of the Penal Code is that the acts committed on the body of a child under the age of 14 years are of lewd or lascivious character and that the intention of the party committing them was thus to excite or arouse the sexual passion or desires of such party or of the party upon whose body they are committed or of both."

[1] Appellant argues that because the testimony of the physician who examined the child showed the use of force in the commission of the crime, resulting in severe injury to the victim, defendant could not have been guilty of acting as charged in the information. As he expresses it in his brief: "From the injuries described by the Doctor one would be led to infer they resulted from the attack of a ferocious beast rather than from the fond and caressing touch of a kindly disposed spirit, regardless of what the purpose was." However, in the O'Donnell case above cited the circumstances were held sufficient to support a conviction under section 288 where the results were similar to those shown in this case and where there was no evidence as to the preceding acts of defendant. Here there is evidence that defendant took the child in his arms and carried her into the building and to the room therein where his purpose was accomplished, and there placed her upon the springs of a bed. As she then became unconscious she could give no testimony as to what subsequent acts defendant performed in the consummation of the crime; and while the evidence would have supported a charge of statutory rape, that fact does not absolve defendant from the crime charged, and he suffered no injury because the information did not so charge. While a crime may be committed under section 288 without its amounting to rape, it seems impossible that rape may be committed upon a child under the age of fourteen years without thereby violating the provisions of section 288.

[2, 3] Appellant also attacks the judgment on the ground of insufficiency of the evidence. An appellate court cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. People v. Stangler, 18 Cal.2d 688, 692, 117 P.2d 321. Here there is ample credible testimony to support the verdict of the jury.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

59 Cal.App.2d 610

PEOPLE v. WILSON.

Cr. 3704.

District Court of Appeal, Second District, Division 1, California.

July 8, 1943.

1. Escape ⚷4

Statute penalizing as a felony the escape from a prison or industrial farm or road camp applies to escapes by persons convicted of misdemeanors as well as of felonies. Pen.Code § 4532.

2. Criminal law ⚷27

Prisoner, who had been convicted of violation of section of Vehicle Code, a felony, and who escaped from honor farm, was guilty of a "felony" under statute penalizing as a felony an escape by a prisoner who is engaged in any county road work or other county work and who shall escape or attempt to escape, though prisoner had been given alternative sentence of one year in county jail. Pen.Code, §§ 17, 4532; Vehicle Code, § 503, St.1935, p. 174.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Earl C. Wilson was convicted of escape, and he appeals.

Affirmed.

Earl C. Wilson, in pro. per., for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant by information was charged with the crime of escape, in that on or about the 8th day of May, 1942, he "did willfully, unlawfully and feloniously escape from the Wayside Honor Farm", while confined therein as a prisoner having theretofore been convicted of a violation of section 503 of the Vehicle Code, St.1935, p. 174, a felony. Appellant entered his plea of not guilty to the charge, waived a jury trial and upon stipulation the testimony taken at the preliminary hearing was admitted in evidence on behalf of the People. No evidence was offered by appellant. Thereafter the court found appellant guilty of the offense, as charged in the information, and sentenced him to the State prison at San Quentin for the term prescribed by law.

Although represented by counsel at the trial, appellant prosecutes this appeal from the judgment in propria persona, and has filed a brief which fails to raise a question of law. Nevertheless, because of the peculiar circumstances surrounding the case, some discussion seems necessary in order to explain the conclusion reached by this court.

The record reveals that in March, 1942, appellant was convicted of a violation of section 503 of the Vehicle Code, a felony, but the trial court, instead of sentencing appellant to the State prison, imposed the alternative sentence of one year in the county jail, as permitted by the terms of section 503, supra. By such action, appellant's crime was thereby reduced or changed from a felony to a misdemeanor, pursuant to the terms of section 17 of the Penal Code, to-wit: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, *it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison.*" (Emphasis added.) Therefore, when appellant on May 8, 1942, made his escape from the Wayside Honor Farm, to which he had been transferred from the county jail, he was serving a sentence for a misdemeanor.

Prior to this, to-wit, on February 14, 1942, the case of In re Wilkins on behalf of Ramirez, 49 Cal.App.2d 709, 122 P.2d 361, in a well-reasoned opinion, held that section 4532 of the Penal Code relating to escapes had reference only to those persons convicted of felonies, and did not apply to a person theretofore convicted of a misdemeanor.

[1] Although he made his escape from the Wayside Honor Farm on May 8, 1942, the information based on section 4532, supra, charging appellant with the crime of escape was not filed until the following December (1942). Meanwhile, the Supreme Court on October 30, 1942, in the

case of In re Halcomb, Cal.Sup., 130 P.2d 384, and companion cases, disapproved the holding in the Wilkins case and decided that section 4532, supra, applied to escapes by persons convicted of misdemeanors, as well as of felonies. See, also, People v. Smillie, 55 Cal.App.2d 381, 130 P.2d 714.

[2] Since this court is bound by the decision of the Supreme Court in the Halcomb case, we are under the necessity of affirming the judgment of the trial court.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, Justices (concurring).

We concur, but we do so with misgiving and only because this court, by tradition and practice, is expected to follow the decisions of the Supreme Court, which in the situation here presented are In re Haines, 195 Cal. 605, 234 P. 883, and In re Halcomb, Cal.Sup., 130 P.2d 384, 387. The action of the 1943 Legislature (Assembly Bill 479, Stats.1943, Chapter 635) in amending section 4532 of the Penal Code, so as to provide for a county jail sentence in the cases of misdemeanants who escape or attempt to escape from lawful custody, adds weight to the dissenting opinion of Mr. Justice Traynor in the Halcomb case, supra, wherein he said: “The courts cannot lift qualifying phrases from legislation without usurping legislative functions and the usurpation is particularly flagrant when the phrase has been added by amendment”. In view of the aforesaid legislative action, particular pertinency attaches to what Mr. Justice Traynor further said in his dissent when he declared: “There is always the possibility that the Legislature intended a provision to be read as it is written, however unwise it appears. The court’s refusal to read it as it is written makes it impossible for any one to rely upon the written word of the Legislature”. By the action taken at its recent session in amending section 4532 of the Penal Code, the Legislature affirms the logical construction placed upon the language and the legislative history of the 1923 amendment to section 107 of the Penal Code (part of which is now section 4532) by Mr. Justice Traynor in his dissenting opinion, supra, and which amendments gave rise to the decisions in the cases of In re Haines and In re Halcomb, supra, which require us, in practice, to affirm a judgment we regard as violative of natural justice and at variance with a legislative intent clearly appearing in the language of the 1923 statute and its legislative history.

We are in accord with what we regard as the timely admonition contained in Mr. Justice Traynor’s dissenting opinion, supra, wherein he urges, for the reasons advanced by him, that the decisions In re Haines, supra, and In re Durand, 6 Cal.App.2d 69, 44 P.2d 367, should be overruled.

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59 Cal.App.2d 703

OCEANVIEW MEMORIAL PARK et al. v. CAMINETTI, Insurance Commissioner, et al.

Civ. 2888.

District Court of Appeal, Fourth District, California.

July 16, 1943.

1. Mortgages 🔑258

Where endorsement of note secured by trust deed was effected before instrument became due, holder thereof was deemed prima facie to be a “holder in due course”, not subject to defenses which would have been available to maker against original payee. Civ.Code, § 3140.

See Words and Phrases, Permanent Edition, for all other definitions of “Holder in Due Course”.

2. Mortgages 🔑270

Evidence supported findings that defendants were not holders in due course of note secured by trust deed, that original and subsequent holders of note were charged with notice of conditions surrounding execution of trust deed and that there was no consideration for note or that the consideration therefor had failed, so that note and deed were unenforceable. Civ.Code §§ 3133 (3, 4), 3140.

3. Evidence 🔑265(8)

Although a verified pleading filed by a party in one action is competent evidence against him in another action as an “admission", it is not conclusive and does not carry the effect of an "estoppel of record".

See Words and Phrases, Permanent Edition, for all other definitions of "Admission" and "Estoppel of Record".

4. Estoppel ⚿3(3)

Answer in action to foreclose mechanics' and materialman's lien on mortgaged realty, which set up defense that note and trust deed securing note had been sold by payee did not constitute an "estoppel" against maker from denying that maker knew of transfer of the instrument and that transferee of note was a holder in due course, where transferees were not parties to and there was no adjudication of such questions in lien foreclosure action.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

5. Mortgages ⚿270

Where payee of note secured by trust deed, without fault of maker, had breached building agreement between maker and payee pursuant to which note and deed had been executed, evidence did not establish that trial court had abused its discretion in failing to award to transferees of note and deed relief against maker, on ground that agreement had not been substantially performed.

6. Appeal and error ⚿1071(6)

Trial court's failure to find on issue raised by answer did not render judgment for plaintiffs improper, where trial court did not abuse its discretion in failing to award relief to defendants and it did not appear that if the trial court had found more fully on the issue, such finding would have been in defendants' favor.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Declaratory judgment action by Oceanview Memorial Park and others against A. Caminetti, Jr., Insurance Commissioner of the State of California, as liquidator of Old West Life & Annuity Company, and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Morton L. Barker and William Paul Wood, both of Los Angeles, for appellants.

Rorick & Cottingham, of Oceanside, and Monroe & McInnis and C. M. Monroe, all of San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs and respondents M. N. Smith and Pearl K. Smith, husband and wife, are the owners of the stock of plaintiff and respondent Oceanview Memorial Park, a corporation (hereinafter referred to as Memorial Park Corporation). This action was brought for declaratory relief in order to determine the validity of a promissory note for $32,500, executed March 5, 1932, and the trust deed securing the same, and to enjoin the foreclosure of the trust deed. It was alleged generally that the consideration for the note failed; that the present holder thereof, defendant and appellant A. Caminetti, Jr., Insurance Commissioner of the State of California, as liquidator of the Old West Life & Annuity Company, a California corporation (hereinafter called the Annuity Company), was not a holder in due course, and that the defendant W. P. Wood, as trustee, was undertaking to foreclose the trust deed by sale, which he had advertised for the 31st day of October, 1941. The relief prayed for was granted by the trial court and this appeal followed.

In 1932, the Smiths organized the Memorial Park Corporation, to conduct a cemetery and mausoleum business. They acquired certain properties for this purpose and divided it into cemetery lots, and a portion thereof was set aside for the building site of a proposed mausoleum. The corporation was mainly created in order that the owners might enter into a proposed agreement with the National Thrift Corporation of America (hereinafter called the Thrift Corporation), to finance and build the mausoleum on the site mentioned. For this purpose a promissory note was signed and a trust deed, dated March 5, 1932, was executed by the Memorial Park Corporation to the Security Title Insurance and Guaranty Corporation, as trustee, and the Thrift Corporation, as beneficiary. By their terms the Memorial Park Corporation agreed to pay $32,500 on or before three years to the beneficiary. Upon the back of the trust deed appears an assignment dated March 7, 1932, two days after its execution, whereby the Thrift Corporation assigned the same to one R. E. Trapp. There also appears an assignment dated March 9, 1932, from Trapp to Los Angeles Life Insurance Company (hereinafter referred to as the Life Insurance Company).

At the same time there was also executed a contract dated March 5, 1932, between plaintiff Memorial Park Corporation and the Thrift Corporation. The contract on behalf of the latter corporation was signed by W. O. Harris, vice president, and Leo T. Porter, secretary. Harris at that time was in charge of construction. This agreement recites that the Thrift Corporation agrees to build in a satisfactory and workmanlike manner, free from debt or liens (other than the trust deed referred to) a mausoleum, according to plans and specifications, for a total consideration of $37,000. This amount was to be paid first, by the note and trust deed for $32,500, and second, by a bill of sale for 20 individual crypts in said mausoleum to be selected by the Thrift Corporation, and from the proceeds of the sale of which the Thrift Corporation was to receive the net amount of $4,500, the Memorial Park Corporation retaining the exclusive option either to buy or sell the crypts within a period of one year. The contract then provides: "We agree to the following allowances in the construction of said mausoleum and will credit the account of the Oceanview Memorial Park, a corporation, with any savings thereon, and will accept payment from said Oceanview Memorial Park for any amount in excess thereof". Then follows the listed items and amounts which aggregate $28,096. It further provides: "We agree to start the construction of said mausoleum as soon as all the papers are in proper form, including the trust indenture hereinabove referred to and to diligently continue the construction thereon and to complete the building within a period of four months from the date thereof."

After executing the above-mentioned contract, there was some delay before construction started. About the month of April, construction commenced and went along for two or three months "rather haphazardly". The Thrift Corporation became financially involved and in September, 1932, finally stopped construction and later went into bankruptcy. Some scaffolding and part of the frame work of the mausoleum was up and some concrete had been poured for the foundation. No grading had been done as agreed in the contract. Trash was left about the place. Some of the walls had been completed "up to the parapet line". Part of the building was built from the foundation up to where the roof line should have been. Roof forms were put on but were never poured with concrete. Those forms and the incompleted mausoleum remained in that condition for about ten years. Shortly after cessation of work on the building, about $8,500 in mechanics' and materialmen's liens were filed and recorded against the property. Actions were commenced upon most of the liens to foreclose them. Settlement was made by Smith with most of the lien claimants. One lien claim was foreclosed. Smith later purchased the property at the foreclosure sale for $300.

In reference to the history of the transaction respecting the trust deed and note the following facts are found by the court: that the Memorial Park Corporation on March 5, 1932, executed the promissory note to the Thrift Corporation in the sum of $32,500; that at the same time and as a part of the same transaction it executed its trust deed securing the payment thereof to the Security Title Insurance and Guaranty Company; that the sole and only consideration for the promissory note and trust deed was the written contract executed upon the same date and as a part of the same transaction; that the Thrift Corporation thereby undertook and agreed to erect upon the real estate and to complete within four months in accordance with specifications then agreed upon and approved, a mausoleum building; that it was an implied term of said contract that said promissory note should not be placed in the hands of an innocent purchaser for value prior to the completion of said mausoleum building; that there was no substantial performance of said building contract; that the Thrift Corporation thereafter was adjudicated a bankrupt, and said structure was never completed; that on March 7, 1932, the Thrift Corporation assigned to Trapp the promissory note for $32,500; that on March 9, 1932, Trapp transferred the same to the Life Insurance Company; that said Life Insurance Company, by successive changes of name, became known as National Thrift Assurance Corporation of California (hereinafter called the Assurance Corporation), and Old West Life & Annuity Company, a corporation; that on March 7, 1932, the Thrift Corporation caused an assignment of its interest in the trust deed to be made to the Assurance Corporation; that said trust deed was recorded on March 26, 1932; that neither Trapp nor the Life Insurance Company were innocent holders or holders for value in due course of said note or the beneficial interest in said trust deed securing the same; that, on the contrary, Trapp and the officers of the last-named corporation well knew the terms of the building contract and that at the time of said transfer the same had not been fulfilled; that said transfers were not made in the regular course of business and that the transfer of the last-named corporation was not for a valuable consideration; that although defendants have possession of the note and trust deed, nevertheless it is subject to all defenses to which the same would be subject in the hands of the original payee, the Thrift Corporation; that the attempted transfer of the note constituted fraud upon the rights of the plaintiffs and that the facts relative thereto were fully known to all subsequent holders thereof. The court concluded that the plaintiffs were entitled to have the title to the property quieted as against the trust deed and the defendants above mentioned, and that the plaintiffs are entitled to an order permanently enjoining the foreclosure or enforcement of the trust deed. Judgment was entered accordingly.

Appellants' main contention is that there is not sufficient evidence to sustain the trial court's finding that the defendant Annuity Company or the defendant Insurance Commissioner, as liquidator thereof, did not take the instruments in question as a holder in due course.

Smith testified that he knew nothing as to what happened to the trust deed until notice of the sale thereunder was given him in the fall of 1941 by W. P. Wood, as substitute trustee; that he did not "suppose they could collect the note as they had not performed the contract"; and that under the contract he was not aware that it would be legally possible for the Thrift Corporation to transfer the note to a third party.

Trapp testified and appellants contend that prior to February 24, 1932, the Thrift Corporation was engaged in procuring funds for use in its business by the sale of what were known as thrift certificates; that the certificates were a form of bond; that the corporation was engaged in making loans of various types and also engaged in the construction and sale of various types of buildings; that he, Trapp, had a contract with the Thrift Corporation on a commission basis which gave him the exclusive agency in the United States covering the sale of the investment certificates issued by the corporation; that these certificates were sold on an installment basis and payments extended over a period of approximately 18 months; that Trapp maintained offices in California and also in other states; that in February, 1932, the Thrift Corporation decided to change its plan of operation and entered into negotiations with Trapp for the cancellation of his contract; that on February 24, 1932, an agreement was entered into by him and the corporation under which he agreed to the termination of his exclusive selling agency and the cancellation of unearned commissions; that at that time it was estimated that the total commissions to which he would be entitled under his contract exceeded the sum of $50,000; that the corporation agreed to pay him $35,000 in securities, consisting of first trust deeds and $15,000 in cash; that at the time of entering into the agreement Trapp had coming to him, as accrued earned commissions, the sum of $19,000; that he received about $5,000 in installments, and the promissory note for $32,500 here involved, secured by the trust deed which is the subject of this action; that the note and deed of trust were acquired by the Thrift Corporation in the following manner: That prior to February 24, 1932, the Life Insurance Company had been engaged in the sale of life insurance and other forms of insurance in the State of California; that the officials of the Thrift Corporation had determined that they could make more money for the corporation by engaging in the sale of a combination of an investment certificate and life insurance policy, and for this purpose the officials acquired control of a corporation which held the stock of the Life Insurance Company; that they planned to discontinue the sale of the thrift certificates formerly sold through Trapp's agency and they so informed him; that he objected to the threatened cancellation of his contract and it was finally agreed that if he would agree to a cancellation and put money into the Insurance Company he would be given a contract for the sale of policies of that company; that pursuant to this agreement Trapp delivered to the Life Insurance Company the sum of $10,000 in cash shortly after February 24, 1932, and agreed to deliver securities of the value of $35,000; that in return, Trapp was to receive stock of the value of $35,000 in a holding corporation which held all of the stock of the Insurance Company; that on February 25, 1932, the name of the Los Angeles Life Insurance Company was changed to National Thrift Assurance Corporation; that because of the fact that the Insurance Company became insolvent no stock in the holding company was ever issued to Trapp under the agreement; that on February 24, 1933, the insurance commissioner of the state, pursuant to a petition filed by him for that purpose, was appointed liquidator of the Old West Life & Annuity Company, by order of the court, and in the latter part of 1941, commenced proceedings for the foreclosure of the trust deed in the full amount set forth therein. This action followed.

[1] It will be noted that the endorsement of the note by the payee thereof and by Trapp was effected before the instrument was due. Under section 3140 of the Civil Code, the holder thereof is deemed prima facie to be a holder in due course. A holder in due course is a holder who has taken a negotiable instrument under the following conditions: "* * *(3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." § 3133, Civ.Code. In this connection, in support of the court's findings, we will review some of the additional evidence offered in that respect.

First, it is conceded that the statute of limitations has run as against the promissory note. The trust deed was assigned directly from the original beneficiary to the Life Insurance Company. It is apparent that the Thrift Corporation and its officers had knowledge of the terms of the building contract for which the note and deed of trust were issued, and that no consideration had passed between the maker and the beneficiary at the time the instruments were executed. The contract was drawn by W. O. Harris and a copy of it was on file in the office of the Thrift Corporation with the note. The trust deed was placed of record. Trapp, for several years, maintained an office on the same floor in the same building with the Thrift Corporation. However, he testified that he did not have knowledge of its transactions or occupy any official capacity with that corporation other than operating his own sales agency in selling securities of that corporation. He did testify that a few days before he accepted the note and trust deed he made a trip to the property; that he did not make any effort to contact the makers of the note or trust deed, but his attorney made an investigation and reported back to him.

Harris, as vice president, testified that he handled the transaction for the Thrift Corporation; that he discussed it with Trapp, and around the time the papers were being completed, Trapp asked him what the details of the deal were, and as he remembered it, he showed him a copy of the building contract.

Plaintiff Smith testified that he discussed "in generalities this contract" with Trapp, which conversation was held shortly before the contract was executed.

Harris further testified that one Bruce Young, affiliated with the Life Insurance Company, was brought to the Thrift Corporation office about that time and that Trapp and Young held a lot of "secret sessions" with Nathan T. Porter and his son Leo T. Porter, president and secretary respectively of the Thrift Corporation; that he, Harris, "knew there was some insurance deal of some kind brewing, but what it was I didn't know"; that as far as he, as vice president of the Thrift Corporation was concerned, he would never "have considered such a proposition as the assignment of the note and deed of trust * * * because it was an incompleted transaction."

The evidence also discloses that in the certificate of change of name, on March 3, 1932, Nathan T. Porter and Leo T. Porter were named as president and secretary of the Life Insurance Company. These individuals were also president and secretary of the Assurance Corporation.

Without setting forth other evidence produced, it already seems to be a logical conclusion to be reached that the parties, finding the Thrift Corporation to be in financial distress and facing bankruptcy, were merely transferring the trust deed and note from one corporation controlled by them to another corporation or corporations also controlled by them, for the purpose of rehabilitating the latter corporations; that Trapp was merely an instrumentality used for this purpose and that they well knew about the entire transaction respecting the Memorial Park, the terms of the building contract, the consideration for the note and deed of trust, that the amount payable by the Memorial Park Corporation was dependent upon contingencies to happen in the future; and that they knew that under the provisions of the building contract the amount to be finally paid on the note and trust deed might be substantially less than the amount expressed on the face of those instruments.

[2] From the evidence the trial court was fully justified in holding that the appellants were not holders in due course; that there was no consideration or that the consideration had failed, and that the note and trust deed were unenforceable, either in the hands of the original holder or subsequent holders, and each were charged with notice of the conditions surrounding the execution of the trust deed. Goodwin v. Nickerson, 51 Cal. 166; Prouty v. Adams, 141 Cal. 304, 74 P. 845; Meyer v. Weber, 133 Cal. 681, 65 P. 1110; Spotton v. Dyer, 42 Cal.App. 585, 184 P. 23; Roush v. Kirkman, 42 Cal.App. 115, 183 P. 353; Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293.

[3, 4] In this connection it is also argued that under the evidence, as a matter of law, plaintiffs are estopped from denying that they had knowledge of the transfer of the instruments and that the defendant Commissioner is a holder in due course. It appears from the evidence that plaintiff Mr. Smith in one of the actions to foreclose one of the liens against Memorial Park Corporation, filed a verified answer in which he set up as a defense thereto that the note and trust deed above mentioned were sold to a third person by the Thrift Corporation and are "still outstanding and unreleased, and said trust deed constitutes a first lien upon said premises"; that before the mausoleum was completed, the Thrift Corporation became insolvent and "the mausoleum still remained 75 per cent uncompleted". Defendants here were not parties to that action. There was no adjudication of those questions in that action. While a verified pleading filed by a party in one action is competent evidence against him in another case as an admission, it is not conclusive and does not carry the effect of an estoppel of record. De Bock v. De Bock, 43 Cal.App. 283, 184 P. 890; 10 Cal.Jur. p. 616, sec. 6. As between the parties to this action the pleadings above mentioned did not constitute an estoppel as a matter of law for the purposes suggested.

It is next contended that even though appellants were not holders in due course, the trial court failed to require the maker of the note and trust deed to make payment to defendants herein for the benefits received under the building agreement pursuant to which the note and trust deed were given; that the action was an equitable proceeding and that therefore before plaintiffs could obtain the relief sought, they would have to do or offer to do equity. It is argued that in their answer defendants alleged that a substantial portion of the mausoleum was completed by the Thrift Corporation; that they expended over $13,000 in its erection; that a portion of the incomplete building is now being used by plaintiffs, and that they have collected large sums from the sale of crypts therein; that the trial court failed to find on this issue and denied defendants any relief. They cite the rule set forth in 27 Cal.Jur. p. 212, § 19, "* * * that while a special contract remains unperformed, the party who has not completed his part cannot sue indebitatus assumpsit to recover compensation for what he has done. But there is an exception to the rule in cases where something has been done under a special contract, though not in strict accordance therewith. While no recovery can be had on the contract, if the other party has derived some benefit from the labor performed the law implies a promise on his part to pay such remuneration as the benefit conferred is really worth."

The trial court did find that "there was no substantial performance of the building contract"; that the trust deed was unenforceable; that the consideration failed, and that plaintiffs were entitled to have their title to the property quieted as against the trust deed and against defendants, and no condition precedent was attached to such right in the findings or judgment.

We must conclude that the court found against defendants on the issue that they were entitled to any relief under their claim. The record fully supports the court's finding that the Thrift Corporation breached its building contract through no fault of plaintiffs. It is true that defendants presented in evidence a record of the Thrift Corporation's cancelled checks and book account purporting to show that certain payments had been made for labor and material by that corporation in reference to the Memorial Park contract. These amounts totalled approximately $12,424.49. Pictures were received in evidence showing the incomplete state of the building.

Defendants produced an engineer as a witness, who testified as to the value of the building in its incomplete state. He testified that he did not see the building until 1942; that he could only put a value on the work that was there then; that it was testified that the work was about 60 per cent completed; that 60 per cent of $12,000 would be about $7,000, not allowing for the marble work which was done later; that the marble work was worth around $4,000; that his estimate of the value of the building in 1932, including all items, was about $6,000.

Plaintiff Smith testified that most of the work that had been done by the Thrift Corporation was more of a detriment to the Memorial Park than it was an asset; that when work ceased on the building, scaffolding and roof forms were left up, but concrete was not poured; that over a period of ten years the forms became weather beaten, were useless, and had to be removed; that he tried to secure a loan on the property to fix it up but could not, due to the clouded condition of the title involving all of his lots by reason of the trust deed; that later he tried to fix up the lower corridor of the mausoleum; that he built an office and rest room, put on a temporary roof over the corridor, and used the marble delivered on the job in constructing some 99 crypts of those contemplated and disposed of most of them at $175 apiece; that the Thrift Corporation never paid for the marble or items of brass and copper that were used by him; that this was an item of one of the liens which he settled; that he paid off approximately $3,000 in liens by exchange for crypts and graves and by cash; that he "laid out" probably $5,000 in money in title searches and additional expenses and also paid out "several thousand dollars" more in parking and landscaping, which was supposed to have been done under the contract, plus another item of $225, for which he held a receipt. He then testified that in his opinion about 60 per cent of the concrete work had been done when the Thrift Corporation went bankrupt (not that 60 per cent of all of the work was completed as believed by defendants' witness, the engineer, and upon which he made his compilation of estimated value); that he, Smith, spent several months of hard work himself in making the buildings and grounds presentable. He then testified upon cross-examination that the Thrift Corporation did put some material and labor into the property and enhanced the value of it about $10,000, but he testified that subtracting the liens, etc., which the Thrift Corporation did not pay, he did not see how it could claim those items as its expenditure of money.

[5, 6] There is no question but that plaintiffs have been greatly inconvenienced and damaged by the Thrift Corporation's breach of the contract, and by its subsequent actions. It is under this evidence that defendants claim that they were entitled to be reimbursed for the purported amount plaintiffs have been enriched by the transaction. Defendants complain because the court failed to find the amount of claimed enrichment and refused to award them a share thereof. From an examination of the evidence it is readily apparent that the evidence was not only conflicting, but also quite confusing respecting the amount of the claimed equitable relief, if any, that might be rightfully due to defendants. It is true that the Thrift Corporation did expend some sums and furnish some material and labor on the building. Much of the material was not paid for by it, however, and liens were allowed to be filed against plaintiffs' property. They were confronted with many law suits in connection therewith. Any beneficial arrangements Smith may have made with those claimants in payment of the material could not and should not be claimed by the Thrift Corporation or its assignees. The Thrift Corporation was the one who breached the contract and apparently by some manipulation endeavored to gain some advantage to them by assigning the note and trust deed. It cannot be said under the evidence that the trial court abused its discretion in failing to award to defendants any relief. The trial court fully considered this question. If counsel are at all in doubt in this respect, a copy of the trial court's opinion accompanying the record should be read. The reasons there expressed and the conclusions reached as to why defendants were not entitled to equitable relief, is stated in quite forceful language. It does not appear therefrom that if the court would find more fully on the subject, such a finding would be in defendants' favor. Bell v. Adams, 150 Cal. 772, 90 P. 118. The trial court's determination of the equities of the respective parties will not be disturbed upon this appeal.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

59 Cal.App.2d 476

CAMINETTI, Insurance Commissioner, v. IMPERIAL MUT. LIFE INS. CO.

Civ. 13703.

District Court of Appeal, Second District, Division 1, California.

June 29, 1943.

Rehearing Denied July 28, 1943.

Hearing Denied Aug. 26, 1943.

1. Appeal and error ⇨931(1), 1010(1)

Usually, an appellate tribunal is not justified in reversing judgment as not sustained by sufficient evidence, unless it appears from record that, accepting full force of evidence adduced, with every inference therefrom favorable to prevailing party, such party is still precluded as matter of law from recovering judgment.

2. Insurance ⇨44

The word "hazardous", as used in statute requiring superior court to direct insurance commissioner to take possession of assets and conduct business of insurance company in such condition that its further transaction of business will be hazardous to its policyholders, means that company's management so conducts its business that there is loss or risk of loss to policyholders. St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Hazardous".

3. Insurance ⇨64

The trial court's determination on competent testimony, without abuse of discretion, that mutual life insurance company's management is such that control of its business should be returned to it by insurance commissioner theretofore appointed as company's conservator, is binding on courts of review. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011

4. Insurance ⇨64

On hearing of mutual life insurance company's application for permission to resume title to and possession of its property and conduct its own business after insurance commissioner's appointment as company's conservator, burden was not on commissioner to prove that company was in hazardous condition. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

5. Insurance ⇨64

While order of proof is generally within trial court's discretion, a mutual life insurance company, on its application for order terminating insurance commissioner's conservatorship of company, must assume burden of proof that ground for commissioner's appointment as conservator does not exist or has been removed and that company can properly resume title to and possession of its property and conduct of its business. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

6. Appeal and error ⇨1170(1)

A judgment may be reversed for erroneous rulings on law questions only when complaining party's rights have been prejudiced, and where trial court's decision or judgment is manifestly right on evidence and error has not resulted in miscarriage of justice, appellate tribunal is not authorized to set aside judgment. Const. art. 6, § 4½.

7. Insurance ⇨64

The superior court's erroneous ruling that burden of proof was on insurance commissioner in hearing on mutual life insurance company's application for permission to resume title to and possession of its property and conduct its own business after commissioner's appointment as company's conservator did not result in "miscarriage of justice," where evidence was sufficient to meet burden of proof imposed on company, so as to preclude reversal of judgment for company. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

8. Insurance ⇨64

Evidence *held* sufficient to justify superior court's judgment restoring to mutual life insurance company its business and property taken over by insurance commissioner as conservator. St.1935, pp. 541, 642, 657–668, 659, 663, 666, 667, 671 et seq., 672, 676, 680, §§ 1012, 10240, 10640–10780, 10669, 10710–10712, 10739–10744, 10810 et seq., 10830, 10870, 10915; St.1937, p. 2563, § 1011(e), (i).

9. Criminal law ⇨27

A federal indictment, charging mutual life insurance company's officers and employees with conspiring to defraud federal government, charged a "felony", though state statute classifies crimes after judgment as felonies or misdemeanors according to penalties actually imposed. Pen.

Code, § 17; Cr.Code §§ 37, 335; 18 U.S.C.A. §§ 88, 541.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony".

10. Criminal law 🔑27

The law of jurisdiction wherein crime is committed determines whether offense is felony or misdemeanor.

11. Criminal law 🔑275

A plea of "nolo contendere", like a demurrer to indictment, admits all facts stated in indictment for purpose of particular case, but cannot be used as "admission" elsewhere, as it is implied confession only of offense charged.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission" and "Nolo Contendere".

12. Criminal law 🔑275

It is discretionary with court whether to receive a plea of nolo contendere.

13. Criminal law 🔑275

An accused is not "estopped" by plea of nolo contendere to plead not guilty in action for same acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

14. Criminal law 🔑275

The plea of "nolo contendere", though often used as substitute for plea of guilty, amounts only to declaration by defendant that he will not contend.

15. Criminal law 🔑275

A plea of "nolo contendere" cannot be used against defendant as an "admission" in civil suit for same act.

16. Criminal law 🔑275

A plea of "nolo contendere" is a "confession," which defendant may be sentenced in particular prosecution, but such conviction cannot be used in another proceeding to discredit witness.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession".

17. Criminal law 🔑275

Strictly speaking, plea of "nolo contendere" amounts only to agreement by defendant that fact charged may be considered as true for purposes of particular case wherein plea is entered, and it is not conclusive, though implied, "confession" of guilt.

18. Judgment 🔑648

On insurance company's application for permission to resume title to and possession of its property and conduct its own business after insurance commissioner's appointment as company's conservator, a plea of nolo contendere, entered by certain officers of company to federal indictment for conspiracy to defraud government, did not constitute evidence that they had engaged in fraudulent transactions, so that their conviction on such plea was inadmissible in evidence as "admission" that company did not comply with legal requirements for issuance of certificate of authority to it. St.1937, p. 2018, § 704.5; p. 2563, § 1011 (i); Cr.Code §§ 37, 335, 18 U.S.C.A. §§ 88, 541.

19. Insurance 🔑64

In superior court's interlocutory judgment, restoring to mutual life insurance company its business and property theretofore taken over by insurance commissioner as company's conservator recital that court retained jurisdiction of proceeding and continued matter for stated time for purpose of receiving further evidence or hearing additional motions was void as contrary to statutory provisions and whole theory of such administrative proceedings. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

20. Insurance 🔑64

The superior court's jurisdiction of special proceeding by mutual life insurance company for restoration of its business and property, taken over by insurance commissioner as company's conservator, is limited by terms and conditions of statute under which proceeding is instituted. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

DORAN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding by A. Caminetti, Jr., Insurance Commissioner, for an order appointing him as conservator of the Imperial Mutual Life Insurance Company and directing him to take possession of such company's books, records and property. From an interlocutory judgment cancelling an order appointing the Commissioner as conservator, dissolving the conservatorship, and restoring the insurance company's property to it, the Commissioner appeals.

Modified, and affirmed as modified.

See, also, 54 Cal.App.2d 514, 129 P.2d 432.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Peery Price, Sp. Counsel, of Los Angeles, for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by the Insurance Commissioner of the State of California from a judgment rendered pursuant to section 1012 of the Insurance Code, St.1935, p. 541, restoring to Imperial Mutual Life Insurance Company (hereinafter referred to as Imperial Mutual) business and properties which had theretofore been taken over by the Commissioner under section 1011 of the Insurance Code, St.1937, p. 2563.

The insurance company here involved was incorporated in 1927 as a mutual benefit association under the assessment plan as provided for in what was commonly known as Chapter 4, of the Civil Code. Chapter 4 was thereafter superseded by Chapter 8 of the Insurance Code (sections 10640 to 10780 inclusive, St.1935, pp. 657–668), and all such Chapter 4 mutual benefit associations were automatically placed under Chapter 8 of the Insurance Code (section 10669, Insurance Code).

From the adoption of the Insurance Code on September 15, 1935, until the latter part of 1936, Imperial Mutual was operated under Chapter 8 of Part 2, Division 2 of that code. It was, in other words, conducted upon the "mutual benefit assessment plan". Its policies did not provide for "premiums" but for "assessments" to be levied as death claims arose. At the time Chapter 8 was enacted the law provided (sections 10739 to 10744, Insurance Code) that such an association could transform itself into a Chapter 9 company without reincorporating, and thereafter be governed by the provisions of such last mentioned chapter. In the case of Imperial Mutual, such transformation was accomplished in the latter part of 1936. At that time its name was changed from Imperial Mutual Life Insurance Association to Imperial Mutual Life Insurance Company; it altered its plan of doing business; prepared new policies and thereafter operated under the provisions of Chapter 9, St.1935, p. 671 et seq., as to all business subsequently written. It should here be noted that Chapter 8 does not provide for reserves on policies, but Chapter 9 requires "modified" or reduced reserves for the first five policy years and thereafter full reserves. Insurance Code section 10870, St.1935, p. 676. So far as the company here involved is concerned, full reserves were required to be maintained on business procured and policies issued after December 31, 1941. Insurance Code, section 10870.

On June 16, 1941, A. Caminetti, Jr., in his capacity as Insurance Commissioner of the State of California and pursuant to the provisions of section 1011 of the Insurance Code, filed in the Superior Court of Los Angeles County his application for an order appointing him as Conservator of Imperial Mutual and directing him as such Conservator to take possession of respondent insurance company. Upon the issuance of such order, appellant insurance commissioner took possession of the books, records and property of respondent and proceeded to conduct, as such conservator, respondent's insurance business. Thereafter, and pursuant to the provisions of Section 1012 of the Insurance Code, respondent made application to said Superior Court for an order permitting it to resume title and possession of its property and to be permitted to conduct its own business. The last mentioned code section provides that the order granted pursuant to section 1011 of the Insurance Code shall continue in force and effect until an application, such as was made by respondent insurance company here, is filed and "it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business."

Upon conclusion of such hearing the Superior Court rendered its judgment, denominated "interlocutory", wherein it was recited that the ground for the commissioner's action in taking over the respondent's business did not exist or had been removed, and that the insurance company could properly resume possession of its property and conduct of its business; that the order issued by the court on June 16, 1941, in accordance with Insurance Code section 1011, appointing the commissioner as conservator, be terminated and cancelled and the conservatorship created by such order be dissolved; and that the said insurance company take immediate possession of its properties; that the commissioner forthwith restore such properties to respondent. Following the foregoing, the judgment provided:

"The court retains jurisdiction of the matter for the purpose of entering a final judgment, upon motion of either party or on the court's own motion, such final judgment to make final disposition of this proceeding and the property and affairs of the respondent company, and which final judgment may be in accord with the interlocutory judgment or different therefrom, depending upon such further showing as may be made to the court.

"That until such final judgment shall have been entered, this court retains complete jurisdiction in the premises and in these proceedings for all purposes, including the making, upon proper showing, of any other or further appropriate order, and the amending or vacation of this interlocutory judgment.

"The matter is now continued on the court's calendar until February 10, 1943, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, in department 12 of this court, for the presentation of such supplementary evidence, the hearing of such argument, and the making of such motions as may be meet and proper in the premises, with the right reserved to either party, however, to have set on the court's calendar at any time convenient to the court in the meantime, any matter appropriate to the premises."

So far as the factual background surrounding this litigation is concerned, the record discloses that for some time prior to 1937, Mr. Mark Pierce, President of Pierce Brothers, a corporation, which operates a large undertaking business in the city of Los Angeles, had been interested in what was then a comparatively new subject, referred to as burial insurance. Such insurance was and is legally authorized in this State. Insurance Code section 10240, St.1935, p. 642. By the terms of the code section just cited, such insurance is referred to as a "burial contract"; is denominated a life policy which contains an agreement for a valuable consideration, to dispose of the remains of any person living at the time such policy is executed. Policies of this character are payable to a funeral director who receives the proceeds thereof in partial or complete payment of the costs for the funeral of the insured. Believing that the establishment of such an insurance company would be of benefit to his mortuary; to funeral directors generally, and as well fill what he conceived to be a public need, Mr. Pierce travelled east where he consulted with the officers of two large life insurance companies in an endeavor to prevail upon them to write and issue such policies in the State of California; but for various reasons the companies interviewed declined to enter such a field of insurance. Mr. Pierce then determined upon identifying himself with some local company in Southern California which would undertake to issue such policies. While seeking an appropriate company for such purposes, Mr. Pierce came in contact with Mr. F. W. Bailey who was then President and a Director of Imperial Mutual and held proxies from most of its members. Mr. Bailey's wife was also a company director, while an employee of the company served as the third director thereof. After some negotiations between Mr. Pierce and Mr. Bailey, the latter agreed to resign as an officer and director; to procure the resignations of the other officers and directors; to procure the election to the board of directors of persons named by Mr. Pierce and to substitute the latter for himself in all of the proxies held by him. In consideration of the foregoing, Mr. Pierce paid to Mr. Bailey the sum of $27,000. Accordingly, Mr. Pierce was duly designated as the proxy holder; and Pierce Brothers, Incorporated, determined who should go on the board of directors of the insurance company. It further appears that prior to consummating the purchase of Imperial Mutual, Mr. Pierce engaged the services of an attorney who was a former insurance commissioner of the State of Missouri and a recognized authority on insurance law, to lay the entire plan before the insurance department of the State of California; submitting to that department the names of those who would constitute the management personnel of the insurance company; that Pierce Brothers would become active in such management and that the company would write burial policies of insurance. The proposed plan met with no opposition from the California State Insurance Department and the testimony indicates a favorable attitude toward the plan on the part of the Insurance Department.

It is also indicated by the record herein that at the time the present management took over Imperial Mutual, that company had slightly more than 1,000 policy holders, to which figure its policy holders had diminished from over 5,000. Under the law such an association was required to have at least 1,000 policy holders and should its membership decrease to less than that number and not be increased to 1,000 within 90 days, its certificate of authority to do business would be revoked and the insurance commissioner would liquidate it or merge it with some other company. Insurance Code sections 10710, 10711, 10712, St.1935, p. 663.

Such minimum membership requirement was, in effect, continued over into Chapter 9. Insurance Code section 10830, St.1935, p. 672. It is noteworthy, in connection with the decision arrived at by the trial court that, under the present management Imperial Mutual enjoyed a substantial growth; expanded its policy holders from a scant 1,000 in 1937 to more than 10,000 by the end of the year 1940 and increased its total assets from some $16,000 to approximately $164,000 during the same period. Without here mentioning by name the persons comprising the present management, it is established by the record that they are men of proven business ability, financial responsibility, and of excellent standing in the community.

In the present proceeding appellant insurance commissioner challenges what is characterized as a "liberal" policy of writing insurance and settling claims thereunder. In that connection it appears that about September, 1938, the then Insurance Commissioner of California prepared a list of some 28 instances in which claims against Imperial Mutual, aggregating some $4,800, had been paid under circumstances not contemplated by the policies and which were hazardous to the successful conduct of the insurance business. Following conferences or hearings held by the commissioner, Imperial Mutual agreed to install a completely new and rigid underwriting system, whereby the acceptance of all new insurance risks would be strictly and rigidly supervised and enforced. Also the same with respect to the payment of all claims; the legality of all claims would be closely considered so that no improper claims would be paid, but on the contrary all proper claims would be paid promptly. The company agreed not to ante-date any more policies except to make the policies uniformly dated on the 1st and 15th. If a policy was issued, we will say, June 10th, it would be dated June 15th, the nearest half month's date, or if a policy were issued June 5th, it would be dated June 1st. A completely new underwriting system was immediately installed whereby all applicants were either inspected or medically examined in accordance with their age or amount of the policy applied for and undesirable risks rejected. A new system was installed with reference to payment of claims. Claims were closely examined and all facts as to their validity were also considered. Every claim was submitted to the company's attorney for his opinion as to the legality of the claim and whether it should be paid or rejected. As to the subsequent conduct of respondent insurance company, appellant commissioner in his brief concedes that "since that conference, the files do not disclose any serious repetition of the situation there presented"; while in connection therewith the trial judge in his summation of the evidence said "The mistakes that were made in those early years have been frankly admitted, and there is no evidence that they were continued. The evidence indicates that the company learned by those mistakes, profited by them, and did not continue any of them."

Further, in connection with the conferences or hearings held by the commissioner in 1938, appellant complains "It was pointed out that the financial situation of the company was becoming impaired; and that Mr. Pierce thereupon donated $9,000 to the company; and his brother-in-law, Mr. Dean, the next year donated an additional $2,000." We fail to perceive in these contributions or loans to the company any evidence that the donors' connection with the insurance company constituted a hazardous or dangerous situation. It seems rather to confirm the position taken by the insurance commissioner in 1938 that the connection of Pierce Brothers, Incorporated, and its officers with Imperial Mutual was more of an asset than a hazard and more a source of strength than of danger.

[1] We shall first give consideration to appellant's claim that the evidence

showed without conflict that the company did not have assets, in excess of its other liabilities, to provide for reserves as required by section 10870 of the Insurance Code, and that, in consequence, the court erred in holding that the company was not in a financially hazardous condition; that it had complied with the law and had met the requirements thereof for the issuance to it of a certificate of authority to do business. Insurance Code sections 10915, 1011(e), 1011(i), St.1935, p. 680, St. 1937, p. 2563. Appellant insurance commissioner concedes the long established and usual rule that before an appellate tribunal is justified in reversing a judgment upon the ground of insufficiency of the evidence, it must appear from the record that accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, it still appears that as a matter of law the prevailing party is precluded from recovering a judgment, but urges that the rule does not apply if the trial judge committed any error or errors of law which manifestly influenced or controlled his conclusions of fact. In other words, that an appellate court is not bound by the findings of the trial court on evidence where an erroneous view of the law has been applied to the facts. To the claimed application of erroneous rules of law to the facts by the trial court, we shall later give consideration because from a review of the record we are convinced that any such errors could not have influenced the conclusion arrived at by the trial court when the evidence herein is considered as a whole.

[2] As we understand the definition of the word "hazardous" as used in the statute, it means that the management of the insurance company so conducts its business that there is a loss or risk of loss to the policy holders. That when such a condition prevails it becomes the duty, and is the right of the insurance commissioner to take possession of the company's assets and to conduct its business as conservator. Appellant insurance commissioner asserts that the present management came into power through an illegal agreement by which it caused to be paid the sum of $27,000 to fiduciaries to induce them to abandon their trust. What we have heretofore said concerning the progress made by the present management strongly militates against the verity of the claim that the action of Pierce Brothers in obtaining control of the insurance company proved in any way hazardous to the latter or its policy holders. It is next contended that the influence and control of Pierce Brothers over the management of Imperial Mutual was inimical to the best interests of the company and tended to produce a hazardous situation in reference thereto. The evidence in the case does not warrant such a conclusion. As heretofore pointed out, the evidence was such as to justify the view taken by the trial court that the present management has been a source of strength to the insurance company. No salaries or other remuneration have been taken by the management. A contribution of $11,000 in cash to the insurance company was made by the management and the company's general agency was financed by the Pierce Brothers group to the extent of some $41,000. Appellant concedes that the men who make up the Pierce Brothers corporation are astute and successful business men but challenges their motive and the opportunity for venality that is presented to them. The record of accomplishments by the insurance company under the present management does not warrant the stricture that they either took advantage of any opportunity to do wrong by the insurance company or that their motive was an evil one. It is the legality of their acts with which the law is concerned rather than the motive which prompts such actions. With reference to the proxies obtained by Mr. Pierce, the record reflects that when the insurance commissioner objected to their use, the management disregarded and terminated such proxies in 1940 and they were not thereafter used. At the annual meeting of the insurance company, whereat directors were elected, the policy holders were fully informed of their rights to personally appear at the meeting or to give their proxy to anyone they chose. The board of directors did name a policy holders committee of five prominent and reputable men but the policy holder was left free to designate any person of his choice as a proxy in the event he did not desire to appear at the meeting and vote in person. True, Pierce Brothers had an interest in the insurance company, reflected in their profits from funerals conducted by them and paid for from the proceeds of the burial policies issued by the company, but

we fail to perceive wherein such an interest was antagonistic to the welfare of the company so long as the affairs of the latter were honestly and efficiently conducted. The record is barren of any evidence of dishonesty at any time and fails to establish any inefficiency since the conferences held with the former commissioner in 1938.

[3] We come now to a consideration of appellant commissioner's claim that the methods adopted by the insurance company in computing its reserves did not conform with the provisions of section 10870 and other Insurance Code mandates. It would unduly prolong this opinion to enter into a discussion of the technical nature of life insurance reserves and the manner of their computation as the same appears in the record. Suffice it to say that conceding a conflict in the evidence upon the merits of reserve computation as practised by the insurance company management and the method advocated by the insurance commissioner, there is nevertheless in the record evidence of sufficient substantiality to warrant the trial court's conclusion that no hazardous or unsound financial condition was proven, and that the further transaction of business by the present management would not be hazardous to the company's policy holders, creditors, or to the public. During the years the company has been in business under the present management it has promptly met all its financial obligations. The factual situations which we have been discussing all involved matters which of necessity must be confided to the sound discretion of the trial court which hears the testimony, observes the witnesses and analyzes the financial statement of the company. When the trial court has, upon competent testimony and without abuse of discretion, determined that the management of the insurance company is such that the control of its business should be returned to it, that determination is binding upon our courts of review. Caminetti v. Guaranty Union Life Insurance Co., 52 Cal.App.2d 330, 336, 126 P.2d 159.

In view of the conclusion at which we have arrived concerning the correctness of the court's decision that respondent company "Can properly resume title and possession of its property and the conduct of its business" (section 1012 Insurance Code) it becomes unnecessary to discuss or decide appellant's contention that the court erred in striking from the order obtained by the commissioner on June 16, 1941, under section 1011 of the Insurance Code, that portion of such order which directed that title to respondent corporation's assets be vested in the commissioner. The latter concedes that the claimed error in this respect is not of itself, of such a nature as to require a reversal of the main order appealed from, and that only in case of a reversal would the question of technical title to the company's assets assume importance.

[4-8] Appellant insurance commissioner next complains of the ruling of the trial court upon the hearing under section 1012 of the Insurance Code that the burden of proof was upon the commissioner. This ruling was erroneous. In making his application under section 1011 of the Insurance Code, the commissioner does not seek a judicial appointment and a judicial ruling that the company is in fact delinquent. By his application the commissioner merely represents that he has found certain conditions to exist and has made his official administrative determination to proceed as authorized by the statute. In obtaining his original ex parte order, the commissioner is not required to show to the court that the company was in fact in a hazardous condition, but only that he, as a state officer, invested by legislative authority with the power, has so "determined" and "found". The insurance code provides that the order or determination of the Commissioner to take over the affairs and assets of the company shall continue in force and effect until, upon application by either the commissioner or of the company, it shall appear to the court, after a full hearing, that the ground for said order does not exist or has been removed and that the company can properly resume title to and possession of its property and the conduct of its business. While the order of proof in any trial is generally speaking within the discretion of the court, it has been decisively settled that in a proceeding such as this, under section 1012 of the Insurance Code, it is the duty of the company challenging the determination of the insurance commissioner to take over its affairs, to assume the burden of proof upon its application to the court for an order terminating the conservatorship. Caminetti v. Guaranty Union Life Insurance Company, 52 Cal.App.2d 330, 335, 336,

126 P.2d 159. However, we are not persuaded that the error in the ruling complained of warrants or necessitates a reversal. A judgment may be reversed for erroneous rulings on questions of law only when the rights of the party complaining have been prejudiced; and where the decision or judgment is manifestly right upon the evidence and the error has not resulted in a miscarriage of justice, an appellate tribunal is not authorized to set aside the judgment. In other words, it is incumbent upon appellant to show that error has occurred which resulted in a miscarriage of justice before he is entitled to a reversal. § 4½, Art. VI, Constitution of California; Tupman v. Haberkern, 208 Cal. 256, 262, 263, 280 P. 970; Lutz v. Merchants' National Bank, 179 Cal. 401, 404, 177 P. 158; Murphy v. Retirement Board, 49 Cal.App.2d 58, 60, 121 P.2d 101. In the instant proceeding there was a full and fair hearing; each side was permitted to and did present all of its evidence. Therefore, notwithstanding this error of law, after an examination of the entire cause, including the evidence, we are unable to say that the error complained of resulted in a miscarriage of justice. We can not, therefore, disturb the judgment. We are not unmindful of appellant commissioner's claim that it can not be assumed that the court would have found in favor of respondent upon the main question involved had it required that the evidence should preponderate in favor of respondent. But as we review the evidence and the summation thereof by the trial court, we are impressed with the belief that respondent met the burden imposed upon it, and consequently, no miscarriage of justice resulted from the erroneous ruling as to who should assume the burden of proof. When considered as a whole, the evidence clearly justifies the decision arrived at in the trial forum.

[9-18] It is next contended by appellant commissioner that the court erred in refusing to permit him to prove that certain officers of respondent company had been convicted of a felony involving fraud. In his "Response to Application for Full Hearing" the commissioner pleaded "On or about the 30th day of March, 1938, the said Mark A. Pierce and the said Joseph B. Dean, and certain other officers and employees of Pierce Bros., a corporation, were charged in an indictment filed in the United States District Court for the Southern District of California with the commission of a felony, to-wit, a violation of 18 U.S.C.A. § 88, in that they did conspire to defraud the government of the United States. Thereafter and on or about the 26th day of September, 1938, the said Mark A. Pierce and the said Joseph B. Dean each entered a plea of nolo contendere to said indictment and judgment was thereupon entered assessing a fine of $2500.00 against each of them". In support of the foregoing allegations the commissioner offered in evidence a certified copy of such an indictment in the United States District Court and of the "judgment and commitment" showing the pleas interposed and the fine assessed. At the close of the hearing the court granted a motion to strike the above quoted paragraph from the commissioner's "response" and sustained an objection to the proffered exhibit. In support of his claim that the rulings of the court were erroneous, appellant urges that the foregoing evidence conclusively established that the company did not comply with the legal requirements for the issuance to it of a certificate of authority (Insurance Code section 704.5, St. 1937, p. 2018) and therefore "he was entitled to continue in possession and control of the company's business, affairs and assets (Insurance Code section 1011(i)". The first section just cited vests in the commissioner power to suspend, revoke, or decline to grant or renew a certificate of authority if any present officer or director of the applicant company has been convicted of a felony, having as one of its necessary elements a fraudulent act or an act of dishonesty in the solicitation of, acceptance, custody or payment of money or property, while the subdivision of the section last referred to authorizes the insurance commissioner to take possession of a company when it has failed to comply with the requirements for the issuance to it of a certificate of authority, or when its certificate has been revoked. Without question Mr. Pierce was an officer and director of Imperial Mutual and it cannot be questioned but what the offense charged in the indictment was one "having as one of its necessary elements a fraudulent act". That the offense charged was a felony must also be conceded. 18 U.S.C.A. § 541; State v. Fousek, 91 Mont. 448, 8 P.2d 791, 84 A.L.R. 303. True, a different rule is prescribed by our statute which classifies crimes after judgment as

felonies or misdemeanors according to the penalty actually imposed. Penal Code, section 17. But that statute has application only to crimes under our State statutes and has nothing to do with crimes denounced by the Federal statutes. It is the law of the jurisdiction where the crime was committed that determines the character of the offense as a felony or a misdemeanor. State v. Fousek, supra. Assuming that a judgment and sentence pronounced following the entry of a plea of nolo contendere constitutes a "conviction", can such a "conviction" predicated as it is on a nolo contendere plea, be received in evidence as an admission of guilt in a collateral and subsequent civil proceeding? In reviewing the history of nolo contendere pleas, the authorities are harmonious in holding that such a plea, like a demurrer, admits for the purpose of the particular case, all the facts therein stated, but is not to be used as an admission elsewhere. Such a plea is an implied confession only of the offense charged. It is discretionary with the court to receive it or not. It is advantageous to a party because by it he is not estopped to plead not guilty to an action for the same facts, as he would not be permitted to do upon a plea of guilty. The existence in the law of the two pleas, i.e., guilty and nolo contendere, is indicative of the fact that there is some distinction or difference between them. Undoubtedly the plea of nolo contendere is often used as a substitute for a plea of guilty but it amounts only to a declaration by the defendant that he will not contend. It has been held not to be a confession of guilt. Barker v. Almy, 20 R.I. 367, 39 A. 185. It is uniformly held that such a plea cannot be used against the defendant as an admission in any civil suit for the same act. Manifestly, if a plea of nolo contendere has the same effect as a plea of guilty, viz., admitting the charge, then it differs in no respect from a plea of guilty. Buck v. Commonwealth, 107 Pa. 486, 489. Tucker v. United States, 7 Cir., 196 F. 260, 41 L.R.A.,N.S., 70, is authority for the statement that the plea of nolo contendere is in fact a confession on which a defendant may be sentenced in a particular prosecution, and as the plea is limited to that particular case, such conviction can not be used in another proceeding to discredit the witness; then in State v. Suick, 195 Wis. 175, 217 N.W. 743, 744, we find the following: "The plea of nolo contendere is an implied confession. Judgment of conviction follows such a plea as a matter of course, yet the plea itself contains no admissions which can be used against the defendant in another action." Strictly speaking, therefore, the plea of nolo contendere amounts only to an agreement on the part of the defendant that the fact charged may be considered as true for the purposes of the particular case wherein it is entered. 31 A.L.R. 278. A plea of nolo contendere, while an implied, is not a conclusive confession of guilt. By entering the plea the defendant does not confess or acknowledge the charge against him, as upon a plea of guilty. Doughty v. De Amoreel, 22 R.I. 158, 46 A. 838; State v. La Rose, 71 N.H. 435, 52 A. 943; White v. Creamer, 175 Mass. 567, 56 N.E. 832. We are therefore persuaded that the plea of nolo contendere did not constitute evidence that the officers of the insurance company herein who entered such a plea in the Federal Court had engaged in a fraudulent transaction and therefore the "conviction" based upon such a plea was inadmissible as an admission against such company officers in the instant proceeding. Appellant commissioner at the trial did not offer any evidence that the company officers in question had engaged in any fraudulent transactions but relied upon the erroneous theory that such officers' pleas of nolo contendere in the Federal Court amounted to a confession of guilt and consequent conviction that was binding upon them in subsequent proceedings including the instant case.

In a well considered and clearly reasoned opinion prepared by Honorable Emmet H. Wilson, Judge of the Superior Court of Los Angeles County, in case numbered 389,698, entitled S. B. Buchsbaum, Petitioner, v. Daugherty, Commissioner of Corporations of the State of California, Respondent, it was held that the corporation commissioner could not refuse to issue a permit because the applicant therefor had entered a nolo contendere plea in a Federal court criminal proceeding which charged a felony. The entry of a nolo contendere plea simply amounts to an arrangement or agreement between the defendant and the court that to save the government the expense of prosecuting the case and to save the defendant the cost and annoyance of defending it, he, the defendant, agrees, solely and alone and for the purpose of that case and for no other purpose, that the Federal court may assume that the defendant is guilty and assess a fine against him. The conviction thus obtained upon such a plea, by reason of the agreement underlying it, must in all good conscience, fairness and equity be held to be a conviction for the limited and agreed purposes of that proceeding, and to carry out the arrangement made with the court, and for no other purpose. The proffered evidence was therefore not admissible against the officers of the company in the case at bar and the rulings of the trial court thereon were correct and proper.

[19, 20] Finally, appellant insurance commissioner contends that the court erred in that part of what was denominated "an interlocutory judgment" wherein the court recited that it retained jurisdiction of the proceedings and continued the matter for a year and a day for the purpose of receiving further evidence or hearing additional motions. We find ourselves in accord with appellant's claim that such attempt by the court to retain jurisdiction over the matter is at entire variance with the statutory provisions, in direct conflict with the whole theory of such administrative proceedings and, therefore, void and ineffective. The challenged portion of the judgment is hereinbefore set forth and quoted in this opinion. This being a special proceeding the jurisdiction of the court is limited by the terms and conditions of the statute under which the proceeding is instituted. Smith v. Westerfield, 88 Cal. 374, 26 P. 206. There was but one question before the court and that was as to the right of appellant commissioner to operate respondent's insurance business, or whether the control and operation of such business should be withdrawn from the commissioner and restored to respondent. When by its judgment the court decided this issue in favor of respondent, it completely and effectively exhausted the court's jurisdiction. Upon the authority and for the reasons stated by us in Caminetti v. Imperial Mutual Life Insurance Co., 54 Cal.App.2d 514, 129 P.2d 432, which had to do with a motion to dismiss this appeal, the judgment herein must be modified by striking therefrom that portion by which the court sought to thereafter retain jurisdiction of the issues here involved.

For the foregoing reasons the judgment appealed from is modified by striking therefrom that portion last referred to and which is herein quoted, and as so modified the judgment is affirmed. Neither party to recover costs on appeal.

YORK, P. J., concurs.

DORAN, Justice (dissenting).

I dissent. I am not satisfied that section 4½ of Article VI is sufficiently comprehensive to redeem the judgment reached, as it was, under the possible and likely influence of a misunderstanding of the law in several vital particulars.

I am in entire accord with the arguments presented by appellant with regard to most of them and in particular with regard to the error of the trial court pertaining to the burden of proof. Equally vital, in my opinion, was the evident misunderstanding of the trial court as to the nature of the action. Obviously, in that connection, the action was confused with an action in equity where the court has and retains control of the receiver at all stages of the proceeding and where the court's judgment is paramount. What the outcome would have been in the absence of these two errors alone, to my mind, is impossible of determination.

It is my understanding of the law, when, from a review of the entire record, it is impossible to determine definitely what the result would have been in the absence of the errors under consideration, then section 4½ may not be applied to uphold the judgment. It has been so held in criminal cases. People v. Salaz, 66 Cal.App. 173, 225 P. 777; People v. Irby, 67 Cal.App. 520, 227 P. 920; People v. Sica, 76 Cal.App. 648, 245 P. 461. And there is no apparent reason for distinguishing between criminal and civil actions in such circumstances. Moreover, in civil actions involving juries it has been held repeatedly that instructions calculated to mislead the jury, and thereby affect their judgment and conclusion upon the issues, is prejudicial and reversible error. An erroneous viewpoint or a misunderstanding as to the law by the trial judge, calculated to mislead and thereby affect the judgment, likewise may result in a miscarriage of justice. Section 4½ is not a cure-all and in my opinion should not be applied to sustain a judgment in the circumstances presented by the record herein.

59 Cal.App.2d 501

IMPERIAL MUT. LIFE INS. CO. v. CAMINETTI, Insurance Commissioner.

Civ. 13787.

District Court of Appeal, Second District Division 1, California.

June 29, 1943.

1. Constitutional law ⚷73

Courts are without power to interfere in intermediate stages of administrative proceeding.

2. Action ⚷6

The statute reposing power in courts to make declaratory decrees does not confer on equity court authority to stop or interfere with administrative proceedings by such a decree where it would not do so under its power to enjoin. Code Civ. Proc. § 1060.

3. Action ⚷6

A mutual life insurance company's action against insurance commissioner for declaratory relief and judgment establishing correctness and legality of plaintiff's method of calculating modified reserves on its outstanding policies was premature, and superior court had no "jurisdiction" to award such relief, in absence of exhaustion of plaintiff's available administrative remedies, such as appeal to Attorney General from commissioner's ruling that such method was incorrect. Code Civ.Proc. § 1060; St.1935, pp. 532, 666, 667, 676, 677, 679, §§ 915, 10739–10744, 10870, 10875, 10895; St.1937, p. 2021, § 12923.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by the Imperial Mutual Life Insurance Company against A. Caminetti, Jr., Insurance Commissioner, for declaratory relief in connection with defendant's interpretation of certain statutory provisions applicable to plaintiff's manner of doing business. Judgment for plaintiff, and defendant appeals.

Reversed.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Peery Price, Sp. Counsel, of Los Angeles, for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by plaintiff for declaratory relief (section 1060, Code of Civil Procedure) in connection with the interpretation placed by defendant insurance commissioner upon certain sections of the Insurance Code of this state insofar as such sections applied to the manner of doing business by plaintiff insurance company.

By its complaint and supplement thereto, plaintiff alleged that it has outstanding approximately 11,000 life contracts or policies, all of which were issued to and held by residents of the County of Los Angeles. That with the exception of approximately 790 policies, which were issued prior to October 26, 1936, when plaintiff became a mutual life and disability insurance company on the stipulated premium plan, with provision for assessments, under and by virtue of the provisions of Chapter 9, Part 2, Division 2 of the Insurance Code, as provided by sections 10739 to 10744 inclusive of said code, St.1935, pp. 666, 667, practically all plaintiff's outstanding policies are what are commonly known as "burial" policies, or "funeral service" policies, providing in substance that upon the death of the insured the plaintiff will procure and pay for a funeral, consisting of various designated services and items for a designated amount by a designated funeral director named in the policy. It was further alleged that of such outstanding "funeral service" policies, approximately 600 are single premium policies, that is, policies paid for by one premium at the time of issuance, and that approximately 9,500 are premium paying policies—that is policies paid for by periodic premiums from time to time during the lifetime of the assured, or for a designated number of years. Plaintiff further alleged that under the provisions of sections 10870 and 10875 of the Insurance Code, St.1935, pp. 676, 677, it had calculated its reserves in accordance therewith and in the regular, usual and acceptable way of calculating reserves on life contracts by all life insurance companies. It is then alleged that starting in 1937 plaintiff company annually furnished and filed with defendant insurance commissioner reports, duly and properly executed, showing in detail the modified reserve calculation, and also filed statements reflecting its condition and affairs. It is then alleged that about November, 1940, defendant commissioner for the first time "intimated to plaintiff that there might be a contention advanced by him that he would adopt another method of calculating modified reserves and another interpretation of section 10870 than that used by plaintiff". It is then further alleged that defendant commissioner did "on or about the 22nd of May, 1941, adopt the contention and still contends that plaintiff's said method under its interpretation of section 10870 is incorrect". Plaintiff's pleading then alleged "That there has arisen and continues to exist, an actual and bona fide dispute and controversy between plaintiff and defendant, with respect to the modified reserve and assessment provisions of plaintiff's outstanding "funeral service" policies and respecting the interpretation of sections 10870 and 10875 of the Insurance Code and respecting the proper method of calculating modified reserves on such business and respecting plaintiff's reserve liability on such business as hereinabove set forth and further, in that defendant contends that plaintiff cannot modify in any way the reserves on its said single premium policies, whereas plaintiff contends that while it has not done so in the past (it has carried full reserves thereon) it may, in accordance with said reserve provisions of such policies and section 10870, for the purpose of a test of solvency, modify reserves on such business, and further in that defendant contends that by applying his method and interpretation of section 10870, there is a deficiency in plaintiff's reserves and that therefore, plaintiff is insolvent and defendant can therefore seize and take over plaintiff, its business and assets, whereas plaintiff contends that there is no deficiency in its reserves and that on the contrary, it has a substantial surplus and is not insolvent, and that if it should be held that defendant's method of calculating modified reserves and his interpretation of section 10870 are correct and that also plaintiff cannot modify the reserves under its said single premium policies, defendant cannot seize and take over plaintiff, its business and assets, but that plaintiff is entitled, and should be given an opportunity, to collect 'additional premiums or assessments' from its policy holders for the purpose of repairing such deficiency, or charging same, if not paid, as a lien against the reserve on such policies, which would eliminate any such deficiency, as specifically provided for in such policies and by the provisions of section 10875 of the Insurance Code."

Plaintiff prayed for declaratory relief and a judgment establishing and decreeing:

"(a) The rights, duties and obligations of the parties respecting the reserves under the provisions of plaintiff's outstanding policies and Section 10870 of the Insurance Code;

"(b) That plaintiff's method of calculating modified reserves on its outstanding policies is correct and lawful under Section 10870 of the Insurance Code;

"(c) That plaintiff may continue to so calculate its modified reserves in such manner;

"(d) That plaintiff in so modifying its reserves in such manner need not reduce in any way its due and deferred premiums;

"(e) That plaintiff, if it so desires, may also modify the reserves on its outstanding single premium policies, in accordance with their provisions and Section 10870 of the Insurance Code;

"(f) That defendant's method of calculating modified reserves under plaintiff's outstanding policies is incorrect and unlawful;

"(g) That plaintiff does not have a deficiency in its reserves and is not insolvent, or if plaintiff does have a deficiency in such reserves,

"(h) That plaintiff has the right and be given sufficient time and opportunity to call for and collect additional premiums or assessments from its policyholders, or charge same to such reserves, to repair such deficiency, in accordance with the policy provisions and section 10875 of the Insurance Code."

Following the filing of defendant's answer, issue was joined and the cause proceeded to trial before the court sitting without a jury. This action, together with the proceeding instituted by the commissioner against defendant company, this day decided (139 P.2d 681), and the mandate proceeding filed by the insurance company against the commissioner, also this day decided (139 P.2d 693), was tried pursuant to stipulation upon the record made in the so-called "principal" proceeding entitled

Caminetti v. Imperial Mutual Life Insurance Co., 54 Cal.App.2d 514, 129 P.2d 432.

After trial the court made findings in favor of plaintiff and entered judgment decreeing that in the conduct of its business the methods used by plaintiff complied with its policy provisions and with sections 10870, 10875, 10895 and 915 of the Insurance Code, St.1935, pp. 676, 677, 679, 532. From such judgment defendant insurance commissioner prosecutes this appeal.

[1-3] Appellant commissioner contends that the trial court was without jurisdiction to award declaratory relief to respondent for the reason that the latter did not exhaust its administrative remedies before seeking judicial intervention. In this claim, appellant must be sustained. The complaint and supplement thereto filed herein alleged "That defendant did, on or about the 22nd day of May, 1941, adopt the contentions and still contends that plaintiff's said method under its interpretation of section 10870 is incorrect * * *"; and that this ruling was in conflict with law. Assuming the truth of these allegations, respondent had the right to appeal to the Attorney General of California, as authorized by section 12923 of the Insurance Code St.1937, p. 2021. That section provides that when a controversy arises between the insurance commissioner and one affected by any order, ruling, decision or act of the commissioner, and is submitted to the Attorney General, the opinion of the latter in response to such submission shall govern and control the commissioner in respect to the matter so submitted. Courts are without power to interfere in the intermediate stages of an administrative proceeding. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 301, 109 P.2d 942, 132 A.L.R. 715. The power reposed in the courts by section 1060 of the Code of Civil Procedure to make a declaratory decree does not confer upon a court of equity authority, by such a decree, to stop or interfere with administrative proceedings, where it would not, under recognized and settled principles, have interfered with or stopped such administrative proceedings under its power to enjoin. Louis Eckert Brewing Co. v. Unemployment Reserves Commission, 47 Cal.App.2d 844, 848, 119 P.2d 227; Bradley Lumber Co. of Arkansas v. National Labor Relations Board, 5 Cir., 84 F.2d 97, 100. In Hoyt v. Board of Civil Service Commissioners of City of Los Angeles, 21 Cal.2d 399, 132 P.2d 804, it was specifically held that the statute authorizing suits for declaratory relief does not enlarge the jurisdiction of courts over parties and subject-matter. Manifestly, in the case at bar the administrative proceeding affecting respondent was not complete; the administrative remedies available to respondent were not exhausted, and the declaratory relief action with which we are here concerned was premature.

The judgment is reversed.

YORK, P. J., and DORAN, J., concur.

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59 Cal.App.2d 494

IMPERIAL MUT. LIFE INS. CO v. CAMINETTI, Insurance Commissioner.

Civ. 13646.

District Court of Appeal, Second District, Division 1, California.

June 29, 1943.

Rehearing Denied July 28, 1943.

Hearing Denied Aug. 26, 1943.

1. Mandamus 🔑10

Generally, an act, to be compelled by mandamus, must be one to performance of which petitioner is entitled when mandamus proceeding is instituted, but mandamus lies when it appears from an officer's or board's conduct or declarations that he or it does not intend to comply with obligation to renew a permit or license when time for such action arrives.

2. Mandamus 🔑176

A mutual life insurance company, filing petition on June 12, 1941, for writ of mandate, directing insurance commissioner to issue to petitioner certificates of authority to do business during fiscal years ending June 30, 1941, and June 30, 1942, was not restricted to suing for renewal of its certificate for balance of 1940-41 fiscal year and obligated to file another petition for ensuing year, in view of statutory rule that law does not require idle acts. St.1935, p. 512, §§ 700, 701; Civ.Code, § 3532.

3. Equity ⟹39(1)

Equity does not look with favor on piece-meal litigation and whenever possible will dispose of entire controversy between parties, grant complete relief, and settle all differences between parties in one action, leaving nothing for further litigation between them on same subject-matter.

4. Equity ⟹39(1)

Equity, having once acquired jurisdiction of subject-matter of action, will retain it, so that complete adjudication of all existing rights may be had and final determination of all matters in controversy accomplished.

5. Mandamus ⟹168(3)

In mandate proceeding to compel insurance commissioner to issue certificate of authority for petitioner to do business as mutual life insurance company, rejection of evidence that two of petitioner's officers and directors were convicted of felony in federal court prosecution, wherein they entered pleas of nolo contendere, because of commissioner's failure to plead such convictions, was not error, regardless of whether court abused its discretion in denying commissioner's motion for leave to file amended answer including such averment, as such evidence was inadmissible because of entry of such pleas. St. 1935, p. 512, §§ 700, 701.

6. Mandamus ⟹177

In mutual life insurance company's proceeding for writ of mandate to compel insurance commissioner to grant petitioner a renewal certificate of authority to do business in state, superior court's award of damages to petitioner against state for commissioner's interference with petitioner's business was erroneous, in view of evidence that any damage sustained was occasioned by commissioner's appointment as petitioner's conservator and decision to discontinue writing of new insurance, rather than by his refusal to issue renewal license. Code Civ.Proc. § 1095; St.1935, p. 512, §§ 700, 701; St.1937, p. 2563, § 1011.

DORAN, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding by the Imperial Mutual Life Insurance Company for a writ of mandate to compel A. Caminetti, Jr., Insurance Commissioner, to issue a certificate of authority or license for petitioner to do business as an insurance company. From a judgment for petitioner and a peremptory writ of mandate issued thereon, defendant appeals.

Modified, and affirmed as modified.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Peery Price, Sp. Counsel, of Los Angeles, for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal from a judgment and the peremptory writ of mandate issued thereon. The proceeding was instituted by Imperial Mutual Life Insurance Company, a corporation (hereinafter referred to as petitioner), against A. Caminetti, Jr., Insurance Commissioner of the State of California (hereinafter referred to as the Commissioner), to compel the latter to issue to petitioner a certificate of authority or license to do business as an insurance company in this state. Insurance Code sections 700, 701, St.1935, p. 512.

By stipulation, this cause was tried upon the record made in the case of Caminetti v. Imperial Mutual Life Insurance Co. in which case we have this date filed an opinion (139 P.2d 681) and to which case reference is made for a comprehensive and detailed statement of the factual background surrounding this litigation. Following the trial, the court entered judgment directing the commissioner to issue to petitioner a renewal certificate of authority to transact business as an insurance company for the period ending July 1, 1942.

In addition to the facts recited in the case above referred to, it may aid the clarity of this opinion to here state that petitioner has been engaged in a mutual insurance business in this state since about 1927, from which date until 1941, such business was conducted pursuant to a certificate of authority originally issued by the commissioner and renewed each year thereafter until 1940. Section 701 of the Insurance Code provides that such a certificate shall expire on the first day of July after its issuance, unless sooner revoked.

The insurance commissioner did not issue the renewal of the license for the period July 1, 1940, to July 1, 1941, but by stipulation with petitioner did extend its certificate of authority from time to time, the last extension by stipulation expiring June 15, 1941. It was during the time covered by these stipulations that a controversy arose between petitioner and the commissioner with respect to the proper interpretation of certain statutes and petitioner's outstanding policy provisions with respect to the reserves it was required to maintain on such outstanding policies. This controversy gave rise to the litigation which forms the basis of Caminetti v. Imperial Mutual Life Insurance Co., Cal.App., 139 P.2d 681, this day decided. On June 6, 1941, petitioner, on a regular form supplied to it by the commissioner, made application for renewal of its certificate of authority for the period from July 1, 1941, to July 1, 1942, accompanying the said application with the regular fee required for the renewal of its license. The commissioner refused to further extend the company's certificate of authority after June 15, 1941, or to renew the certificate of authority for the period from July 1, 1941, to July 1, 1942. On June 13, 1941, petitioner filed in the superior court its "Petition for Writ of Mandate, Temporary Injunction and Other Relief". By such petition the petitioner sought a writ of mandate directing the commissioner to issue a renewal certificate of authority in the usual form, authorizing petitioner to do business for the period commencing July 1, 1940, to July 1, 1941, and from July 1, 1941, to July 1, 1942. When the matter came on for trial, the period ending June 30, 1941, had expired and the judgment therefore provided only for the issuance of a writ of mandate directing the commissioner to issue to petitioner a certificate of authority for the period July 1, 1941, to July 1, 1942. By the judgment it was further ordered that pursuant to the provisions of section 1095 of the Code of Civil Procedure, petitioner have and recover from the State of California the sum of $7,500 as compensation for damages found by the court to have been sustained by petitioner by reason of the refusal of the commissioner to issue a renewal of petitioner's certificate of authority to do business.

[1-4] For the first ground of appeal the commissioner contends that insofar as the writ of mandate applies to the fiscal year 1941–1942, the petition therefor was prematurely filed. Such petition was filed June 12, 1941, and prayed for a writ directing the issuance of certificates of authority for the fiscal years 1940–1941 and 1941–1942. As heretofore noted, when the cause came on for trial the first named fiscal year had expired and the judgment entered herein on March 7, 1942, directed the commissioner to issue a renewal certificate of authority "For the period ending January 1, 1942". Appellant Commissioner urges that by its petition filed June 12, 1941, respondent was restricted to sue for the renewal of its certificate for the balance of the fiscal year 1940–1941 or the remainder of such period from June 15th, when the stipulation between the parties expired, and June 30, 1941. It is true, as contended by the commissioner, that section 701 of the Insurance Code provides that every such certificate shall expire on the first day of July after its issuance, and it cannot be questioned that the general rule is that the act sought to be compelled by mandamus must be one to the performance of which the party is entitled at the time the proceeding in mandate is instituted (McGinnis v. Mayor and Common Council of City of San Jose, 153 Cal. 711, 715, 96 P. 367), but that rule is subject to a kindred rule that mandate may be resorted to when it appears from the conduct or declarations of the officer or board, that they do not intend to comply with their obligation to renew a permit or license when the time for such action arrives. In the instant case we are confronted with the fact that differences and disputes had arisen between the commissioner and respondent insurance company during the fiscal year 1940–1941 in connection with which the commissioner permitted the company to do business only by stipulations. When the stipulation ending June 15th was about to expire the commissioner indicated his intention not to extend the same. Upon the expiration of such stipulation, he seized the company under section 1011 of the Insurance Code, St.1937, p. 2563. Respondent company had made regular application for renewal of its certificate of authority for the period 1941–

1942, paid the fee therefor, and such renewal was refused. In fact, by his answer and return to the alternative writ the commissioner "Admits that respondent (commissioner) refused and still refuses to issue to petitioner a certificate of authority for the period commencing July 1, 1941, and terminating July 1, 1942". To insist in an equitable proceeding such as mandate is, and under the facts and circumstances here present, that petitioner should have been compelled to file a petition for renewal of its license for the few days between June 15th and June 30th, 1941, and then, subsequent to July 1st, file another petition for the ensuing fiscal year ending June 30, 1942, would do violence to the rule enunciated in section 3532 of the Civil Code, which reads "The law neither does nor requires idle acts." Equity will also consider the fact that there is no showing of prejudice to appellant commissioner by reason of the time when the action herein was filed. The court was concededly clothed with jurisdiction under the petition to deal with the remaining days of the 1940–1941 fiscal year, and at the time the cause came on for trial the last mentioned fiscal year had passed and the following fiscal year of 1941–1942 was more than half over. Equity does not look with favor upon litigation by piecemeal, and whenever possible will dispose of the entire controversy between the parties, will grant complete relief and whenever possible will settle and determine all differences between the parties in the one action, leaving nothing for further litigation between the same parties and upon the same subject-matter. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52, 113 P.2d 495. Let us assume that on June 12, 1941, when the petition for a writ of mandate was filed, petitioner had no cause of action against the commissioner to compel a renewal of its license for the following fiscal year commencing July 1, 1941. This situation continued to exist until the last named date, but admittedly, at any time after July 1, 1941, petitioner might properly have brought an action in mandate affecting the fiscal year ending June 30, 1942. Therefore, under the familiar rule that equity once having acquired jurisdiction of the subject-matter of an action will retain it, to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished, the court was justified in retaining jurisdiction until all the issues in the action should be determined and all the differences between the parties arising thereunder were settled. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 183, 66 P.2d 1215. By such procedure the court was enabled to do complete justice by deciding the whole case. "Equity regards that as done which ought to have been done." 10 Cal.Jur. 505; Civil Code § 3529.

[5] Appellant commissioner next complains of the action by the court in rejecting evidence showing that two of the officers and directors of the insurance company had been convicted of a felony in a Federal court prosecution wherein they entered pleas of nolo contendere. In the instant mandate proceeding the court grounded its ruling on the fact that the matter of such conviction was not set up in the pleadings filed by the commissioner. An oral motion for leave to file an amended answer including such an averment was denied by the court. It becomes unnecessary to pass upon appellant commissioner's claim that in denying such motion the court abused its discretion. In view of what was said by us in Imperial Mutual Life Insurance Co. v. Caminetti, 139 P.2d 691, this day decided, concerning the inadmissibility of such evidence because of the pleas of nolo contendere entered in the criminal proceeding in question, it follows that had the court permitted appellant to file the requested amendment to his answer, the conviction relied upon could not aid appellant, and would not have constituted grounds upon which he could legally predicate a denial of petitioner's application for a renewal of its certificate of authority to do business.

[6] Finally, appellant challenges the legality of that portion of the judgment by which the court, acting pursuant to section 1095 of the Code of Civil Procedure, awarded petitioner damages in the sum of $7,500 against the State of California. The court made extensive findings as to the damage allegedly sustained by petitioner due to the interference with its business by appellant commissioner. But as we read the record it seems clear to us that the damage, if any, sustained by petitioner was occasioned by the appointment, under section 1011 of the Insurance Code, of the commissioner as conservator, and by the latter's decision to discontinue the writing of new business. Imperial Mutual

Life Insurance Co. v. Caminetti, supra. It is apparent to us from the record that assuming the commissioner had issued the certificate of authority and then had proceeded as he did to procure his appointent as conservator, then determined as he did, not to write further new business, the damages for which redress is sought herein would nevertheless have accrued. When he took over as conservator the commissioner was not required to issue to himself a certificate of authority had he concluded to continue the writing of new insurance business. In the light of the record before us it would therefore be highly speculative to say that the damage to petitioner was occasioned by the refusal to issue the renewal license rather than on account of the action of the commissioner in taking over the affairs of the company under the provisions of the insurance code. No causal connection was shown or proven between the damage claimed and the action of the commissioner which gave rise to the mandate proceeding with which we are here concerned.

For the foregoing reasons the judgment appealed from is modified by striking therefrom that portion thereof reading as follows: "It is further ordered, adjudged and decreed that petitioner herein, Imperial Mutual Life Insurance Company, have and recover of and from the State of California, damages in the sum of Seven Thousand Five Hundred Dollars ($7,500)." As so modified, the judgment is affirmed. Neither party to recover costs on appeal.

YORK, P. J., concurs

DORAN, Justice (dissenting in part).

I concur in that part of the decision which modifies the judgment but dissent as to that portion which approves of the issuance of the writ.

22 Cal.2d 562

SHRIMPTON et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18644.

Supreme Court of California.
July 27, 1943.

1. Certiorari ⊂=5(1), 6

Certiorari will not lie to review an appealable order or judgment either before or after the expiration of the time limited by law for appeal therefrom. Code Civ. Proc. § 1068.

2. Certiorari ⊂=5(1)

Certiorari cannot be used as a substitute for appeal.

3. Certiorari ⊂=5(1)

An order which is not provided for in California procedure is not an "appealable order" within statute providing that writ of review may be granted when an inferior tribunal has exceeded its jurisdiction and there is no appeal, and in such a case an application for writ of review is the proper remedy. Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

4. Certiorari ⊂=5(1)

Order setting aside order and judgment of dismissal was an "order made after judgment", and being appealable, was not reviewable by certiorari. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Made after Judgment".

In Bank.

Proceeding by B. F. Shrimpton and others for a writ of certiorari to review an order of the Superior Court of Los Angeles County, vacating a judgment dismissing an action against petitioners.

Petition denied.

For prior opinion, see 131 P.2d 849.

J. H. O'Connor, County Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for petitioners.

Courtney A. Teel, of Los Angeles, for respondent.

CURTIS, Justice.

In an action entitled Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455, pending in the Superior Court of the County of Los Angeles, plaintiff on April 17, 1942, recovered judgment against the defendants. Petitioner was one of the defendants in said action. Defendants, within the permissible time, served a notice of intention to move for a new trial. Subsequently said motion was made and the trial court at the hearing thereof on June 22, 1942, made an order vacating the findings and judgment and dismissed the action on the ground that it had no jurisdiction of the action. On July 7, 1942, there was entered a formal judgment of dismissal. Thereafter and on August 12, 1942, and after notice to defendants, plaintiff moved the court to set aside said order and judgment of dismissal on the ground that said order was void and in excess of the jurisdiction of said court. This motion was made under section 473 of the Code of Civil Procedure authorizing the court, on motion after notice to the other party to set aside any void judgment or order. On August 19, 1942, the trial court granted said motion and set aside and vacated both the order vacating the findings and judgment and the formal judgment of July 7, 1942, based upon said order. The effect of this order of August 19, 1942, if valid, would be to restore the original judgment rendered in that action in favor of the plaintiffs.

Thereupon the petitioner, as one of the defendants in said action, instituted this proceeding in certiorari to review the last mentioned order of the trial court of date, August 19, 1942. It is the contention of petitioner that the judgment of date, July 7, 1942, dismissing said action, was a valid and final judgment and that the trial court was without jurisdiction to vacate the final judgment.

Preliminary to the discussion of the merits of this controversy, it is necessary to consider and pass upon the point raised by respondents, that certiorari will not lie to review the order of August 19, 1942, for the reason that it is an order made after final judgment and therefore is appealable.

Section 1068, Code of Civil Procedure, provides that "A writ of review may be granted by any court, except a municipal, police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."

[1] We deem it unnecessary to do any more than cite a few of the decisions of this court holding "certiorari will not lie to review an appealable order or judgment either before or after the expiration of the time limited by law for appealing therefrom." Ivory v. Superior Court, 12 Cal. 2d 455, 459, 85 P.2d 894; Harth v. Ten Eyck, 12 Cal.2d 709, 87 P.2d 693; Id., 16 Cal.2d 829, 108 P.2d 675; Coan v. Superior Court, 14 Cal.2d 591, 95 P.2d 931, 932; Howaldt v. Superior Court, 18 Cal.2d 114, 114 P.2d 333; Bank of America v. Superior Court, 20 Cal.2d 697, 703, 128 P.2d 357; Lewith v. Rehmke, 215 Cal. 241, 9 P. 2d 297; Casner v. Superior Court, 23 Cal. App.2d 730, 74 P.2d 298. In the last named case at page 732 of 23 Cal.App.2d, at page 300 of 74 P.2d, we find the following statement of the law: "The order of the court vacating the judgment of dismissal was a special order made after final judgment, as were also the respective orders for judgment in defendants' favor, and, as such, were appealable under the provisions of section 963 of the Code of Civil Procedure. [Citing authorities.] Where the law allows an appeal from an order or judgment, even when the tribunal making such order or rendering such judgment exceeded its authority in so doing, a writ of review may not be granted. [Citing authorities.]"

As against these decisions, we are cited to the following cases decided by this court, which, it is claimed, support a contrary rule: Stanton v. Superior Court, 202 Cal. 478, 488, 261 P. 1001; Lankton v. Superior Court, 5 Cal.2d 694, 696, 55 P.2d 1170; Treat v. Superior Court, 7 Cal.2d 636, 638, 62 P.2d 147; Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449. In our opinion these cases can all be distinguished from the decisions holding that certiorari will not lie to review an appealable order.

In Stanton v. Superior Court, supra, the trial court in two actions pending before it made an order in each case purporting to vacate the judgment previously entered therein, and directed a different judgment, and signed and entered the same in lieu of the former judgment. On appeal the court recited the steps taken in the two actions before the trial court resulting in the orders vacating the original judgments and the entry of the different judgments in the place of the former judgments. The court also discussed the power of the trial court, and the procedure to be followed under sections 473, 663, and 663a of the Code of Civil Procedure, governing the vacation of judgments and the entry of different judgments in the same actions, and concluded as follows: (202 Cal. at page 489, 261 P. at page 1005) "We are therefore satisfied that said sections of the Code were never intended to apply to orders or judgments attempted after the fashion herein disclosed. We are also satisfied that neither of these orders or subsequent judgments can be said to be special orders made after final judgment within the meaning of section 963 of the Code of Civil Procedure, because such section contemplates orders given by a court having jurisdiction to act." The court, therefore, in the Stanton case held that as the orders in question were not special orders made after final judgment, they were not appealable and were therefore subject to review under proceedings in certiorari. Reference to this case may be found in Ivory v. Superior Court, supra, and Bank of America v. Superior Court, supra.

In Lankton v. Superior Court, supra, after the judgment in favor of the plaintiff had become final and the time for appeal and motion for new trial had elapsed, the trial court in a memorandum opinion indicated its purpose to reduce the amount of the judgment in favor of plaintiff in a material amount. Plaintiff applied either for a writ of prohibition or a writ of review. It was held that he was entitled to a writ of prohibition but not a writ of review, as no order modifying the judgment had been actually made by the trial court.

In Treat v. Superior Court, supra, the trial court set aside its findings and judgment in favor of plaintiff. It was held that the court was authorized to make such an order either under the provisions of section 662 of the Code of Civil Procedure, that is, upon a motion for a new trial, or by reason of its inherent power to correct mistakes in its proceedings, and to annul within a reasonable time orders and judgments prematurely, inadvertently, or improvidently made. However, it appeared from the record of the proceeding before the court, that the order of the trial court under attack was not made under the authority of either of these methods of procedure. While a notice of intention to move for a new trial was filed at the same time as the motion to vacate the findings and judgment, it is stated in the opinion: (7 Cal.2d at page 641, 62 P.2d at page 149)

"There is nothing before us to indicate that any action upon the motion for a new trial was ever taken by the trial court," and also (7 Cal.2d at page 640, 62 P.2d at page 149) "Respondent advances no claim or contention that the original findings and judgment were prematurely or improvidently made." The court in that case upon the authority of the Stanton case, held that the order was not one rendered in pursuance of any of the prescribed rules of procedure as defined by the sections of the Code of Civil Procedure and was therefore subject to attack in a proceeding for a writ of review.

[2, 3] In Whitley v. Superior Court, supra, it was sought to review two nunc pro tunc orders of the trial court granting a motion for a new trial. As amended in 1939, section 657 of the Code of Civil Procedure provided that when a new trial was granted on the ground of the insufficiency of the evidence, the order of the trial court shall so specify in writing and shall be filed with the clerk within ten days after the motion is granted, otherwise on appeal it will be conclusively presumed that the order was not based upon that ground. In the case in which these orders were made, the trial court granted the motion of defendant for a new trial, but failed to file any written order other than a minute order. After the ten day period, the plaintiff appealed. Almost two months later in one instance and almost three months in the other, the trial court apparently being of the opinion that the written minute order was insufficient as entered, signed and filed the two nunc pro tunc orders; the first of which stated that the ground upon which the order granting a new trial was made was the insufficiency of the evidence, and in the second of said orders, it was recited that the failure to file the written (signed) formal order within the ten day limit was due to the inadvertence of the court and not of counsel as had been stated in the prior signed order. After holding that the court was without jurisdiction to make either of said orders, and in reply to the contention that certiorari would not lie, the court on page 82 of 18 Cal.2d, on page 453 of 113 P.2d stated: "Finally, as an objection to a determination of the validity of these nunc pro tunc orders, respondent urges the point that a writ of review is not a proper proceeding in this case, as petitioner has her remedy by appeal. Respondent here calls attention to the general rule that certiorari may not be used as a substitute for appeal. 4 Cal.Jur. 1052. But it is likewise well recognized that an order which is not provided for in our procedure is not an appealable order within the meaning of section 1068, Code of Civil Procedure, and an application for a writ of review is the proper remedy. [Citing among others the Stanton and Treat cases.]" No claim was made in that case that either of the two nunc pro tunc orders was made under section 473 of the Code of Civil Procedure, and therefore that point was not passed upon by the court in its decision.

[4] In each of the four cases just discussed, there appeared some special reason why the general rule that certiorari will not lie to review an appealable order was not applicable. These cases can readily be distinguished from the instant proceeding. It will be noted that the underlying principle upon which the Stanton case was decided, and which was followed generally in the other cases, was that the order of the trial court under attack was not in pursuance of any of the prescribed methods of procedure as defined by the Code of Civil Procedure. As noted herein the order of August 19, 1942, setting aside the order and judgment of dismissal was rendered in pursuance of section 473 of the Code of Civil Procedure. It was, therefore, an order made after judgment and was appealable.

We are therefore of the opinion in view of the overwhelming weight of authority in this state, that the petition herein to review the order of the trial court of date, August 19, 1942, purporting to vacate its order dated July 7, 1942, should be denied. This conclusion renders it unnecessary to enter into any discussion of the question of the validity of said order of August 19, 1942, or of any other question raised by the petition.

The petition is denied for the reason hereinbefore stated.

SHENK, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the judgment. It is settled that certiorari does not lie to review an appealable order. Cal.Code Civ.Proc., § 1068; see cases cited in 4 Cal.Jur. 1036 et seq. Section 963 of the Code of Civil

Procedure lists among appealable orders, "any special order made after final judgment." Since the order of August 19, 1942, was a special order made after final judgment it was appealable and certiorari is therefore not available. The majority opinion takes the view, however, that the order in question was appealable not simply because it was a special order after final judgment but also because it was made pursuant to an established method of procedure, in this case, section 473 of the Code of Civil Procedure. It is my opinion that any special order after final judgment that affects the judgment (see 2 Cal.Jur. 153) is appealable whether or not it is made pursuant to a prescribed rule of procedure. The exception of orders that are not authorized by the Code of Civil Procedure was first read into section 963 in 1927 in the case of Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, in disregard of numerous cases of long standing. Livermore v. Campbell, 52 Cal. 75; In re Estate of Bullock, 75 Cal. 419, 17 P. 540; White v. Superior Court, 110 Cal. 54, 42 P. 471; Anglo-California Bank v. Superior Court, 153 Cal. 753, 96 P. 803; Hildebrand v. Superior Court, 173 Cal. 86, 159 P. 147; Magee v. Superior Court, 10 Cal.App. 154, 101 P. 532; for additional cases see 2 Cal.Jur. 184 and 4 Cal.Jur. 1036 et seq.

The holding in the Stanton case that section 963 "contemplates orders given by a court having jurisdiction to act" (202 Cal. 478, 489, 261 P. 1001, 1005) would apply as well to final judgments, for both final judgments and orders after such judgments are made appealable in the same terms. No condition that the court must have jurisdiction to act is set forth with respect to either, and there is no more justification for adding such a condition in the one case than in the other. The Stanton case and those based upon it have departed from established principles without adequate consideration of the authorities. These cases should be overruled and the law restored to its traditional pattern as described in White v. Superior Court, 110 Cal. 54, at page 57, 42 P. 471, at page 472: "The order in question is a special order, made after final judgment, and, as such, is made the subject of appeal by express terms of the statute (Code Civ. Proc., § 939, subd. 3; Id., § 963, subd. 2; Slavonic [etc.], Ass'n, v. Superior Court, 65 Cal. 500, 4 P. 500; Livermore v. Campbell, 52 Cal. 75; Calderwood v. Peyser, 42 Cal. 110); and, being so appealable, it cannot be reviewed by certiorari.

"Nor does it make any difference in this respect if the order be, as contended, in excess of the jurisdiction of the court making it, and consequently void. Void judgments and orders are not the less appealable by reason of that fact (Livermore v. Campbell, supra); and, when that remedy is afforded, it excludes the right to certiorari, notwithstanding the order be void in the extreme sense. People v. Shepard, 28 Cal. 115; Stoddard v. Superior Court [108 Cal. 303] 41 P. 278. 'It may be readily admitted,' says Mr. Justice McFarland, in delivering the opinion of the court in the case last cited, 'that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only when "there is no appeal."'

"So far, then, as the remedy by certiorari is concerned, it would be wholly unprofitable to consider the question as to the jurisdiction of the respondent to make the order complained of."

GIBSON, C. J., and EDMONDS, J., concurred.

22 Cal.2d 410

PACIFIC LUMBER CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16801.

Supreme Court of California.

July 8, 1943.

Rehearing Denied Aug. 5, 1943.

1. Workmen's compensation 🔑252

A contract for sale of designated trees by lumber company to tie maker for cutting into logs and splitting thereof into ties, posts, etc., at price based on board measure content of suitable timber, as determined by representative of company, which retained rights to inspect work, demand that buyer utilize all suitable portions of each tree, assign contract, and prevent buyer from assigning it or his rights thereunder, gave company complete control over buyer, so as to justify Industrial Accident Commission's finding that buyer was company's "employee" within Workmen's Compensation Act.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Workmen's compensation ⟹1386

In workman's compensation proceeding, where it is contended that parties' written contract was not employment contract, oral evidence is admissible to show inception of agreement, parties' situation when contract was executed, and their practical construction of contract by their subsequent acts.

3. Workmen's compensation ⟹1446

In workman's compensation proceeding by one injured while cutting down tree under contract with lumber company, evidence *held* sufficient to warrant inference by Industrial Accident Commission that underlying purpose of contract was to have company's timber made into redwood split products by claimant for company's use, or sale to its customers, rather than to sell them to claimant for resale to third parties, and that parties contemplated that such products should become company's, not claimant's property, so that contract was one of employment of claimant by company.

4. Workmen's compensation ⟹1939

In proceeding to review Industrial Accident Commission's award of compensation to one injured while cutting tree under contract with lumber company, which contended that contract was not one of employment, but conditional sales agreement, Supreme Court is bound by Commission's finding on conflicting evidence as to claimant's receipts under contract and previous similar contracts between parties.

5. Workmen's compensation ⟹252

The fact that lumber company, before its employment of tie maker, claiming compensation for injuries sustained while cutting tree under contract with company, had operated under similar written contracts, was immaterial on question whether particular contract was one of employment or conditional sales agreement.

6. Workmen's compensation ⟹252

Whether lumber company changed its plan of operation from relation of employer and employee between it and tie maker to relation set forth in written contract between them for reasons other than to avoid benefits and privileges accorded employee by law was immaterial on question whether contract was one of employment, so as to entitle tie maker to compensation for injuries sustained, if status of employer and employee continued under new plan.

7. Contracts ⟹155

Where written contract between lumber company and tie maker, operating thereunder when injured while cutting down tree on company's land, was prepared entirely by company, it must be construed in tie maker's favor and against company in determining whether he was company's employee at time of injury.

8. Workmen's compensation ⟹52

The provisions of Labor Code must be liberally construed by court with purpose of extending their benefits for protection of persons injured in course of their employment. St.1937, p. 265, § 3202.

9. Workmen's compensation ⟹1939

Whether one claiming compensation from lumber company for injuries sustained was company's employee when injured was fact question for Industrial Accident Commission to determine.

10. Workmen's compensation ⟹1939

Courts are without power to disturb Industrial Accident Commission's findings, unless there is lack of substantial evidence supporting them, and are not concerned with conflicts in evidence, and where there is such evidence supporting Commission's findings and orders, reviewing court may not substitute its views for those of Commission and annul Commission's award.

11. Workmen's compensation ⟹1939

Where Industrial Accident Commission's findings are supported by inferences which may fairly be drawn from evidence, reviewing court will not disturb Commission's award, though evidence is susceptible of opposing inferences.

SCHAUER and EDMONDS, JJ., dissenting.

In Bank.

Proceeding by the Pacific Lumber Company to review an order of the Industrial Accident Commission awarding compensation to John Turkovich for personal injuries sustained in the course of his employment by petitioner.

Award affirmed.

For prior opinion, see Cal.App., 126 P. 2d 1.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, both of San Francisco, for respondents.

CURTIS, Justice.

On June 21, 1941, while cutting timber on land belonging to petitioner, the Pacific Lumber Company, John Turkovich was struck by a falling tree and suffered a fracture of his leg. He filed a claim for compensation against the company before the Industrial Accident Commission. His claim was contested by the company on the ground that Turkovich was not in its employ at the time he received his injury. The commission found to the contrary, its finding being that "John Turkovich, while employed as a tie maker on June 21, 1941, at Redcrest, California, by Pacific Lumber Company, sustained injury arising out of and in the course of aforesaid employment when a tree fell upon him fracturing his right leg." Based upon this finding an award was made in favor of Turkovich. The sole question before us in this proceeding is whether there was any substantial evidence before the commission supporting this finding.

[1] At the time Turkovich sustained said injury he was working under a written contract between himself and the Pacific Lumber Company (referred to hereafter as the company). This written contract purported to be a conditional sales agreement, and it recited that the company agreed to sell and Turkovich agreed to buy certain designated trees for the purpose of cutting them up into logs and splitting the logs into ties, posts, shakes, stakes, etc., referred to in the written contract as "redwood split products." The price to be paid by Turkovich, the "Buyer," was determined "on the basis of board measure content of such timber suitable for manufacture by Buyer of such redwood split products." Such board measure and suitability were to be determined by a representative of the company and his decision was made conclusive upon both parties. This written contract was dated March 18, 1941, and provided that the "Seller hereby grants to Buyer a limited license of ingress into and egress from and occupancy of the portions of the real estate hereinabove described [being the land upon which the designated trees were standing] solely for the purpose of cutting said timber, so marked and designated, manufacturing or reducing the same into such redwood split products, storing such products and removing the same for sale and delivery elsewhere, * * * provided that this agreement is upon the condition that Buyer shall begin to cut or cause to be cut said timber so marked and designated on or before March 18, 1941, and shall have completed all of the cutting, reducing, manufacture, storage and removal of the resulting redwood split products herein referred to from the premises hereinabove described not later than June 30, 1941. * * *" Payment of purchase price of said timber was to be made on the 1st and 16th days of each month, or at such other times as may be mutually agreed upon.

Paragraphs 5 and 8 of the contract read as follows:

"5. Seller may at all reasonable times send inspectors on the premises in order to determine whether or not Buyer's operations are being conducted in a wasteful manner or are unnecessarily wasteful and destructive of the timber or the real property on which it is located. Buyer agrees to abstain from any practice which in the judgment of the Seller * * * is wasteful or destructive. For the purpose of preventing unnecessary waste Seller shall have the right to demand that all portions of each tree suitable for manufacture into split stock products be so utilized by Buyer.

"8. This agreement, or any right thereunder, may be assigned by the Seller but shall not be assignable by the Buyer without the consent of the Seller."

The company reserved the title and ownership of the timber and products manufactured therefrom until the purchase price was fully paid, with the proviso that Turkovich might have vested in him the title to such portions of said timber in lots of not less than 1,000 feet, board measure, upon payment of the purchase price. In case the Buyer failed to pay for the timber covered by the written contract, the company was given the right, among others, to sell the products manufactured therefrom to itself, at private sale without notice, and to hold Turkovich for the balance due, if any, of the purchase price after applying proceeds of said sale to payment of the purchase price.

If we construe the written contract without reference to any extrinsic considerations, we think it shows that the company retained control over Turkovich in many essential respects. The trees which were covered by the contract were designated and marked by the company, and Turkovich was required to convert them into "redwood split products." Turkovich had no part in their selection, nor did he have any right to the trees which he purported to buy except to use them for this one purpose. The company retained the right to determine "the board measure content" of such timber suitable for manufacture into split products, and its determination as to suitability and board measure was conclusive on both parties. The company retained the right to send inspectors on the premises to determine whether Turkovich's manner of operation was wasteful or destructive of the timber or of the real property on which the timber was standing. The company retained the right to demand that all portions of each tree suitable for manufacture into split stock products be utilized by Turkovich. The company also retained the right to assign the written contract and to prevent Turkovich from assigning it or any of his rights thereunder. Turkovich is the one who had the right to cut the trees but he could not assign that right, thereby showing that although the transaction purported to be a sale, it called for purely personal services on the part of Turkovich.

The company retained the title to the timber and all products manufactured therefrom until the purchase price thereof was paid. It also retained the right to restrict the sale of the manufactured products by Turkovich to lots of not less than 1,000 feet, board measure. The company retained possession and control over the manufactured products as security for the payment of any amount due from Turkovich, and the right in a summary manner to sell the same to itself without notice at private sale. After applying the proceeds of the sale—less expenses, including attorney's fees—to the amount due from Turkovich, the company retained the right to hold Turkovich personally for any balance due in case the proceeds of the sale were not sufficient to satisfy said indebtedness. While the company blandly states that Turkovich had full control over his work, we submit that a reading of the contract shows to the contrary. We might ask what independence Turkovich actually had under the contract. As we will later show, only a few trees were covered by any one contract and, when this contract was finished, a like contract would be given for additional trees. Any manifestation of independent action on Turkovich's part (such as for instance, selling ties to persons other than the company) would simply end his employment. The company would simply stop "selling" trees to him and he would be through. The practical effect of the contract was to give the company complete control over Turkovich.

[2] However, in a proceeding before the Industrial Accident Commission for an award for personal injuries, where it was contended that the written contract between the parties was not a contract of employment, oral evidence is admissible to show the inception of the agreement, the situation of the parties at the time of the execution of the contract, and the practical construction of the contract by the parties thereto in their subsequent acts. Carlson v. Industrial Acc. Comm., 213 Cal. 287, 2 P.2d 151; Luckie v. Diamond Coal Co., 41 Cal.App. 468, 183 P. 178. Pursuant to the above proposition of law, the Industrial Accident Commission at the hearing of the present matter received in evidence not only the written contract, but evidence of the parties as to their business relations, their situation at the time the written contract was executed, and the subsequent acts of the parties thereto in operating under said contract.

[3] The evidence shows that the company was the owner of certain timberland and was engaged, along with the general business of manufacturing and selling lumber, in the business of manufacturing redwood split products from timber belonging to it. This was a regular branch of its business, and it employed a number of tie makers for this purpose. It required all such split products for its own business, and in addition thereto it frequently had to buy such products from other parties in order to meet the demands of its trade. All such split products so produced by its employees were of course the property of the company and were subsequently sold by it to the trade.

There was but slight conflict in the evidence which showed that Turkovich was a tie maker by occupation and, as such, he was engaged in felling trees, cutting them into logs, and splitting the logs into ties and fence posts, referred to in the contract as "redwood split products." He had been so engaged with the company some four years prior to receiving his injury. At the beginning of his employment he was assigned a certain definite strip of land on which there were trees suitable to be manufactured into redwood split products. It was orally agreed between him and the company that he would convert these trees into ties and posts, and that he was to receive for his services a certain price per tie or post depending upon the size and measurement of the tie or post produced. He was admittedly an employee of the company under this oral agreement and was entitled to hospital service, social security benefits and workman's compensation. This form of employment continued until some time in 1940, when Mr. Skiffington, who had charge of the split products department of the company, came to Turkovich and told him that the company was going to adopt a new system under which the tie makers were to produce split products from the timber belonging to the company. Under this new system the tie makers were to operate under a written contract and were to be without hospital service, social security benefits and workmen's compensation. To quote the testimony of Mr. Skiffington, when asked what Turkovich said when he was asked to sign the contract, "Well, he didn't like it too well, but he signed the contract and went on to work." This statement in a way agrees with that of Turkovich, who, when asked what he said on that occasion, stated "Well, what can I say? I was against it, you know, but I got to do something. I got a family to support it, but I can't get no other work because I am old age." Turkovich signed three of such contracts, each providing for the conversion of a certain number of designated trees into ties and posts. The first was dated October 24, 1940, and second December 14, 1940, and the third March 18, 1941. It was while working under this third contract that he was injured on June 21, 1941.

Petitioner, the Pacific Lumber Company, concedes that prior to the adoption of the plan providing for a written contract, Turkovich was in its employ and entitled to workmen's compensation and other benefits now enjoyed by employees. Turkovich testified that after the adoption of the new plan and the signing by him of the first of the three written contracts, as stated above, and during the entire time he was working under said contracts, he carried on his work as he had while he was admittedly an employee. He cut the trees covered by his contracts and converted them into ties and posts, and left the ties and posts on the ground as he did while working as an employee, and the company sent its trucks and hauled them away as it did previously. He received practically the same pay for his services after as he did before he signed any written contract. Before he worked under the new plan, he was paid as an employee every two weeks, and the written contract called for a settlement on the 1st and 16th of each month. He worked the same hours both before and after the new plan was put into operation. He never paid any money on the so-called purchase price of the timber. The company took all ties and posts which he made from the company's trees, and he sold none of them to anyone. There is no evidence that the company ever agreed to pay him any stated amount for these ties and posts, or that he ever agreed to accept any price for the ties and posts which he had made. The company, so far as the records show, just assumed either that the ties and posts were its property or that under the terms of the contract between it and Turkovich it had bought the ties and posts from him. Mr. Skiffington testified that he paid Turkovich $15.50 per thousand board feet for ties of a certain length, but there is nothing in the record to show that he ever told Turkovich that he was to receive that amount, or that Turkovich ever knew what price he was receiving for "his" ties and posts. There are in evidence two checks from the company to Turkovich with certain notations thereon indicating that they were given for "Split Stock Purchases," but neither the amount of the stock "purchased" nor the price at which it was purchased is shown on either of these checks or on any other exhibit or testimony before the commission. He accepted the checks and, as they were practically the same in amount as those received by him before he started work under the written contracts, he asked no questions regarding them.

If we view this contract in the light of the situation of the parties at its inception, we have this situation. The company was in the business of converting its timber into ties and posts, and other redwood split products, and selling the finished products to the trade. Mr. Skiffington, in charge of the split products department of the company, so testified. He also testified that the company obtained its principal supply of such products from timber growing upon its own lands, but that the company frequently found it necessary, in order to meet the demands of the trade, to purchase such products from outside sources. It does not seem reasonable that the company, in entering into these contracts with its tie makers, ever intended that these products from its own timberlands would be sold by the tie makers to outside parties. Especially would this seem to be so when the supply from its own timber was insufficient to meet its own needs.

Reading the written contract in the light of this evidence, it would seem that the commission could reasonably have drawn the inference that the underlying purpose of said contract on the part of the company was to have its timber made into redwood split products for its own use, and for the purpose of meeting the demand of its trade, rather than to sell them to the tie makers, to be resold by the latter to third parties. Furthermore, we think that this was the construction placed on the contract by the acts of the parties subsequent to its execution. Turkovich testified that he worked the same after this new plan was adopted as before. He worked the same hours and received the same pay; that he cut and split the trees into ties and posts as he did when he was admittedly an employee, and that the company came with its trucks and hauled them away as it did before. The written contract under which he was working at the time of his injury required that Turkovich should begin to cut the timber so marked and designated on or before March 18, 1941, and should complete all of the cutting, reducing and manufacture, storage and removal of the resulting redwood split products therein referred to from the premises described in the contract not later than June 30, 1941.

The construction placed upon this provision of the contract is shown by the evidence just narrated. Turkovich removed none of the manufactured products from the company's premises. In fact it is doubtful whether he ever had a chance to do so, as by his testimony, which is undisputed, after he cut and split the trees into ties and posts, the company came with its trucks and hauled them away as it did when he was working as an admitted employee of the company. The company treated the ties and posts produced under the written contract as its own property in the same manner as it did those previously produced by Turkovich as its employee, and so did Turkovich. He never assumed ownership over them. He paid nothing on the contract. He made no attempt to sell them nor to dispose of them in any manner, nor did he object at any time to their being hauled away by the company as it had previously done.

These acts of the parties under the contract after its execution justified an inference on the part of the commission that the parties thereto did not regard the ties and posts after their manufacture as the property of Turkovich, for the reason that the company assumed control of them and treated them the same as when they were produced by Turkovich as an admitted employee of the company, and this was done with the consent and concurrence of Turkovich.

Therefore, whether we consider the situation of the parties at the time of their entry into the written contract or the construction placed on the contract by the subsequent acts of the parties, we find ample justification for holding that the parties contemplated that these products of the company's timber in the shape of so-called "redwood split products" were to become the property of the company when produced under the terms of the contract. The contract therefore, as construed by the situation of the parties at the time of its execution and by the subsequent acts of the parties, was nothing more nor less than a method employed by the company to have its timber converted into split products for its own use to be used in its own business, and that it never intended that Turkovich should own the products or have any right to sell them. In legal effect it was a contract of employment of Turkovich by the company.

[4] Before closing this opinion, we wish to call attention to some further points discussed in the briefs filed in the case.

The first of these concerns the compensation received by Turkovich while working under the written contracts. We have made the statement that Turkovich received practically the same compensation after he operated under the written contract as he did while working for the company as an admitted employee. Turkovich so testified. At the close of the hearing before the commission the referee asked for a statement from the company showing the amount received by Turkovich before and after the written contract was entered into. The company, in answer to the request, mailed to the commission a letter of date October 1, 1941. This letter purported to give the receipts of Turkovich for one year prior to the execution of the first of said contracts, which showed that he received only a little over $100 per month. The letter also purported to give his receipts for ten months during which he was working under the written contracts and it showed that his monthly receipts were over $190 per month. In this letter the receipts of Turkovich were given for the month of April, 1941, at $367.11 and for the month of May, 1941, at the sum of $403.88. The company also introduced in evidence during the hearing, its Exhibit 6, which contained two checks given to Turkovich by it for the two months of April and May, 1941. The check for the month of April contained a notation as follows:

"Split Stock Purchases $367.11
Less Your Trade Ledger Account 186.36
$180.75"

The check was for $180.75 only. A similar situation is shown on the check given for the month of May and is as follows:

"Split Stock Purchases $403.88
Less Your Trade Ledger Account 201.28
$202.60"

This check was only for said amount of $202.60. As we interpret the notations on these checks, the item "Split Stock Purchases," from the company's standpoint, represents the amount the company paid Turkovich for the split products produced by him for the respective months, and the item "Less Your Trade Ledger Account" represents the amount Turkovich owed the company under the conditional sales contract for the timber used by him in producing said products. If we are correct in this interpretation of the checks, then Turkovich for these two months received only about one-half the amount which the letter of October 1 purports to show he did receive. As to the remaining months during which Turkovich operated under written contracts, there is nothing in the record to show directly that they are incorrect, nor is there anything to show that they are correct, as the company only offered in evidence the two checks for the months of April and May. As the statement in the letter of October 1 is shown to be decidedly incorrect for these two months, we do not feel justified in giving it full credit in respect to amounts paid Turkovich for the remaining months. This letter of October 1 simply produces a conflict in the evidence as to Turkovich's receipts under the written contracts. The commission evidently accepted Turkovich's testimony upon that issue and we are bound by its finding.

[5-8] Some stress is laid by the company upon the fact that prior to the time Turkovich entered its employ as a tie maker, it had operated under written contracts similar to those employed by it and under which Turkovich was working at the time of his injury. We are unable to perceive how that fact can have any particular bearing upon its relations with Turkovich. It makes the further point that it changed its plan of operations from the relation of employer and employee to that set forth in the written contract for reasons other than to avoid the benefits and privileges that the law now accords to an employee. It undoubtedly had these latter in mind, as its representative informed Turkovich that under the newly adopted plan, the company would not be liable for either hospital privileges, social security or workmen's compensation. The reason for the change of plan is in no way controlling, for if, under the new plan the status of employer and employee still continued, the reason for adopting the written contract plan is not material. The written contract under which Turkovich was operating at the time of his injury was prepared entirely by the company, and, therefore, according to the well established rule of construction, is to be construed in favor of Turkovich and against the company. Laidlaw v. Marye, 133 Cal. 170, 65 P. 391. Furthermore, the provisions of the Labor Code are to be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. § 3202, Labor Code, St.1937, p. 265. See, also, Liptak v. Industrial Acc. Comm., 200 Cal. 39, 251 P. 635; Harris v. Industrial Acc. Comm., 204 Cal. 432, 268 P. 902; La Franchi v. Industrial Acc. Comm., 213 Cal. 675, 3 P.2d 305.

[9-11] The commission under the facts before it found that Turkovich was an employee of the company at the time of his injury, and that the injury sustained by him arose out of and in the course of his employment. Whether Turkovich was an employee or not was a question of fact for the determination of the commission. Schaller v. Industrial Acc. Comm., 11 Cal.2d 46, 51, 77 P.2d 836. In reviewing the findings of the commission, the courts are without power to disturb them unless there is a lack of substantial evidence. The courts are not concerned with conflicts. Associated Indem. Corp. v. Industrial Acc. Comm., 18 Cal.2d 40, 42, 112 P.2d 615. Where there is substantial evidence to support the findings and order of the commission, the reviewing court may not substitute its views for those of the commission and annul the award. Morris v. Industrial Acc. Comm., 40 Cal.App.2d 94, 104 P.2d 408. If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award. Schaller v. Industrial Acc. Comm., supra.

In view of these authorities as applied to the evidence before the commission, we are of the opinion that the commission was justified in finding that Turkovich was an employee of the company at the time of his injury. Accordingly, the award in his favor should be affirmed and it is so ordered.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, Justice (dissenting).

I dissent. I recognize the social desirability of reaching the conclusion declared in the majority opinion insofar as some of the ends to be thereby attained are concerned, but am, regretfully, unable to join the majority of the members of this court in their view of the factual record in such a quantity of its aspects as to make it impossible for me to reach their conclusion. It therefore becomes necessary for me to set out my own impression of a fair and accurate portrayal of the factual record as well as my conclusion of law.

The primary question involved in this proceeding is the sufficiency of the evidence to support the critical finding (or conclusion) of the commission that the applicant, Turkovich, at the time of his injury, was an "employee"; i. e., was "in the service" of petitioner. (See definitions of "employer" and "employee" as stated in section 3300(c) and 3351, respectively, of the Labor Code, St.1937, pp. 266, 267.) This primary question is to be considered in the light of another finding of the commission; viz., that "At the time of [the injury] * * * applicant was working for Pacific Lumber Company* *under the terms of a 'Conditional Sales Agreement'.*" Also very definitely involved, in any realistic view of the case, is a question as to whether parties may make and be protected in the integrity of lawful contracts or whether the Industrial Accident Commission and this court shall examine a contract which the parties are found to have made, and being dissatisfied with its terms, although lawful and free from fraud and concealment, rewrite the contract to effect a substantial change in the relationship of the parties and enforce it as rewritten.

It appears without dispute that Turkovich received the injuries while working as a split products maker on June 21, 1941, at Redcrest, California, on timberland owned by petitioner; that the work consisted of felling trees, cutting them into logs and splitting the logs into ties, fence posts, etc., known as "split products"; and that approximately four and one-half years prior to the date the injuries were received Turkovich had been orally employed by petitioner, through the agency of its employee, one P. B. Skiffington, as a tie maker, had thereafter, during the period of employment, received his pay every two weeks on an agreed piecework basis, and incident to such employment had received social security and hospital benefits. This arrangement continued until the fall of 1940, at which time the same Mr. Skiffington, who was in charge of the split products department of petitioner company, informed Turkovich that the company was inaugurating a "new system," that Turkovich would thenceforth be "on his own," and that hospital and social security benefits would cease. Skiffington then presented and Turkovich thereupon signed a contract which purported to effect a conditional sale to Turkovich by the company of certain specified trees on the company's timberland, which Turkovich was to convert into split products. Thereafter the parties entered into at least three additional contracts, all identical with the first contract except for dates and trees sold. It was on trees covered by a contract dated March 18, 1941, that Turkovich was working at the time of his injury on June 21, 1941.

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* All emphasis within quotations is added.

Although a written contract, unambiguous in terms, does not conclusively establish the relationship between the contracting parties in a proceeding before the Industrial Accident Commission wherein it is sought to show that the true relationship of such parties, contrary to that purportedly established by the contract, is that of employer and employee, it is nevertheless prima facie proof of the relationship it purports to establish and must prevail unless the circumstances under which it was made and the subsequent conduct of each party, known to and acquiesced in by the other, show that a different relationship existed at the time the injuries were received. (See Luckie v. Diamond Coal Co., (1919) 41 Cal.App. 468, 479, 183 P. 178; Carlson v. Industrial Acc. Comm., (1931) 213 Cal. 287, 290, 2 P.2d 151). Here the contract involved is unambiguous in its terms, and the commission found that *the applicant was working under those terms.* Under its terms Turkovich clearly was neither an employee nor an independent contractor; he was an independent operator. Such finding of the commission appears, then, on its face, to be determinative of this litigation. The commission, however, received in evidence not only the contract under which the parties were operating at the time of Turkovich's injury but also proof of the execution of previous contracts between them, proof of a prior employee-employer relationship, and proof of the circumstances under which the several contracts were executed and performed, and upon all of this evidence also found or concluded that Turkovich was an employee of petitioner at the time of the injury. Hence, it becomes proper to examine all of the evidence to ascertain whether the commission's conclusion as to the employee-employer relationship can be sustained, notwithstanding its express finding as to the contractual relationship.

The contract here involved provided, in material part, as follows:

"1. Seller hereby agrees to sell the redwood trees or strips or groups of redwood trees * * * designated * * * to Buyer at and for the price of Seven and 50/100 dollars ($7.50) per thousand board feet on the basis of board measure content of such timber suitable for manufacture by Buyer [Turkovich] of * * * redwood split products (the decision of Seller's [petitioner's] representative as to such suitability and measure to be conclusive on both parties hereto), and Seller hereby grants to Buyer a limited license of ingress into and egress from and occupancy of the portions of the real estate hereinabove described solely for the purpose of cutting said timber, so marked and designated, manufacturing or reducing the same into such redwood split products, storing such products * *and removing the same for sale and delivery elsewhere* * * *; provided that this agreement is upon the condition that Buyer shall begin to cut or cause to be cut said timber so marked and designated on or before * * * [specified date] and shall have completed all of the cutting, reducing, manufacture, storage and removal of the resulting redwood split products herein referred to from the premises hereinabove described not later than [specified date] * * *.

"2. All of the * * * operations herein provided for are to be at the sole cost and expense of Buyer and Seller is to be under no obligation to furnish any tools, appliances, facilities or materials necessary for any of said operations.

"3. Payment by Buyer to Seller of the purchase price of said * * * timber at the rate hereinabove specified shall be made as follows:

"On the 1st and 16th day of each month, or at such other times as mutually agreed upon between Buyer and Seller.

"4. Buyer agrees to take all necessary precautions for the prevention of fires, and to comply with all public laws and regulations relating to said real property and the work to be performed by him hereunder.

"5. Seller may at all reasonable times send inspectors on the premises in order to determine whether or not Buyer's operations are being conducted in a wasteful manner or are unnecessarily wasteful and destructive of the timber or the real property on which it is located. Buyer agrees to abstain from any practice which in the judgment of the Seller or its inspectors is wasteful or destructive. For the purpose of preventing unnecessary waste Seller shall have the right to demand that all portions of each tree suitable for manufacture into split stock products be so utilized by Buyer.

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* Emphasis added.

"6. Buyer further agrees to indemnify and hold Seller harmless of and from all liability, cost, or expense of every kind or nature which Seller may suffer or incur on account of or in connection with any damage to property, or injuries to or death of persons which relate to or result from the carrying out of this agreement by Buyer.

"7. Buyer agrees to remove from the real property, leaving the same in as good condition as it was at the time he went upon it for the purpose of performing this agreement, reasonable wear and tear and the changes incident to the carrying out of this agreement excepted.

"8. This agreement, or any right thereunder, may be assigned by the Seller but shall not be assignable by the Buyer without the consent of the Seller.

"9. Title to and ownership of said * * * timber, * * * and of all of the products into which the same is converted by Buyer, shall remain * * * in Seller until the purchaser has fully paid the purchase price * * *; provided that Buyer shall have the right to have vested in him or his assigns the title to such portions of said timber in lots of not less than One Thousand (1000) feet, board measure, upon payment at the rate hereinabove specified of the purchase price thereof; and provided, further, that the entire purchase price for all of said * * * timber shall be paid by Buyer to Seller not later than said * * * [specified date], on or before which * * * Buyer must have completed all of his operations hereunder."

It further appears that although Turkovich was told by Skiffington that the trees designated in the contracts were his (Turkovich's) trees and he could sell the products thereof to whomever he wished, petitioner company actually purchased all of such products, paying Turkovich therefor by check at such times as he made delivery; that no deductions for unemployment insurance, social security, or hospital benefits were made from such checks; that Turkovich paid no money to petitioner for the trees "sold" to him under the contracts, but, instead, received from petitioner the difference between the price specified in the contracts and the price at which petitioner purchased the split products from him; that both before and under the contracts Turkovich furnished his own tools, and petitioner company came to get the split products at its own convenience, but, while the operations were under the contract system, as often as Turkovich announced that he was ready to make delivery of finished products.

Turkovich testified that he was fifty-nine years old; that he was against signing the contracts, but that he signed because of the difficulty of getting other work at his age; that Skiffington told him the company "got kind of new system, * * * kind of contract" and that there would be no more hospital or social security benefits. He further testified that he knew he had been protected by the Workmen's Compensation Law before the contracts and that nothing was said about workmen's compensation when Skiffington told him about the new system; that he did the same work under the contracts as he had done for the company before; that before the contracts he was not told what trees to cut, but under them he could cut only the designated trees, in the selection of which he participated with Skiffington and which were thereupon marked with his identification symbol; that he "never refused" a tree but cut it down and left it "if I can't make nothing out of it"; that before the contracts Skiffington told him what kind of stock or split product to make, but under the contracts he was not told "anything"; that both before and during the contracts Skiffington told him "where to work," his total hours of work were approximately the same, and he went to work when he felt like it and when the weather permitted; that before the contracts Skiffington had told him he should not work more than 40 hours a week, but after he signed the first contract he received no further instructions as to his hours of work; that nobody told him how to do his work because "I am old tie maker, nobody can tell me about that"; that he made about the same amount of money under the contracts as before he signed them.

A report of petitioner company, furnished at the request of the commission, showed that Turkovich's average earnings were $102.41 per month during his last year as petitioner's acknowledged employee, but that it had paid him, *after deducting the price of trees he purchased*, a net average of $193.65 per month under the contracts. This was his average monthly earning or profit derived from petitioner for the entire calendar period subsequent to termination of the original employee relationship despite two intervals between contracts when he apparently had no business connection with petitioner. The accuracy of this report was not challenged at the oral argument and should be accepted by us as true for what it purports to establish. The "Trade Ledger Account," referred to in the majority opinion, does not purport to show the conditional sale contracts accounts.

Derby Bendorf, an industrial engineer employed by petitioner company, testified that prior to March, 1937, the company considered its split stock workers to be independent contractors, made no hospital benefit deductions from their pay checks and gave them no "continuous service bonuses" such as were received by regular employees of the company; that in March, 1937, such workers were required to take the regular company physical examination and those who passed were taken on as employees and continued in that status for approximately three years, receiving hospital benefits and service bonuses; that because of the difficulty of checking on the working hours of the men in the woods in order to comply with the Federal Wages and Hours Act [officially designated as the Fair Labor Standards Act (U.S.C.A. tit. 29, ch. 8 § 201 et seq.) which became effective in 1938] the company decided in about April, 1940, to change over to "the selling of the timber to purchasers, who make the stock for themselves"; that thereafter the company "did away with the physical examination, and we did away with any hiring cards, and we discontinued the hospital deductions, and also the continuous service plan was abandoned; in other words, we abandoned all of the employee relationship"; that the company no longer kept records of the men's working hours; that the men were not instructed that they "were not to resell their products to anyone except Pacific Lumber Company"; that it was common for split products workers to sell their products to third parties; that he could (and he did) name one split products operator, working on petitioner's land, who sold his manufactured product to a buyer other than Pacific Lumber Company; that petitioner company purchased split products from workers not working on petitioner's own land (this fact was established by stipulation); that payment to the company by the purchasers of the timber was made "as it is cut out, on a depletion basis or on a finished product basis"; and that the only supervision exercised by the company over the workers on its land was to see that timber was not unnecessarily destroyed or wasted. None of the foregoing epitomized testimony was denied.

Patrick Skiffington, in charge of the split products department of petitioner company, testified that certain of the conditional sale contracts for timber were made by the company with individuals and others with partnerships; that the buyers were free to and occasionally did hire men to help them in the work, paying such men themselves; that after the contracts were entered into no effort was made to keep a record of the men's time; that Turkovich was given no instructions as to what kind of split products he should make, although from time to time he was informed that the company was in the market for some specified product and Turkovich would then manufacture it, and that Turkovich was free to make whatever his trees were suitable for; that before the contracts were signed the company occasionally "fired" certain of the split products workers, but that it had never attempted to terminate any of the work under any contract until the contract expired; that the men, including Turkovich, chose the trees they wished to work under the contracts; that before the contract system was inaugurated Skiffington assigned the men, including Turkovich, a strip of trees and they worked the whole strip rather than, as under the contracts, individual trees.

Charles R. Barnum, a real estate broker from the community in which Turkovich worked, testified that he was familiar with the practices of the local lumber companies in selling their timber to split products makers; that ordinarily a contract was entered into requiring only a small, if any, down payment to the company with the balance of the payments being made upon sale of the finished products; that it was customary for the company to see that the manufacturing was efficiently done so that "all possible can be got out"; that the price received by the company for its trees was in many cases "determined by footage received, if the claim is on a yield basis;" that usually the companies retained title to the finished product until they had received payment for the trees; that when the split products worker sold his products he would commonly direct that payment therefor be made to the seller of the trees, who would then deduct the price of the trees and remit the balance to the worker; that it was not usual in such cases for the company to secure workmen's compensation insurance on the buyer of the timber, or to specify or keep track of the buyer's hours of work; that he had been acquainted with this practice for the past 11 years and it had "been going on for a long time ahead of my time."

The commission found that: "1. John Turkovich, while employed as a tie maker on June 21, 1941, * * * by Pacific Lumber Company, sustained injury arising out of and in the course of aforesaid employment * * *.

"2. At the time of aforesaid injury, applicant was working for Pacific Lumber Company **under the terms of a 'Conditional Sales Agreement.'* The terms of said 'Conditional Sales Agreement' are not sufficient to constitute applicant an independent operator or independent contractor at the time of said injury."

In Burlingham v. Gray, (Cal.Sup.1943), 137 P.2d 9, the rules for determining whether one rendering service to an employer is an employee or an independent contractor are assembled and authorities in support thereof are set forth. Such rules may be summarized as follows: An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished, whereas the relationship of employer and employee exists whenever the employer retains the right to control or direct how the work shall be done as well as the result to be accomplished. One means of ascertaining whether or not the right to control exists is the determination of whether, if instructions were given, they would have to be obeyed. A strong factor tending to show the relationship of an employee is the employer's right to terminate the work at his pleasure. Neither the manner of payment nor the choosing by the employee of his own hours of work is conclusive of the relationship.

In determining that Turkovich was injured while "employed * * * by Pacific Lumber Company" I recognize that the commission was entitled to consider evidence showing "the inception of the agreement, the understanding of its purport by * * * the * * * parties concerned with it, and the practical construction thereof by such parties in their subsequent acts." (Carlson v. Industrial Acc. Comm., supra, (1931), 213 Cal. 287, 289, 290, 2 P.2d 151, 152; see S. A. Gerrard Co. v. Industrial Acc. Comm., (1941) 17 Cal.2d 411, 414, 110 P.2d 377.) For that reason it has been necessary to review the evidence in all its material entirety, as above set forth. It is also true that it is only where such evidence, coupled with reasonable inferences therefrom, offers no support to the findings of the commission that the award may be annulled. (Carlson v. Industrial Acc. Comm., supra; La Franchi v. Industrial Acc. Comm., (1931) 213 Cal. 675, 676, 3 P.2d 305; Murray v. Industrial Acc. Comm., (1932) 216 Cal. 340, 345, 14 P.2d 301; S. A. Gerrard Co. v. Industrial Acc. Comm., supra.) "Whether a workman is an employee within the Workmen's Compensation Act or an independent contractor [the same principle would apply to an independent *operator*] is a question of fact upon which the judgment of the Industrial Accident Commission is conclusive, where the facts are in dispute, and becomes a question of law only when but one inference can reasonably be drawn from the facts." (Roman Catholic Archbishop v. Industrial Acc. Comm., (1924) 194 Cal. 660, 667, 668, 230 P. 1, 4). But neither the Industrial Accident Commission nor this court may arbitrarily disregard undisputed evidence and only fair and reasonable inferences should be drawn.

I find no substantial conflict in the evidence in the record establishing the relationship between Turkovich and petitioner company. The established facts appear to me to require the conclusion that Turkovich was not "in the service" of the company as either an employee or an independent contractor, but was, instead, an independent operator. His hours of work were of his own choosing; he could employ such assistants as he wished; his products were purchased by petitioner company because he chose to sell to it as well as because it wished to buy them; he was paid for such products whenever he chose to make delivery of them; he was free to make such products as he wished and to dispose of them to whomever he pleased, subject only to the company's "right [under the contract] to demand that all portions of each tree suitable for manufacture into split stock products be so utilized," and provided that the company received the contract price for the trees sold. The only control or *right* to control retained by the company over Turkovich was the contract provision just quoted, and that control, even if Turkovich could be said to have been performing service for the company, would obviously relate only to the results of the work, and not to the means of its accomplishment. It would tend, therefore, to make him an independent contractor but not an employee. The reservation by the company (as security) of title to the trees sold, as well as the right to inspect the premises to protect itself from wasteful destruction of the timber, constituted no such control over Turkovich or his work as to render him its employee, but, as pointed out by petitioner, simply limited Turkovich's use of petitioner's own property.

Perhaps the most plausible argument that has been advanced in favor of respondent's finding is the suggestion that admittedly, immediately prior to the inauguration of the conditional-sale-contract system, Turkovich was an employee "in the service" of petitioner; that the service rendered consisted in his felling trees belonging to petitioner and in converting them into split products so that petitioner could market such products; that under the contract system the same result was accomplished and, hence, that he continued to render the same service. But the flaw in any pertinent syllogism which can be constructed out of such propositions is the fact that one can render service to another without necessarily being "in his service" as an employee. Under our constitutional system of government the freedom of contract, subject to reasonable regulation, is guaranteed. There was more than one lawful method by which petitioner could market its trees. It could sell the land with the trees standing, it could retain the land and employ men to fell its trees and convert them into lumber products for *its own account,* or it could sell the trees, standing or fallen, to another person to convert into lumber products for *his* account. In the open market it could bid for such products. The fact that in the competition for purchase of such products it might have had the advantage of some establishment or organization in proximity to the place of manufacture, fails to change the quiddities of the transaction. Upon the contract which the respondent commission specifically found that Turkovich and petitioner were operating under *Turkovich was free to sell his products to whomever he wished.* Hence, in manufacturing them he was acting *in his own service* and not in the service of petitioner. The fact that petitioner's interest also was served by the transaction is but incidental; it is not to be expected that in a free country an owner will sell his property (or a workman his services) unless his interest is thereby served.

There is nothing in the record which justifies the conclusion that the contract system was but a subterfuge to conceal an actual employee relationship. It is undisputed that that system was an old, established business procedure which had been in common usage in the district for many years. Upon the facts as reflected in this record, and the law as now constituted, we cannot consistently hold that petitioner and Turkovich were not free to make the contracts they made.

I hasten to emphasize that the freedom of contract is not absolute but is subject to laws protecting the weak against the strong (see Chicago, B. & Q. R. Co. v. McGuire, (1911) 219 U.S. 549, 567, 31 S.Ct. 259, 55 L.Ed. 328, 338; Max Factor & Co. v. Kunsman, (1936) 5 Cal.2d 446, 458–462, 55 P.2d 177; People v. McEntyre, (1938) 32 Cal.App.2d Supp. 752, 754, 755, 84 P.2d 560; State, etc., Bureau v. Pomona, etc., Ass'n, (1940), 37 Cal.App.2d Supp. 765, 770, 98 P.2d 829). Social progress may well demand that men engaged in independent operations of the type depicted here be protected by some adequate form of insurance, but the absence of or need for laws covering such situations does not give us authority to engraft onto the Labor Code a provision creating and placing on one person liability for the misfortune of another who is not his employee, even though the former was being benefited incidentally by the independent operations of the latter.

Upon the record here, even if we could properly hold that Turkovich was "in the service" of petitioner at the time of the injury, it should avail him nothing as, under heretofore recognized principles, he would be, at best, an independent contractor rendering "service for a specified recompense for a specified result, under the control of his principal* *as to the result of his work only* and not as to the means by which such result is accomplished." Labor Code, sec. 3353, St.1937, p. 267; see, also, for rules governing the determination of what constitutes an independent contractor, Burlingham v. Gray, supra, (1943) 137 P.2d 9. As an independent contractor he would not be entitled to workmen's compensation under the Labor Code.

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* Emphasis added.

Respondent argues that the contract in this case is comparable to purported written "leases" involved in Carlson v. Industrial Acc. Comm., supra, (1931) 213 Cal. 287, 2 P.2d 151, and S. A. Gerrard Co. v. Industrial Acc. Comm., supra, (1941), 17 Cal.2d 411, 110 P.2d 377, in each of which this court affirmed the commission's award in favor of the claimed employee. In the Carlson case both the "lease" and the interpretation thereof by the parties demonstrated such an extensive right of control reserved in the "lessor" of ranch property over the work of the "lessee" as to establish an employment relationship. In the Gerrard case the "lease" itself was found to have given the "lessee" of farm lands (page 414 of 17 Cal.2d page 378 of 110 P.2d) "no right to do anything with the * * * crop, from planting to sale," without consent of the "lessor," and to have constituted the "lessee" an employee. Neither of those cases constitutes authority for affirmance of the award here.

Lastly, and as previously noted, the commission specifically found that "At the time of aforesaid injury applicant was working * * * *under the terms of a 'Conditional Sales Agreement'*." The terms of that agreement, as hereinabove set forth, are unambiguous and clearly create a relationship other than that of employee-employer. The conclusion of the commission with respect to that agreement, *in the light of all the evidence above narrated*, is *not* that it was a subterfuge or that it was procured by fraud or deceit. Neither does it find that such agreement failed to state the true contract of the parties. It merely concludes *as a matter of law* that "The *terms* of said '* * * Agreement' are not sufficient to constitute applicant an independent operator or independent contractor," and *in the light of such conclusion of law* on its part finds that applicant was an employee of petitioner. If we were to assume a jury trial, an instruction of the court that "The terms of said '* * * Agreement' are not sufficient to constitute applicant an independent operator or independent contractor," a special verdict that the parties were operating under the agreement, and a general verdict based implicitly on a finding that the employee-employer relationship existed, I think there should be no hesitancy in reversing the judgment. That is the case we have here.

The award should be annulled.

EDMONDS, J., concurred.

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22 Cal.2d 516

GUARANTEE INS. CO. LIMITED MUTUAL v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18614.

Supreme Court of California.
July 14, 1943.

1. Workmen's compensation 🔑210

If mother had right to exercise control over son's employees by terms of oral agreement with son to have his employees haul certain pipe for mother, mother would be "special employer" of son's employees, regardless of whether she actually exercised the control, as respects whether mother's insurance carrier was liable for compensation for death of one of son's employees resulting from accident while hauling pipe.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employer".

2. Workmen's compensation 🔑237

Mere payment of wages is not sufficient to establish "employer and employee relationship", as regards workmen's compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee Relationship".

3. Workmen's compensation 🔑1432

Evidence supported finding that mother had right to exercise control over son's employees by terms of oral agreement with son to have his employees haul certain pipe for mother, so as to render mother "special employer" of son's employees as regards compensation for death of one of employees as result of accident while hauling pipe.

4. Workmen's compensation ⚷1939

Where there was sufficient evidence to support finding that mother was special employer of son's employees while they were hauling pipe for her under oral agreement with son, even if evidence was also subject to inference that son acted as independent contractor or as sole employer, Supreme Court could not say as matter of law that inference drawn by Industrial Accident Commission was incorrect.

5. Workmen's compensation ⚷1062

Where mother seeking workmen's compensation insurance for her son's business paid premium, and soliciting agent stated that son "was covered", and thereafter an accident happened to one of son's employees before insurance company had received application for policy, and insurance company promptly rejected application, insurance company was not liable for compensation to injured employee as son's insurance carrier.

In Bank.

Petition by Guarantee Insurance Company Limited Mutual to review an order of the Industrial Accident Commission awarding compensation for death to the dependents of Lowell Havener, which was opposed by Bessie Novak and another.

Award affirmed in part and annulled in part.

Prior opinion, 130 P.2d 436.

J. L. Kearney and Herbert S. McCartney, Jr., both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

SHENK, Justice.

The petitioner, the Guarantee Insurance Company, seeks the annulment of an award of the Industrial Accident Commission holding it as the insurance carrier of Al Novak as general employer, and Mrs. Bessie Novak as special employer, of Lowell Havener, deceased.

Mrs. Bessie Novak and her son, Al Novak, were engaged in the junk business. Mrs. Novak's establishment, the Gate City Junk Company, was located at San Bernardino, while her son operated a similar but much smaller business, the Gate City Wrecking Company, in Ontario. Mrs. Novak heard of an auction in Sacramento and requested her son to attend it and buy pipe for her. This he did, paying part of the purchase price in cash furnished by his mother, and the remainder by a trade acceptance on which Mrs. Novak was obligor. Mr. Novak then telephoned his mother in San Bernardino to send her men after the material. She stated that she had no truck available at the time and requested him to send his own trucks. He objected to the use of his trucks on a haul of that length, as he did not then have workmen's compensation insurance. She replied that she had compensation insurance, saying, "I can take care of that from this end." In the same conversation Mrs. Novak asked Al why he did not have compensation insurance. He informed her that he was short of money, whereupon she assured him that she would lend him the necessary funds and that she would immediately call her insurance agent and request a policy covering his business. This she did on October 14, 1941, paying $195 on account of the premium to Mr. Carroll Strachota, the same agent who had procured the policy issued by the petitioner on Mrs. Novak's business.

Following the conversation with his mother, Mr. Novak called his manager, a Mr. Renek, in Ontario, asking him to send two men with a truck to transport the material purchased for his mother. The men were to take the material to Ontario where Mr. Renek would give further directions. Mr. Novak instructed Mr. Renek to keep time commencing when the men left until they returned so that it could be charged to his mother's business.

On October 16, 1941, while Mike Williams and Lowell Havener were hauling the pipe from Sacramento to Ontario, an accident occurred which resulted in the death of Lowell Havener.

Mr. Strachota, the insurance agent, wrote to the petitioner on October 17, 1941, requesting an insurance policy on Mr. Novak's business, to be dated back to October 14, the day on which he had received the premium. The company refused to write the policy and it has never been issued.

The petitioner attacks the finding of the Commission that Mrs. Novak was a special employer, contending that Mr. Novak was the sole employer of the deceased; and urges that there is no evidence to support the finding that petitioner is the insurance carrier of Mr. Novak since no policy had been issued prior to the accident.

The petitioner contends that the test in determining special employment is not met by the facts of this case. Mr. Campbell in his work on compensation (Workmen's Compensation, vol. 1, § 454) states: "The real test of what constitutes special employment lies in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in its performance. It must appear, either by the terms of the contract or during the course of its performance, that the employee of the general employer came under the direction and control of the other party to the contract and suffered injury as the result of such direction and control. The right to or the actual exertion of control must exist. The alleged employer must be in control of the work so that he can at any time stop or continue it and determine the way in which it shall be done, not merely in reference to the result to be reached but as to the method of reaching the result."

[1] The petitioner insists that the evidence definitely establishes that the employees did not come under the direction or control of Mrs. Novak; that it does not appear that she was in control of the work nor that she could at any time stop or continue it or determine the manner in which it should be done; that her only interest was in the final result; that Mr. Novak retained the right of control and directly and through his manager exerted the physical control which identified him as the employer. It is true, as petitioner states, that all of the actual contacts with the employees were made by Mr. Novak, and that he attended to the details of getting the pipe loaded, and delivered instructions to the men. These facts, of course, are not inconsistent with the holding that he acted as general employer, but the petitioner urges that they are inconsistent with the holding of Mrs. Novak as special employer since they preclude the exercise of control or supervision on her part. It is noted that Mr. Campbell states that the right to control or the actual exertion of control must exist to constitute the relation of special employment. If Mrs. Novak had the right to exercise control by the terms of her agreement it would be immaterial whether she actually exercised the control. Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820; Claremont C. Club v. Industrial Acc. Comm., 174 Cal. 395, 163 P. 209, L.R.A. 1918F, 177. Evidence of direction and control are often important factors in determining the factual question of what the understanding between the parties really was.

[2, 3] There was no written agreement between Mr. Novak and his mother. The terms of the agreement must be derived from their testimony before the commission. Their testimony, if believed, makes it clear that Mr. Novak had no interest in the transaction other than accommodating his mother. At some inconvenience to himself he made the trip to Sacramento, acted as her agent at the auction, and then consented that his truck and men be used for the procurement of the material purchased on her behalf. He satisfied himself that his mother was to pay the men. He instructed his manager that this transaction was to be charged against his mother's business. The petitioner contends that Mr. Novak in fact paid wages to Mike Williams and to Lowell Havener's widow after the accident, but there is no contradiction of Mr. Novak's testimony that the money he gave them was in the nature of advancements to tide them over until all claims had been settled. Mrs. Novak testified that she was to put their names on her payroll, but because of the accident she did not do so, suspending all activities pending the hearing before the commission. Petitioner lays some stress on the question of whose payroll was actually to carry the names of the employees, but that factor would not alone be determinative of the issue of special employment, as it has been held that mere payment of wages is not sufficient to establish the relation of employer and employee. Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 262 P. 757. Petitioner points out that Mrs. Novak could not have interrupted or controlled the activities of the men after they had se out on their trip, and that they probably would not have recognized her authority had she been able to reach them. But neither could her son do so. See Drillon v. Industrial Acc. Comm., 1941, 17 Cal.2d 346, 110 P.2d 64. From the terms of the understanding the commission could justifiably conclude that the mother had the right to issue instructions concerning the details of the transaction.

[4] Whether the right to control this venture and to direct the manner in which it was to be carried out rested in Mrs. Novak or her son was a question of fact. The accounts of the transaction as related by Mr. Novak and his mother were es-

sentially the same. We cannot say that there was no substantial evidence on this issue, nor was the commission bound to infer collusion from the fact that the witnesses were mother and son. On the contrary, there was abundant evidence from which the commission could infer that the elements of a special and general employer relationship were present, some of which were (1) a loaned employee situation, (2) a joint participation by the alleged general and special employers, (3) some power, not necessarily complete, of direction and control in each. Campbell, Workmen's Compensation, vol. 1, § 457. If the evidence before the commission was also subject to the inference that Mr. Novak acted as an independent contractor or as the sole employer, we are not permitted to say as a matter of law that the inference drawn by the commission is incorrect. George L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 598, 200 P. 17; Western Pac. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754. We therefore find no error in the commission's conclusion that Mrs. Novak was the special employer and Mr. Novak the general employer of Lowell Havener.

[5] We come now to the question of whether Mr. Novak was insured by the petitioner at the time of the accident. Mrs. Novak testified that on October 14 she called Mr. Strachota and arranged for workmen's compensation insurance for her son's business. She paid to Mr. Strachota the same amount toward the premium as she was accustomed to pay for her own business. This agent had on previous occasions written insurance for Mr. Novak. Mr. Strachota admitted that he stated to Mrs. Novak on the day when the premium was paid that her son "was covered." The accident happened October 16, and on October 17 Mr. Strachota wrote to the petitioner requesting that a policy dated back to October 14, be issued to Al Novak. This the company refused to do. Mr. Strachota stated that he had not immediately forwarded the premium upon its receipt by him, as there was certain additional information to be procured from Mr. Novak before the application could be completed. It was not until after the accident that he secured this information. From all the evidence offered at the hearing, Mr. Strachota appeared to be merely a soliciting agent, in so far as workmen's compensation insurance was concerned. He solicited such business for several insurance companies, sending all requests for policies in to the companies, and delivering the policies when issued. He wrote no policies of this kind in his own office and had no authority to write them for the petitioner.

The evidence fails to support a finding that a contract of insurance was completed between Mrs. Novak and the petitioner on behalf of her son, and the company cannot be held as his insurance carrier unless there is evidence of estoppel. The soliciting agent did not submit the application for the policy until after the accident occurred. The application was promptly rejected by the company and it received no money on account thereof. There is no question of unreasonable delay on the part of the company. No evidence was produced to indicate that the company had done anything to hold Mr. Strachota out to the public as its agent with power to issue policies or otherwise bind the company. No element of estoppel is present. We must therefore conclude that the petitioner was not the insurance carrier of Al Novak at the time of the accident.

That part of the award is annulled which holds the petitioner as the insurance carrier of Al Novak. In other respects the award is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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22 Cal.2d 344

CAMINETTI, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

L. A. 17678.

Supreme Court of California.

June 25, 1943.

Rehearing Denied July 22, 1943.

1. Statutes 🔑263

The rule that statutes are ordinarily construed to operate prospectively is based upon the presumed intent of the legislature, and has no application where the legislature manifests a contrary intent.

2. Insurance 🔑4

Quoted words of statute authorizing insurance commissioner to transfer to a trustee under a voting trust agreement the stock of an insurer "heretofore or hereafter issued" to him as a conservator under a rehabilitation agreement clearly indicate the legislature intended a retrospective operation. St.1937, p. 2565, § 1037(e).

3. Insurance ⚷44

The statute authorizing insurance commissioner to transfer stock to voting trustees specifically referred to stock issued to insurance commissioner as conservator or as liquidator in connection with the rehabilitation or reinsurance agreement, was applicable to stock of an insurance company organized as a medium for rehabilitation of a delinquent insurer. St.1937, p. 2565, § 1037(e).

4. Statutes ⚷181(1), 190

Intent of the legislature must be ascertained from language of the enactment, and where language is clear there can be no room for interpretation.

5. Appeal and error ⚷1056(1)

Where statute authorizing insurance commissioner to transfer stock to voting trustees specifically applied to stock of a new insurance company organized as a medium to rehabilitate old insurance company, exclusion of evidence that at time of enactment of statute insurance commissioner, who now desired retransfer of new insurance company's stock, held stock of other insurers to which the statute assertedly was intended to apply was not prejudicial. St.1937, p. 2565, § 1037(e).

6. Insurance ⚷44

Where there was nothing in rehabilitation agreement or court orders approving agreement to indicate that stock issued thereunder to insurance commissioner was issued to him in any capacity other than conservator or liquidator as contemplated under statute authorizing insurance commissioner to transfer stock issued to him as conservator or liquidator to voting trustees, commissioner held stock of new company in his capacity as conservator or liquidator and not as a special contractual trustee permitted to obtain retransfer of stock. St.1937, p. 2565, § 1037(e).

7. Insurance ⚷44

The insurance commissioner acts as an officer of the state in the public interest regardless of the fact that his duties as conservator are in the nature of those of a receiver or trustee.

8. Insurance ⚷44

Where under rehabilitation agreement, stock of new insurance company organized to rehabilitate old insurance company was issued to insurance commissioner who transferred stock to voting trustees but retained entire beneficial interest for benefit of creditors of old company and interested parties, and voting trust agreement gave only administrative duties relating to stock and recited that covenants therein contrary to rehabilitation agreement were void, the two agreements were not inconsistent so as to invalidate voting trust.

9. Contracts ⚷152

Words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.

10. Insurance ⚷44

Under rehabilitation agreement providing for the issuance to insurance commissioner of stock in a new insurance company organized to rehabilitate old insurance company and providing that commissioner should not "dispose of" stock, transfer of stock to voting trustees did not "dispose of" stock within meaning of agreement so as to invalidate voting trust where commissioner reserved beneficial ownership of stock, voting trust could be terminated under agreement and commissioner retained supervisory powers given in rehabilitation agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Dispose Of".

11. Insurance ⚷44

Where voting trust created by insurance commissioner's transfer to voting trustees of stock of new insurance company organized to rehabilitate old insurance company was consistent with rehabilitation agreement, and court order approved rehabilitation agreement and prior actions of commissioner, and provided for enforcement of agreement without purporting to prohibit future changes in commissioner's title, voting trust was consistent with court order and hence valid.

12. Insurance ⚷44

Under rehabilitation agreement providing for issuance to insurance commissioner of stock in insurance company organized for rehabilitation purposes, transfer of stock to voting trust under statute providing therefor, was not invalid on ground that continued exercise of voting right by commissioner was substantive right of creditors acquired under court order approving rehabilitation agreement, where there was no attempt to alter substantive rights of parties, voting trustees were state agency, and neither rehabilitation agreement nor court order restricted power of legislature to transfer duties of commissioner to another state agency. St. 1937, p. 2565, § 1037(e).

13. Constitutional law ⚿106

There is no constitutional right to a particular form of remedy or to the enforcement of such remedy by a particular state official.

14. Insurance ⚿44

Where insurance commissioner serving as liquidator of delinquent insurer transferred stock of insurance company organized for rehabilitation purposes to board of trustees under statute providing therefor, board of trustees could properly serve as state agency although its members were private persons. St.1937, p. 2565, § 1037(e).

15. Constitutional law ⚿154(3), 278(1)
Insurance ⚿4

Where rehabilitation of delinquent insurer was of general public concern, and statute authorizing transfer by insurance commissioner to voting trust of stock of insurance company organized for rehabilitation purposes was reasonable means for promoting management continuity and policy uniformity in company, such statute did not violate constitutional inhibitions against impairment of contract and taking property without due process. St.1937, p. 2565, § 1037(e).

16. Constitutional law ⚿117

Contract and property rights must yield to legislation in the interest of the general welfare.

17. Insurance ⚿44

The power of the insurance commissioner with respect to statutory proceedings against insolvent or delinquent insurers is of general public concern, as affecting validity of legislation claimed to impair contract and property rights.

18. Constitutional law ⚿70(3)

With respect to statutory proceedings against insolvent or delinquent insurer, it is for the legislature to determine what the interests of the public require and what measures are necessary for their protection.

19. Constitutional law ⚿117

The state cannot abdicate or bargain away its police power even by express grant, and rights under a so-called public contract are subject to further exercise of the power to which they owe their existence.

20. Constitutional law ⚿55
Insurance ⚿4

Where rehabilitation agreement provided for the issuance to insurance commissioner of stock in new insurance company organized to rehabilitate old insurance company, statute authorizing transfer of stock to voting trustees, was not invalid as a legislative encroachment upon the powers of the judiciary. St.1937, p. 2565, § 1037(e).

21. Constitutional law ⚿152, 315

Generally, the judgment of a court may not be modified or altered by legislative action, because a judgment is a form of "contract" protected by the contract and due process clauses of the state and federal constitutions.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

22. Constitutional law ⚿62
Insurance ⚿4

Statute authorizing a voting trust with respect to stock issued to insurance commissioner as conservator or liquidator was not an invalid delegation of legislative power for lack of standards by which commissioner was to be guided in determining when to set up voting trust. St.1937, p. 2565, § 1037(e).

23. Insurance ⚿44

Under statute authorizing a voting trust with respect to stock issued to insurance commissioner as conservator or liquidator, court approval was not required to enable commissioner to transfer to voting trust stock of new insurance company organized to rehabilitate old insurance company. St.1937, p. 2565, § 1037(e).

24. Insurance ⚿44

Requirement for permission of court to sell property with market value of over $1,000 in statute relating to insurance commissioner's authority as liquidator or conservator over property of insurance company did not apply to the creation of a voting trust under a separate provision of the statute which made no specific requirement for court approval, where under provision referring to voting trust, substantive rights of parties and corpus of trust were not disturbed. St.1937, p. 2565, § 1037(d, e).

25. Insurance ⚷44

Where stock of new insurance company organized to rehabilitate old insurance company was issued to insurance commissioner under rehabilitation agreement, and statute authorized commissioner to enter into rehabilitation agreement upon court order, transfer of stock to voting trust, not altering substantive right, did not constitute a new rehabilitation agreement for which court approval was required under statute. St.1935, p. 547, § 1043; St. 1937, p. 2565, § 1037(e).

26. Insurance ⚷44

Fact of ownership by insurance commissioner of policies in delinquent insurer did not disqualify commissioner from transferring stock of company organized for rehabilitation purposes to voting trust. Pol. Code, §§ 920, 922; St.1935, pp. 547, 773, §§ 1043, 12901; St.1941, p. 2935, § 12901.

27. Officers ⚷103

An officer, otherwise disqualified by personal interest, may still act, if his failure to act would necessarily result in a failure of justice.

28. Insurance ⚷44

Under rehabilitation agreement providing for issuance of stock of new insurance company to insurance commissioner, transfer of stock to voting trust and provision in voting trust agreement granting commissioner fees and expenses did not give commissioner personal interest in voting trust so as to invalidate trust where allowances to commissioner were expressly limited to his expenses. St.1937, p. 2565, § 1037(e).

29. Insurance ⚷44

Amendments of statutes relating to orders and authority of insurance commissioner as liquidator of delinquent insurer did not repeal authority of commissioner to hold title to property of delinquent insurer as liquidator, and did not terminate rehabilitation proceeding where statute relating to authority of commissioner in liquidation, after amendment, furnished sufficient statutory basis for exercise of commissioner's duty under court order as liquidator of delinquent insurer. St.1937, pp. 2564, 2565, §§ 1016, 1037; St.1935, p. 547, § 1043.

30. Statutes ⚷158

Repeals by implication are not favored in the law.

31. Insurance ⚷44

Under rehabilitation agreement providing for issuance to insurance commissioner of stock in new insurance company organized to rehabilitate old insurance company where issues raised in law action to compel retransfer of stock from voting trustees to insurance commissioner and in equity action with respect to voting trust were heard together with permission of complaining parties, error in determining the law action before completion of the equity case was deemed "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

PETERS, J. pro tem., and TRAYNOR, J., dissenting.

In bank.

Appeals from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceedings by A. Caminetti, Jr., insurance commissioner, etc., and William H. Neblett and others against Pacific Mutual Life Insurance Company of California, a corporation, and others to show cause why certain stock should not be retransferred to the insurance commissioner. From order denying applications for order to show cause, the first named parties appeal.

Affirmed.

See, also, 136 P.2d 779.

Mitchell, Silberberg, Roth & Knupp, Eugene P. Fay, and Peery Price, all of Los Angeles, for appellant Caminetti, Jr.

Wm. H. Neblett, in pro. per., Josiah Brill, E. Walter Guthrie, and James P. Nunnelley, all of Los Angeles, E. W. Miller, of San Diego, and Vernon Bettin and Alfred F. MacDonald, both of Los Angeles, for appellants Neblett et al.

Overton, Lyman & Plumb, Donald H. Ford, Lyman P. Robertson, Cosgrove & O'Neil, John N. Cramer, Edward R. Young, Hanna & Morton, and Byron C. Hanna, all of Los Angeles, for respondents.

J. M. Mannon, Jr., and Harold A. Black, both of Los Angeles, Burnham Enersen, of San Francisco, and Hobson & Garrett, of Los Angeles, for voting trustees.

GIBSON, Chief Justice.

In 1936, the business and assets of the Pacific Mutual Life Insurance Company of California (hereafter called the "old company") were taken over by the Insurance Commissioner of this state pursuant to statutory authority. Ins. Code, §§ 1011 and 1013, St.1935, pp. 540, 541. Thereafter, respondent Pacific Mutual Life Insurance Company (hereafter called the "new company") was organized as part of a plan of rehabilitation of the old company by the commissioner who purchased its entire capital stock with assets of the old company. Pursuant to section 1043 of the Insurance Code, St.1935, p. 547, a "Rehabilitation and Reinsurance" agreement was entered into between the new company and Samuel L. Carpenter, Jr., the then Insurance Commissioner, as conservator of the old company. The agreement contemplated a transfer to the new company of the assets of the old company (except certain claims against officers and directors of the old company) and the assumption by the former of the obligations of the latter, excluding what is known as "non-can" policies. The new company also assumed a limited obligation with respect to the non-can policies and agreed to set up a special fund for the restoration of benefits thereunder. The capital stock of the new company was to be held by the commissioner as conservator or liquidator for the benefit of the creditors, policyholders, and stockholders of the old company. On December 4, 1936, the agreement received court approval. The legality of the original seizure and the lawfulness of the plan of rehabilitation were upheld on appeal. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, affirmed in Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182. On February 2, 1937, an order was made providing for the liquidation of the old company and appointing the insurance commissioner as liquidator. The legality of this order was likewise upheld on appeal. Carpenter v. Pacific Mutual Life Ins. Co., 13 Cal.2d 306, 89 P.2d 637. The factual background of this prolonged litigation is set forth in the prior decisions and will be repeated here only insofar as is necessary to an understanding of the problems raised on the present appeals. Cf. Carpenter v. Pacific Mutual Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796.

On April 4, 1938, the stock of the new company was transferred by the then commissioner by a voting trust agreement to five persons named as voting trustees. Commissioner Caminetti succeeded to the office in June, 1939, and in June, 1940, sought an order directing respondents to show cause why the voting trustees should not be directed to retransfer the stock to him upon the ground that the voting trust was invalid. Prior thereto, and in December, 1939, a motion had been noticed upon similar grounds by William H. Neblett and others. On May 8, 1940, the superior court denied both applications. Appeals were taken from these orders of denial and are presented upon a single bill of exceptions. Certain contentions are made which are common to all appellants. Other contentions are made by Neblett et al. in which the commissioner does not join. For purposes of clarity they will be grouped under separate headings.

A. Contentions common to all appellants.

Appellants advance three main contentions in support of their claim that the voting trust is invalid. It is urged (1) that section 1037 (e) of the Insurance Code, St. 1937, p. 2565, relied upon by respondents as authority for the creation of the voting trust, is inapplicable to the stock of the new company; (2) that the section is unconstitutional if construed to authorize the voting trust; and (3) that court approval, not obtained in the present case, is required under the code for the creation of a voting trust.

(1) Applicability of section 1037 (e).

Section 1037 (e), enacted in 1937, provides: "Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator: * * * (e) Shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to him as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. Such voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent such stock, and shall not be irrevocable for a period of more than twenty-one (21) years." Appellants contend that this section must be construed to operate prospectively to the exclusion of the stock of the new company which had been issued prior to its enactment, and further that the section was not intended to apply to stock of an insurer organized, as was the new company, as a medium through which rehabilitation of the business of a delinquent insurance company was to be accomplished.

[1, 2] The rule that statutes are ordinarily construed to operate prospectively is based upon the presumed intent of the Legislature. Jones v. Union Oil Co., 218 Cal. 775, 25 P.2d 5; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Anderson v. Ott, 127 Cal.App. 122, 15 P.2d 526; Addiss v. Selig, 264 N.Y. 274, 190 N.E. 490, 92 A.L.R. 1384. It has no application where the Legislature manifests a contrary intent. McCann v. Jordan, 218 Cal. 577, 24 P.2d 457; Krause v. Rarity, supra; Addiss v. Selig, supra; In re Bond & Mortgage Guarantee Co., 157 Misc. 240, 283 N.Y.S. 623. Section 1037(e) expressly includes "stock of an insurer *heretofore or hereafter* issued" to the commissioner. Its language is unambiguous and clearly indicates the Legislature intended a retrospective operation. Cf. Addiss v. Selig, supra; Westervelt v. Gregg, 12 N.Y. 202, 62 Am.Dec. 160.

[3, 4] To adopt the contention that section 1037 (e) was not intended to apply to stock of an insurance company organized as a medium through which rehabilitation of the business of a delinquent insurer was to be accomplished would require us to disregard the clear language of the statute. Section 1037 (e) specifically refers to stock issued to the commissioner "as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement." The intent of the Legislature must be ascertained from the language of the enactment and where, as here, the language is clear, there can be no room for interpretation. First Congregational Church v. County of Los Angeles, 9 Cal.2d 591, 594, 71 P.2d 1106; Riley v. Robbins, 1 Cal.2d 285, 287, 34 P.2d 715; People v. Stanley, 193 Cal. 428, 431, 225 P. 1.

[5] In view of our conclusion that the statute applies here, no prejudice could have resulted from the rejection of evidence offered by the commissioner to show that at the time of its enactment he held stock of other insurers to which the statute assertedly was intended to apply.

[6, 7] Section 1037 (e) authorizes a voting trust with respect to stock issued to the commissioner as "conservator or as liquidator." It has been suggested that the stock of the new company was issued to the commissioner not as "conservator or liquidator" but as a special contractual trustee. There is nothing in the rehabilitation agreement or court orders to indicate that this stock was issued to the commissioner in any capacity other than that of conservator or liquidator as contemplated by the section. The rehabilitation agreement refers only to stock held by the commissioner as "conservator or liquidator", and paragraph 25 provides that he is bound by the provisions of the agreement "only in his capacity as * * * Conservator or Liquidator of the Old Company." The court order of December 4, 1936, approving the agreement provides that the commissioner "as conservator * * * or * * * liquidator" is authorized to carry out its covenants. On appeal from that order, this court stated: "The plan * * * provides that the commissioner, either as conservator or liquidator, shall continue to hold all of the stock of the new company * * *." Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, at page 322; 74 P.2d 761, at page 771. Finally, the order for liquidation of February 2, 1937, provides: "That title to all property and assets of respondent corporation * * * together with all right, title, and interest of said Commissioner *as Conservator* in said stock of [the new company] shall remain and be vested in said Commissioner * * * as *liquidator* of [the old company]." (Italics added.) It necessarily follows that the commissioner held the stock of the new company in his capacity as conservator or liquidator and not as a special contractual trustee. It has been held that the commissioner acts "as an officer of the state * * * in the public interest" regardless of the fact that his "duties * * * as conservator are in the nature of those of a receiver or trustee." Anderson v. Great Republic Life Ins. Co., 41 Cal.App.2d 181, 188, 106 P.2d 75, 79. See, also, Insurance Code, §§ 1057, 1059, St.1935, p. 552; Mitchell v. Taylor, 3 Cal.2d 217, 43 P.2d 803; Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 330, 335, 338, 340, 74 P.2d 761; Garris v. Carpenter, 33 Cal.App.2d 649, 654-656, 92 P.2d 688; cf. Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107.

(2) Constitutionality of section 1037 (e).

[8] It is next contended that section 1037 (e) as here construed is unconstitutional as a legislative impairment of contract obligations, as a taking of property without due process, as a legislative encroachment upon the powers of the judiciary, and as an unlawful delegation of legislative power. This follows, it is argued, because the voting trust assertedly violates the terms of the rehabilitation agreement and the orders of the superior court approving the same and providing for the liquidation of the old company. The contention that contract and property rights are impaired requires a consideration of the terms of the rehabilitation agreement and court orders, the rights thereunder, and the effect of the voting trust agreement thereon.

The rehabilitation agreement provides that the stock of the new company, which already had been organized as the corporate agent of the commissioner, shall continue to be held by the commissioner as conservator. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 321, 325, 74 P.2d 761. The assets of the old company were to be transferred to the new company and, in return, the new company was to assume the obligations of the old company except with respect to the non-can policies. The new company also assumed a limited obligation with respect to such non-can policies and agreed to set up a special fund for the restoration of full benefits under those policies. Paragraph 20 of the agreement, entitled "Mutualization and Disposition of Stock of New Company," relates to the ultimate status and ownership of the new company. It provides that neither the conservator nor liquidator shall "dispose of" the stock of the new company except as follows:

Subdivision (a) authorizes the commissioner to dispose of the stock in accordance with any plan of mutualization thereafter adopted by the policyholders of the new company, and such a disposition may include a transfer to voting trustees if the plan of mutualization so provides. Subdivision (b) authorizes merger, consolidation, reorganization or reinsurance. Subdivision (c) gives the old company the option to pay the full amount needed to restore benefits under the non-can policies and authorizes the commissioner in that event to distribute the stock upon court order. Subdivision (d) authorizes the commissioner to sell the stock upon court order if, at any time, he determines that such a sale is required for the protection of the estate in liquidation. Subdivision (e) states that "It is the purpose, spirit, and intent of this agreement that, unless the provisions for mutualization are eliminated pursuant to the provisions of subparagraph (b) of this paragraph 20, the stock of the New Company shall not be sold or disposed of prior to the full restoration of benefits under Non-Can Policies except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue. * * *" Subdivision (f) contains the usual severability clause.

The affairs of the new company are placed in charge of a board of directors to whom the agreement expressly confides a large measure of discretion. Supervisory powers, however, are reserved to the commissioner, independent of and in addition to his statutory powers over delinquent insurance companies. For example, no investment or reinvestment of the assets of the old company may be made without written approval of the commissioner. Payments to the restoration fund for non-can policies are subject to the approval of the commissioner who, in addition, may require further payments thereto. The determination by the board of directors of the apportionment of expenses and the exchange of assets among the several departments of the new company is subject to adjustment by the commissioner. Reserves against policies of the old company subject to assumption of reinsurance under the agreement were to be established by the new company with the approval of and in accordance with the requirements of the commissioner. While as holder of the stock the commissioner possessed the voting rights incident thereto, the agreement contains no express provision with respect to the exercise of the voting power.

The voting trust, on the other hand, is a contract between the commissioner as conservator or liquidator and named trustees. It recites that "it is one of the primary purposes of this agreement to assure the full accomplishment of all of the intents and purposes of the Rehabilitation Agreement in accordance with its terms. The parties hereto therefore declare that no provision of this agreement is to be construed in any manner which would result in a violation of any of the terms, agreements, or provisions of said Rehabilitation Agreement; and *if any covenant or agreement provided* *herein * * * should be contrary to any express provision of said Rehabilitation Agreement, or contrary to the policy of said Rehabilitation Agreement * * * then such covenant or covenants, agreement or agreements, shall be null and void, and shall be deemed separable from the remaining portions hereof. * * *"* [Italics added.]

The trustees are given legal title to the stock of the new company with the power to exercise all the rights of ownership. The commissioner, however, retains the entire beneficial interest for the benefit of creditors of the old company and others interested. The voting trust undertakes to transfer to the trustees only administrative duties relating to the stock, principally the right to vote the same. The trust is made irrevocable for a period of slightly less than twenty-one years, except that it may be terminated sooner in accordance with the provisions of paragraph 20 of the rehabilitation agreement. Moreover, it must be conceded that the Legislature may terminate the trust at an earlier date.

The two agreements are not inconsistent, as contended by appellants, but on the contrary the voting trust agreement, as declared therein, is intended to and does supplement and facilitate the carrying out of the provisions of the rehabilitation agreement. The intent of the parties is apparent from that portion of the voting trust agreement, quoted above, which declares that if any of its covenants are contrary to the rehabilitation agreement such covenants "shall be null and void."

[9] Appellants contend that the restriction against disposal in paragraph 20 of the rehabilitation agreement precludes the creation of a voting trust. This provision, they argue, gave the policyholders a right to have the commissioner administer the new company, by means of the power to vote its stock. Neither the language nor the purpose of the restriction supports the interpretation. Paragraph 20 relates only to the ultimate status and ownership of the new company including possible mutualization and full restoration of benefits to non-can policies. It does not pertain to the administration of the new company or the supervisory powers of the commissioner which are fully set forth in other paragraphs. As indicated in subdivision (e) of paragraph 20, the purpose of the restriction is to prevent such a sale or disposition of the stock as would permit the transferees to prematurely cut off the rights of the policyholders either to mutualization or to full restoration of benefits under the non-can policies.

The words "dispose of," as used in the paragraph, are directed at any complete alienation of the stock, but do not prohibit transfer of the management of the company by means of transfer of the voting rights of the stock pending rehabilitation. The quoted phrase is used in this sense elsewhere in the agreement (paragraphs 1, 19 (e), 20 (a)).

Words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another. Pringle v. Wilson, 156 Cal. 313, 319, 104 P. 316, 24 L.R.A.,N.S., 1090; 6 Cal.Jur. 286. It is true that the words "dispose of" are used in subdivision (a) of paragraph 20 in connection with an authorization to the commissioner to transfer the stock of the new company to voting trustees in accordance with a plan of mutualization. But it is clear that under that subdivision the transfer there provided for would require a complete alienation of the stock in order to carry out the plan of mutualization contemplated therein.

[10] The voting trust agreement is not a disposal of the stock within the meaning or purpose of paragraph 20 of the rehabilitation agreement. Although the trust agreement transfers to the trustees the legal title to the stock, it expressly reserves to the commissioner "the entire beneficial interest in such stock." The commissioner therefore retains for the benefit of the stockholders and creditors of the old company the same substantial interest he theretofore possessed as statutory trustee. As said in Smith v. Bramwell, 146 Or. 611, 31 P.2d 647, 648, 649: "Notwithstanding plaintiff had transferred the legal title to his stock to the trustees, he still was the beneficial owner of the same. The trustees had no interest in the stock other than to vote it in keeping with the purpose of the trust agreement. * * * *He still, to all intents and purposes, is a stockholder except that he has no personal right to vote his stock."* To the same effect, see Application of Bacon, 287 N.Y. 1, 38 N.E.2d 105, 107; In re Morse, 247 N.Y. 290, 160 N.E. 374, 379; State Tax Com'r v. Com'rs of Baltimore Co., 138 Md. 668, 114 A. 717, 721. The reservation of the beneficial ownership of the stock, coupled with the fact that the voting trust may be terminated in accordance with paragraph 20 of the rehabilita-

tion agreement and the further fact that the commissioner retained the supervisory powers given elsewhere in the rehabilitation agreement, is a complete answer to the contention that the commissioner by creating the voting trust had transferred "all that he had."

[11] Nor do we find any inconsistency between the voting trust and the court orders. The order of December 4, 1936, does no more than approve the rehabilitation agreement and the prior actions of the commissioner and provide for its enforcement. If the voting trust is consistent with the rehabilitation agreement, it is equally consistent with the court order. The voting trust does not interfere with the jurisdiction retained by the court over the commissioner. And, as stated in the order, the commissioner was authorized to do whatever was deemed reasonably necessary to effectuate the agreement "either with or without further order of this court." The order for liquidation of February 2, 1937, provides "that title to all property and assets of respondent corporation [the old company] now vested in said Commissioner as said conservator, together with all right, title and interest of said Commissioner as said conservator in said stock of Pacific Mutual Life Insurance Company [the new company], shall remain and be vested in said Commissioner, and his successor in office, as liquidator. * * *" This provision was "obviously * * * inserted in the liquidation order * * * in order to provide that the alteration in the commissioner's duties in carrying on the business of the old company as conservator, to winding it up as liquidator, should not divest nor disturb his titles." Carpenter v. Pacific Mutual Life Ins. Co., 13 Cal.2d 306, 312, 313, 89 P.2d 637, 641. It does not purport to prohibit future changes in the commissioner's title.

[12, 13] The commissioner prior to the creation of the voting trust exercised the voting rights incident to stock ownership. It is contended, in effect, that continued exercise of this power by the commissioner is necessary to safeguard the interests of the creditors and is a substantive right acquired under the court order approving the rehabilitation agreement. The power conferred upon the commissioner to create a voting trust does not authorize him to alter or modify the substantive rights of the parties as set forth in any plan of rehabilitation and no such attempt was made in this case. Rather, it permits a transfer of the administrative duty of voting the stock from one state instrumentality to another. There is no constitutional right to a particular form of remedy or to the enforcement of such remedy by a particular state official. Neblett v. Carpenter, 305 U.S. 297, 305, 59 S.Ct. 170, 83 L.Ed. 182; Gibbes v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342; cf. In re Westchester T. & T. Co., 268 N.Y. 432, 198 N.E. 19. Neither the rehabilitation agreement nor the court orders undertake to restrict the power of the Legislature to transfer the duties of the commissioner to another state instrumentality, and it may well be that any attempt to do so would be improper.

[14] The board of voting trustees created under section 1037(e) may, in our opinion, properly serve as a state agency or instrumentality, although its members are private persons. Similar devices are familiar to the law. For example, the directors of a corporation in the course of dissolution were at one time, by statute, made trustees to wind up its affairs—their powers were derived from the statute alone and court appointment was unnecessary. Rossi v. Caire, 174 Cal. 74, 80, 81, 161 P. 1161; Clark v. Millsap, 197 Cal. 765, 242 P. 918; 6A Cal.Jur. 1490–1493. A privately owned corporation, together with a voting trust, was held a proper instrumentality of the United States for administration of German chemical patents. United States v. Chemical Foundation, 272 U.S. 1, 18, 19, 47 S.Ct. 1, 71 L.Ed. 131. National banks are federal instrumentalities though they are privately owned and controlled. Davis v. Elmira Savings Bank, 161 U.S. 275, 283, 16 S.Ct. 502, 40 L.Ed. 700; First Nat. Bk. v. California, 262 U.S. 366, 368, 43 S.Ct. 602, 67 L.Ed. 1030; cf. McCulloch v. Maryland, 1819, 4 Wheat. 316, 4 L.Ed. 579; 12 U.S.C.A. §§ 24, 51 et seq., 71. The members of the Board of Regents of the University of California are not public officers. Lundy v. Delmas, 104 Cal. 655, 658–660, 38 P. 445, 26 L.R.A. 651. A new bank has been substituted for the state superintendent of banking in the rehabilitation of an insolvent bank. Doty v. Love, 295 U.S. 64, 55 S.Ct. 558, 79 L.Ed. 1303, 96 A.L.R. 1438. And in this proceeding a new corporation was created as the corporate agent of the commissioner in rehabilitating the old company. Carpenter v. Mutual Life Ins. Co., 10 Cal.2d 307, 321, 322, 324, 325, 74 P.2d 761; Neblett v. Car-

penter, 305 U.S. 297, 302, 59 S.Ct. 170, 83 L.Ed. 182.

[15-18] Even if we were to assume, however, that exercise of the voting power of the stock by the commissioner is a contractual obligation under the rehabilitation agreement and court orders, it would not follow that section 1037(e) authorizing exercise of that power by voting trustees violates the constitutional inhibitions against the impairment of contracts or the taking of property without due process of law. It is settled that contract and property rights must yield to legislation in the interest of the general welfare. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 331, 74 P.2d 761; Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 554, 55 P.2d 495; Veix v. Sixth Ward etc. Assn., 310 U.S. 32, 40, 60 S.Ct. 792, 84 L.Ed. 1061; Union Dry Goods Co. v. Georgia P. S. Corp., 248 U.S. 372, 375–377, 39 S.Ct. 117, 63 L.Ed. 309, 9 A.L.R. 1420. That the power of the commissioner with respect to statutory proceedings against insolvent or delinquent insurers is of general public concern is not open to question. See Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761; Mitchell v. Taylor, supra. It is for the Legislature to determine what the interests of the public require and what measures are necessary for their protection. Ex parte Quong Wo, 161 Cal. 220, 230, 118 P. 714; State Sav. & Comm. Bank v. Anderson, 165 Cal. 437, 443–445, 132 P. 755, L.R.A.1915E, 675 affirmed in 238 U.S. 611, 35 S.Ct. 792, 59 L.Ed. 1488; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Nebbia v. New York, 291 U.S. 502, 537, 538, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Erie Railroad Co. v. Williams, 233 U.S. 685, 699, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097. By its enactment of section 1037(e) the Legislature has determined that the public interest is served by permitting the commissioner to utilize the voting trust technique of corporate control even as to stock theretofore issued to him. Its determination finds support in the following considerations: As statutory receiver of delinquent insurers stock of many insurers is issued to the commissioner with the result that the duty of exercising the voting power thereof would seriously encroach upon his time to the detriment of other statutory duties. The use of a voting trust also serves to obviate conflicting interests which might arise from the commissioner's exercise of the voting power incident to possession of the stock of an insurer and his exercise of regulatory power over insurance companies in general. It also makes possible continuity in management and uniformity in policy. The fact that the voting trust form of management is not mandatory but discretionary with the commissioner is not a valid argument against the propriety of the legislation. That other means were available to attain a legitimate objective does not render the statute unconstitutional. The authorization contained in section 1037(e) constitutes a reasonable means of effecting the foregoing objectives.

The decision of the New York trial court in In re Bond & Mortgage Guarantee Co., 157 Misc. 240, 283 N.Y.S. 623, cited by appellants, is not authority for the contention that section 1037(e) is not a proper exercise of the police power. The case is factually distinguishable. There the Bond & Mortgage Guarantee Company [the old company] had guaranteed mortgage certificates issued by the Title Guarantee & Trust Company and the Bond Company also had a contract to service the mortgages. The Bond Company subsequently was rehabilitated under the Schackno Act, McK. Unconsol.Laws, § 4871 et seq. (similar to Calif. Ins. Code, § 1043). The superintendent of insurance organized the Bond & Mortgage Corporation [the new company] and received its capital stock as rehabilitator of the old company. Pursuant to the court order a servicing contract was entered into between the new company and the Title Company. Subsequently the Legislature enacted the Mortgage Commission Act which purported to authorize the Mortgage Commission to take over from the superintendent certain assets of companies under rehabilitation, including servicing contracts. Holders of mortgage certificates sought to enjoin the Mortgage Commission from taking over the mortgages and the servicing contracts. The court held that the Legislature had no power to take from the new company assets that had been given to it pursuant to contract and approved by the court. Without considering the propriety of the holding in that case, we find it inapplicable here. It would be in point only if the Legislature in the present case had purported to take from the new company assets given to it under the rehabilitation plan.

[19] It is urged that while a private contract fixing private rights is subject to a proper exercise of the police power, a different rule obtains where, as here, the contract was imposed upon the parties in the first instance by the state acting in the interests of the general welfare. We know of no authority holding that in such a situation the state may not thereafter legislate on the same subject. On the contrary, the state cannot abdicate or bargain away its police power even by express grant (Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721), and rights under a so-called "public" contract are subject to further exercise of the power to which they owe their existence.

[20, 21] The contention is made that section 1037(e) as here construed results in legislative encroachment upon the powers of the judiciary. This conclusion is based upon the premise that the Legislature's authorization of a voting trust sanctions a modification of the orders approving the rehabilitation agreement and providing for liquidation in which orders the court directed that title to the stock should remain and be vested in the commissioner. As shown above, the voting trust agreement is not inconsistent with those orders. Assuming an inconsistency, however, no encroachment upon judicial power resulted. Ordinarily the judgment of a court may not be modified or altered by legislative action. (Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639; State v. Wildes, 34 Nev. 94, 116 P. 595; Gilman v. Tucker, 128 N.Y. 190, 28 N.E. 1040, 13 L.R.A. 304, 26 Am.St.Rep. 464), because a judgment is a form of contract protected by the contract and due process clauses of the state and federal Constitutions. Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819; Mooney v. Drainage Dist. No. 1, 134 Neb. 192, 278 N.W. 368; In re Bond & Mortgage Guarantee Corp., 157 Misc. 240, 283 N.Y.S. 623. A further reason has been advanced to the effect that such legislation is an infringement upon the functions of the judicial branch of the government. See Lincoln v. Alexander, supra; Mooney v. Drainage Dist. No. 1, supra. Thus, in State v. Wildes, supra, where the Nevada court had assumed jurisdiction in equity to appoint a receiver and conduct the liquidation of a bank, it was held that the Legislature could not by statute transfer that liquidation proceeding into the hands of the state bank examiner. The decision, however, is not controlling here. This proceeding is wholly statutory. The duties imposed upon the commissioner, and the supervision over him vested in the courts, result from the statute. Responsibility for devising procedures of rehabilitation or liquidation rests with the Legislature and the fact that a particular procedure has been approved with respect to a specific plan of rehabilitation does not foreclose further legislative action with respect to procedural matters. In the case of In re Westchester Title & Trust Co., 268 N.Y. 432, 198 N.E. 19, the court denied that infringement of judicial power resulted where the Legislature passed a statute transferring the functions of a court-appointed financing agent to a Mortgage Commission following the insolvency of the former. The court there said (268 N.Y. at page 441, 198 N.E. at page 22): "The Legislature could provide a new method for the administration of these mortgage investments for the benefit of those interested in such investments without invasion of the equity powers of the Supreme Court over trusts." Cf. Estate of Barreiro, 125 Cal.App. 153, 13 P.2d 1017. Nor is the present situation altered because the superior court in its order of December 4 specifically retained jurisdiction over the proceeding. Jurisdiction was not expressly retained for the purpose of controlling or supervising the voting of the stock. The court had jurisdiction to correct any fraud or abuse in the exercise of the voting power by the commissioner. It possesses the same jurisdiction over the voting trustees (1 Restatement of the Law of Trusts, § 187) and the statute has not therefore curtailed the judicial function.

[22] It is also asserted that as here construed section 1037(e) constitutes an invalid delegation of legislative power because there are no standards by which the commissioner is to be guided in determining when to set up voting trusts. The commissioner is given wide discretion and broad powers in the use of voting trusts in rehabilitation proceedings. The guide for the exercise of those powers appears in the concluding provision of section 1037 which authorizes him to do that "which he may deem necessary or expedient for the accomplishment or in aid of the purpose of such proceedings." This is the standard considered controlling by the Legislature and is sufficient under the decisions as against this challenge to the statute's

constitutionality. Cf. Gaylord v. City of Pasadena, 175 Cal. 433, 439, 166 P. 348; People v. Globe Grain & Mill. Co., 211 Cal. 121, 124, 294 P. 3; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 642, 91 P.2d 577. As said in United States v. Chemical Foundation, 272 U.S. 1, 12, 47 S.Ct. 1, 5, 71 L.Ed. 131, "It [is] not necessary for [the Legislature] to ascertain the facts of or to deal with each case. The act went as far as was reasonably practicable under the circumstances existing." It is peculiarly within the province of the commissioner to know the facts and to determine when a voting trust is expedient or necessary to effectively carry out a plan of rehabilitation.

(3) Court approval.

[23-25] Appellants contend that the voting trust is invalid because court approval thereof was not secured. Section 1037(e), however, contains no requirement for court approval. The absence of such requirement indicates that none was intended. This is suggested by the opening paragraph of the section which grants authority to "the commissioner, *exclusively* and except as otherwise expressly provided." It is also suggested by the fact that subdivision (d) of section 1037 as well as sections 1035, 1036, 1041, and 1043 St. 1935, pp. 545, 547, expressly require court approval of certain acts of the commissioner. By the subsequent enactment of section 1037(e) without such requirement it must be concluded that the omission was intended. Appellants insist, however, that the creation of a voting trust in this case came within the meaning of sections 1037 (d) and 1043 and therefore required the court approval contemplated by those sections. This contention would compel us to read such requirement into section 1037(e). Section 1037(d) authorizes the commissioner to sell, transfer or dispose of real or personal property of any person whose property and business has been taken over provided that, if the transaction involves property the market value of which is over $1,000, permission of court must be obtained. This requirement has no application to the creation of a voting trust under a separate provision of the statute which makes no specific requirement for court approval. A clear distinction exists between a disposal of assets under section 1037(d) and a transfer of voting power to a board of trustees (another state instrumentality) under section 1037(e) in which the substantive rights of the parties and the corpus of the trust are not disturbed. Section 1043 authorizes the commissioner to enter into rehabilitation agreements upon court order. Appellants contend that the voting trust was a modification of the rehabilitation agreement and was, in effect, a new and different plan of rehabilitation requiring court approval. As stated above, the voting trust does not alter or modify the provisions of the rehabilitation agreement. Even if it does, however, the modification concerns only administrative duties connected with the stock of the new company and does not alter substantive rights in any way. It follows that the voting trust does not constitute a new rehabilitation agreement for which court approval is required under section 1043.

B. Contentions of Neblett, et al.

We now turn to a consideration of the contentions of Neblett and others in which the commissioner does not join.

[26-27] The Neblett motion urged that the voting trust was invalid because it constituted a contract in which Commissioner Carpenter was interested personally through ownership of policies of insurance in the old company, later converted into policies in the new company. Political Code, section 920, provides: "Members of the legislature, *state,* county, city, and township *officers,* must not be interested in any contract made by them in their official capacity * * *." Contracts made by a public officer in his official capacity may be avoided at the instance of any party except the interested officer where the officer has any direct or indirect interest therein. Political Code § 922; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095; Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31. The sole question in the present case is whether section 920 precluded the commissioner from making contracts relating to Pacific Mutual, for it must be conceded that persons may hold the *office* of commissioner although they own policies in companies subject to the act. (Prior to 1941 section 12901 of the Insurance Code, St.1935, p. 773, provided "An officer, agent, or employee of an insurer is not eligible to the office of commissioner," but it did not render anyone ineligible because of ownership of policies, and in 1941 the section was clarified to specifically permit such ownership, St.1941, p. 2935.) The Legislature has directed

that certain provisions of the Insurance Code, including the sections authorizing voting trusts and rehabilitation agreements, are to be carried into effect by the commissioner. If the commissioner were disqualified to act with respect to delinquent insurers in which he holds policies, such insurers and their creditors and policyholders would be deprived of many benefits of the code. No other officer is authorized to perform the commissioner's duties, and if he cannot act, his agents or deputies would likewise be disqualified. In such a situation it must be assumed that the Legislature intended that the commissioner act regardless of the possibility that he might hold policies in the delinquent company. As said in 42 American Jurisprudence 312 "There is an exception, based upon necessity, to the rule of disqualification of an administrative officer. An officer, otherwise disqualified, may still act, if his failure to act would necessarily result in a failure of justice." The rule of necessity has been applied in this state to members of municipal bodies charged with hearing protests in connection with street assessments. Federal Construction Co. v. Curd, 179 Cal. 489, 177 P. 469, 2 A.L.R. 1202; cf. Nider v. Homan, 32 Cal.App.2d 11, 17, 89 P.2d 136. The rule is not confined to officers exercising quasi-judicial functions. Marion Township of Boone County v. Howard, 196 Ind. 167, 147 N.E. 619; cf. Capital Gas Co. v. Young, 109 Cal. 140, 41 P. 869, 29 L.R.A. 463.

[28] Appellant Neblett contends also that the commissioner's personal interest in the voting trust is established by provisions therein granting him fees and expenses not authorized by law. The allowances to the commissioner are expressly limited to his expenses, and this cannot be held to give him a personal interest in the trust.

[29, 30] It is also argued that the 1937 amendments to sections 1016 and 1037, St. 1937, pp. 2564, 2565, had the effect of repealing the authority of the commissioner to hold title to the property of the old company as liquidator and of terminating the entire rehabilitation proceeding. After the amendments, section 1016 contained the following language: "Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person." This language furnishes sufficient statutory basis for the exercise of the commissioner's duties under court order as liquidator of the old company, and does not constitute an implied repeal of the authority previously vested in him. Neither does the authority to set up voting trusts, conferred upon the commissioner by section 1037(e), constitute an implied repeal of the provisions of section 1043 authorizing the commissioner to enter into plans of rehabilitation. Appellants contend that the omission of a requirement for court approval in the former section impliedly repeals the provisions of the latter section because, in effect, it authorizes the commissioner to create new plans of rehabilitation without court approval despite the fact that section 1043 requires court approval for plans of rehabilitation. Repeals by implication are not favored in the law (Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 634, 128 P.2d 23; Railroad Commission v. Riley, 192 Cal. 54, 57, 218 P. 415), and no implied repeal need be found under the facts of this case. Section 1037(e) does not authorize new plans of rehabilitation without court approval.

[31] Finally, it is contended that the trial court lost jurisdiction to act in this proceeding by reason of its order made on February 5, 1940, continuing the hearing "until the completion of trial" of a concurrently pending action in equity involving the same issues. It is said that the equity action was not completed until after the orders appealed from herein were made. The record shows, however, that appellants permitted the issues raised in this proceeding and in the equity action with respect to the voting trust to be heard together as a matter of convenience. Any error, therefore, in determining this proceeding before completion of the equity case must be deemed waived.

Additional grounds for reversal are suggested, based upon the alleged disqualification of the trial judge who denied the motions here involved and upon the asserted invalidity of the basic rehabilitation agreement. These questions are considered and determined in companion cases decided herewith. Caminetti v. Pacific Mutual Life Ins. Co., Cal.Sup., 139 P.2d 930; Neblett v. Pacific Mutual Life Ins. Co., Cal.Sup., 139 P.2d 934. The conclusion reached therein that the contentions are unfounded is determinative upon this appeal.

The orders are affirmed.

SHENK and CURTIS, JJ., and SPENCE, J. pro tem., concurred.

PETERS, Justice pro tem. (dissenting).

I dissent.

Two basic questions are presented on these appeals: (1) Is the voting trust agreement so inconsistent with the rehabilitation agreement that it impairs the obligation of contracts? (2) Can such a voting trust agreement be created under section 1037(e) of the Insurance Code without court approval? On the first issue the majority opinion holds that the two agreements are not inconsistent, that there is no impairment of the obligation of contracts, and that even if there is such impairment it is justified under the police power. On the second issue it holds that, properly interpreted, the section authorizes the creation of the challenged voting trust without court approval. It is the position of this dissent on the first issue, that the two agreements are inconsistent; that the voting trust impairs the obligation of contracts by impairing the rights of thousands of policyholders who entered into contracts with the new company on the basis of a reorganization plan approved by them and the courts; that such impairment cannot be justified under the police power; and that the voting trust renders nugatory several judicial orders already made. On the second issue this dissent takes the position that the construction given the section by the majority is not compelled by the language of the amendment; that it renders the section unconstitutional; that it results in the repeal by implication of another subsection of section 1037, and abrogates another section of the Insurance Code; and that such a voting trust can be entered into only after first securing court approval.

Are the provisions of the voting trust agreement so inconsistent with the provisions of the rehabilitation agreement that they impair the obligation of contracts and vested rights?

This question should be disposed of before the section is construed, for if the voting trust impairs the obligation of contracts and abrogates rights vested on the faith of the court approved rehabilitation agreement, the section, as construed by the majority, would be unconstitutional as in violation of both the federal and state constitutions, unless such impairment is justified under the police power. This issue is relevant to the question of construction, because, if two equally reasonable constructions are possible, that which does not make the statute unconstitutional is to be preferred to a construction which accomplishes that result.

A comparison of the provisions of the two agreements demonstrates that they are incompatible. The voting trust provides for a disposition of the stock of the new company in a manner expressly forbidden by the rehabilitation agreement.

The voting trust agreement was entered into by Carpenter on April 4, 1938. Prior to that time Carpenter held the entire capital stock of the new company as a special trustee under the terms of a "Rehabilitation and Reinsurance Agreement" entered into on December 4, 1936, as of July 22, 1936. The history and background of that contract, approved by court order as required by law, have been sufficiently set forth in prior decisions. Carpenter v. Pacific Mut. Life Insurance Co., 10 Cal.2d 307, 74 P.2d 761, affirmed in Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182; Carpenter v. Pacific Mut. L. Ins. Co., 13 Cal.2d 306, 89 P.2d 637; Carpenter v. Pacific Mut. Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796. Suffice it to say that the agreement was approved by the court after careful consideration to make certain that the rights of all persons with claims against the old company would be protected. Among other things, it provided that the commissioner should transfer to the new company all the property and assets of the old company and that, in return, the new company should assume the obligations of the old company except with respect to a particular class of policies known as noncancellable policies. In a subsequent clause the new company also assumed a limited obligation with respect to the so-called "non-can" policies and agreed to set up, as rapidly as possible, a special fund for the restoration of full benefits thereunder. The entire capital stock of the new company was to be held by the commissioner as a contractual trustee for the purpose of carrying out the rehabilitation plan. The permit which authorized the New Pacific Mutual Life Insurance Company to issue 10,000 shares of capital stock, provided that the commissioner should subscribe for and purchase all of the authorized stock of the new company for which he was to pay $3,000,000 in cash. Section 6 of the rehabilitation agreement provides that the $3,000,000 paid by the commissioner for the capital stock is to constitute the capital and paid-in surplus of the new company.

Section 20 of the Rehabilitation and Reinsurance Agreement is entitled "Mutualization and Disposition of Stock of New Company." It provides that the commissioner, as conservator or liquidator of the old company, shall not dispose of any of the capital stock of the new company except as provided therein. The following exceptions are the only ones specified: Subdivision (a) of section 20 provides that the commissioner may dispose of the stock of the new company in accordance with any plan of mutualization which may thereafter be adopted by the policy holders of the new company, and that such a disposition might include a transfer to voting trustees if the plan so provided. Subdivision (b) contains other provisions not involved in the present problem. Subdivision (c) contains a provision giving the old company the option to pay off the amount needed to restore benefits under the "non-can" policies and authorizing the commissioner to dispose of the stock of the new company in accordance with any court order entered pursuant to such a full settlement of the obligations of the old company. Subdivision (d) authorizes the commissioner to sell the capital stock of the new company upon order of court if, at any time, he determines that such a sale is required for the protection of the state in liquidation. Subdivision (e) provides: "It is the purpose, spirit, and intent of this agreement that, unless the provisions for mutualization are eliminated pursuant to the provisions of subparagraph (b) of this paragraph 20, the stock of the New Company shall not be sold or disposed of prior to the full restoration of benefits under Non-Can Policies except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue. * * *" Subdivision (f) contains the usual severability clause. The effect of this plan of rehabilitation was to place in the hands of the commissioner legal title to the stock of the new company in return for which he parted with the assets of the old company. He held legal title as trustee for the benefit of the creditors and policyholders of the old company for whom the capital stock of the new company was the most important remaining asset. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 335, 74 P.2d 761.

On February 2, 1937, upon the application of Samuel L. Carpenter, Jr. as Insurance Commissioner, the court made an order of liquidation reciting that the commissioner had transferred all the assets of the old company to the new Pacific Mutual Life Insurance Company except the capital stock of the new company and any claims the old company might have against its past or present officers. The order stated that since any further efforts to conserve the business of the old company appeared futile to the commissioner, he was thereby appointed liquidator and directed to wind up its business. The rights and liabilities of the old company, its creditors, policyholders and share holders were fixed as of July 22, 1936, the date when the rehabilitation plan became effective. Section 8 of the court's order of liquidation provided: "That title to all property and assets of respondent corporation [the old company] now vested in said Commissioner as said conservator, together with all right, title and interest of said Commissioner as said conservator in said stock of Pacific Mutual Life Insurance Company [the new company], shall remain and be vested in said Commissioner, and his successor in office, as liquidator of The Pacific Mutual Life Insurance Company of California."

When the commissioner, under the powers conferred upon him by the Insurance Code, took over the old company in July of 1936 every policy of the company, totalling millions of dollars, was placed in jeopardy. The agency organization and the good will of the old company was in danger of being lost. The rehabilitation plan, resulting ultimately in the court approved rehabilitation agreement, was an attempt by the commissioner, acting pursuant to the provisions of section 1043 of the Insurance Code, to meet this emergency by creating a new company to take over the solvent policies. The basis of that plan was that, acting pursuant to the provisions of the agreement, the commissioner was to hold and control the stock of the new company until all claimants were paid. Pursuant to this fundamental policy the agreement expressly provided in section 20, quoted supra, that the commissioner was prohibited from disposing of the stock except as provided in the plan. Policyholders were given the election of accepting policies in the new company or of filing claims against the old company. As to both assenting and dissenting policyholders, an integral part of the contract was that the state insurance commissioner, until all claimants were paid, would control the policy and management of the new company through ownership of the stock. The inducement held out to secure court approval, and the inducement held out to the policyholders, was that the new company, under this plan, could not be returned into private management, but that the new company would remain under the management and control of the insurance commissioner until all claimants were paid. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 332, 74 P.2d 761. The superior court approved that plan on the basis of continued commissioner control, and the court's order of liquidation, quoted supra, expressly provided that the stock of the new company should remain in the commissioner and his successor in office. The action of the superior court in approving the reorganization agreement was affirmed by this court and by the United States Supreme Court, again on the hypothesis that by the agreement every interested person's rights were protected by the provision that control of the stock would remain in the hands of the commissioner and his successor in office. On that basis thousands of policyholders made their election. Direct and continuous commissioner control was the very essence of the court approved contract. Now what happened?

On April 4, 1938, after this agreement had been entered into and approved by the court, and after thousands of policyholders had changed their position in reliance thereon, Carpenter entered into the Pacific Mutual Voting Trust Agreement here challenged. It purports to be a contract between Carpenter as conservator and liquidator of the old company on the one side, and four named trustees on the other. The voting trust agreement recites that the purposes of the rehabilitation agreement of July 22, 1936, will be facilitated by the transfer of legal title in the capital stock of the new company to voting trustees of established character and ability. Paragraph Fourth provides: "All of said stock * * * shall be received by the Trustees in trust, and shall be held, distributed, or otherwise disposed of, by the Trustees as provided in this agreement. While this agreement continues in effect the Trustees shall have full legal title to all shares of the stock of the Corporation [the new company] deposited with or held by them hereunder, and shall be entitled to exercise with respect thereto all rights and powers of every name and nature which the Depositor [the commissioner] had except as may be otherwise herein expressly provided." The trust was made irrevocable for a period of slightly less than twenty-one years except that it could be terminated sooner by the commissioner in the exercise of any of the powers of disposition over the stock reserved to him in Paragraph 20 of the Rehabilitation and Reinsurance Agreement. Paragraph Eighth of the voting trust agreement provides: "*The Trustees, during the continuance of this Agreement shall be vested with and shall possess and shall be entitled to exercise in their discretion all the rights and powers of an absolute owner of the stock held by them hereunder.* * * *" The trustees agreed to carry out faithfully the obligations of the commissioner as set forth in the rehabilitation agreement. Paragraph Eleventh states: "The Depositor [the commissioner], as herein provided, retains a beneficial interest in the shares of stock which are the subject matter of this Voting Trust. * * *" Paragraph Twenty-third provides: "It is one of the primary purposes of this agreement to assure the full accomplishment of all of the intents and purposes of the Rehabilitation Agreement in accordance with its terms. The parties hereto therefore declare that no provision of this agreement is to be construed in any manner which would result in a violation of any of the terms, agreements, or provisions of said Rehabilitation Agreement. * * *

The obvious purpose and legal effect of this voting trust agreement was to transfer from the commissioner, a state official, to a board of private trustees, the legal title to the stock and all of the responsibilities and duties which devolved upon the commissioner as special trustee and holder of the capital stock of the new company under the rehabilitation agreement.

It does not require extended comment to demonstrate that the voting trust agreement violates the provisions of the Rehabilitation Agreement. Section 20 of the

Rehabilitation and Reinsurance Agreement provides that the commissioner shall not dispose of the stock of the new company except as therein provided. The exceptions provided are: (1) Pursuant to the terms of any plan for mutualization of the new company; (2) according to court order if the old company proved able to pay off its obligations under the "Non-Can" policies; and (3) by court order where he deems it necessary to safeguard the interests of the estate in liquidation. The first and third of these alternatives contemplate a change in the corpus of the trust held for the creditors of the old company, the first by mutualization of the new company and the last by exchange of the stock of the new company for a more secure piece of property. The second alternative contemplates a termination of the trust in the event the old company raised sufficient funds to pay off its obligations.

The voting trust agreement transfers full legal title to the board of trustees in a situation where the rehabilitation trust is to continue, but it is not a transfer pursuant to a plan of mutualization nor one made in order to safeguard the estate in liquidation. If the creation of the voting trust were not contrary to the provisions of the rehabilitation agreement then section 1037(e) was superfluous. But the majority concedes that the sole source of power to transfer title to the stock to the voting trustees is to be found in that section.

The majority opinion does not dispute that this transfer is not provided for in the rehabilitation plan. It does, however, argue that the rehabilitation plan does not prohibit this transfer, urging that section 20 of the rehabilitation plan uses "dispose of" in the sense of an absolute disposition of the stock, rather than merely a transfer of legal title in trust. This argument is unsound. The rehabilitation plan by expressly providing that the commissioner shall not dispose of the stock except under certain specific conditions provides the exclusive modes by which the commissioner may dispose of the stock. The attempt to limit the meaning of "dispose" to absolute alienation is met directly by the fact that although one of the exceptions provided in the rehabilitation plan is a transfer to voting trustees, such a transfer must be pursuant to a plan of mutualization of the new company under section 20(a). Furthermore, under the rehabilitation plan the commissioner was a trustee for the creditors of the old company. Thus, all he had was the legal title to the stock. The beneficial interest was in the creditors of the old company. Since all he had was the legal title, the transfer of all that he had is obviously a disposition of the stock within the meaning of the rehabilitation plan.

The majority opinion (139 P.2d 914) lays great stress upon the provision of the voting trust agreement that "if any covenant or agreement provided herein * * * should be contrary to any express provision of said Rehabilitation Agreement, or contrary to the policy of said Rehabilitation Agreement * * * then such covenant or covenants, agreement or agreements, shall be null and void." Since the rehabilitation agreement expressly prohibits the commissioner's disposing of the stock except as specifically authorized, and since the disposition in question is not so authorized, the voting trust is void under its own provisions.

The majority opinion urges, however, that the two agreements are not inconsistent but that the voting trust agreement "is intended to and does supplement and facilitate the carrying out of the provisions of the rehabilitation agreement" (139 P.2d 915), and states that this is made apparent by the provision above quoted that if any covenant of the voting trust is contrary to the rehabilitation agreement it is null and void. The argument is that because the voting trust states that it was intended to facilitate the rehabilitation agreement, and because it states that if any of its provisions are contrary to the rehabilitation agreement such provisions are null and void, none of its provisions can violate the rehabilitation agreement. The *non sequitur* is obvious. The rehabilitation agreement provided that the commissioner should exercise the voting rights; the voting trust provides that such power should be exercised by the voting trustees. Such provision is "contrary to the policy of said Rehabilitation Agreement" and is contrary to an "express provision of said Rehabilitation Agreement." The provision of the voting trust purporting to transfer this power to the voting trustees is therefore "null and void" under the very terms of the voting trust.

The majority opinion states, however, that "Although the trust agreement transfers to the trustees the legal title to the stock, it expressly reserves to the commissioner 'the entire beneficial interest in such stock.' The commissioner therefore retains for the benefit of the stockholders and creditors of the old company the same substantial interest he theretofore possessed as statutory trustee." 139 P.2d 915. It is true that the voting trust provides that the commissioner retains "the entire beneficial interest" in the stock. But it also provides that "full legal title" thereto is transferred to the voting trustees in order that "they may exercise the rights of stockholders in the control of the Corporation," and that the trustees "shall be entitled to exercise with respect thereto all rights and powers of every name and nature which the Depositor had" except as expressly provided otherwise. A subsequent paragraph provides that the "Trustees, during the continuance of this Agreement shall be vested with and shall possess and shall be entitled to exercise in their discretion all the rights and powers of an absolute owner of the stock held by them hereunder."

The majority opinion in several places states that by the voting trust agreement the commissioner simply transferred the "administrative duties" of voting the stock to the trustees while retaining the "beneficial interest" in the stock. Just what is meant by a transfer of the "administrative duties" of voting the stock is not clear. The power that was transferred to the trustees by the voting trust was the power to vote 100% of the stock of the new company. What does that mean? It means that prior to creation of the voting trust the commissioner had the power to elect the entire board of directors of the new company. Through the exercise of that power he had the power and it was his duty to control the general policy of a corporation with several hundred millions of dollars of assets. It was these powers that he voluntarily transferred to the voting trustees. To characterize such important functions as the mere "administrative" duty of voting the stock does not minimize their importance. Moreover, the commissioner has retained no "beneficial interest" in the stock. He was not the beneficial owner of the stock, and never had a beneficial interest therein. He had the legal title as trustee, and the rehabilitation agreement so provided. In Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, at page 335, [74 P.2d 761, at page 778,] this court, in referring to what the record there showed, stated: "It discloses that as trustee for all creditors of the old company, including dissenters, the commissioner holds all of the stock of the new company * * *." The creditors and policyholders and stockholders of the old company owned and still own the beneficial interest in the stock. The commissioner had the legal title subject to the terms of the trust set forth in the rehabilitation agreement. He transferred all that title, all those rights, and all of his duties to the trustees. There was nothing of a "beneficial" nature or otherwise for him to retain. He transferred everything he had and retained nothing.

The majority opinion then seeks to show that there is no inconsistency between the voting trust and the various court orders. Of course if the voting trust is consistent with the rehabilitation agreement it is likewise consistent with the court orders. If a transfer of all his interest in the stock to the trustees did not violate the express provisions of the rehabilitation agreement prohibiting such transfer, then the transfer did not violate the similar provision in the court orders. But, as already pointed out, the voting trust does violate the provisions of the rehabilitation agreement. For the same reasons it violates the court order heretofore quoted.

The next argument advanced in the majority opinion is that the voting trust merely "permits a transfer of the administrative duty of voting the stock from one state instrumentality to another". 139 P.2d 916. On the next page of the opinion this thought is further elaborated upon, and it is definitely held that the voting trustees are a "state agency or instrumentality" and that all that section 1037(e) and the voting trust do is "to transfer the duties of the commissioner to another state instrumentality." The thought is then expressed that the voting trustees are a state board, agency or instrumentality in the same sense that national banks, although privately owned, are government agencies, or that the Regents of the University of California, although not public officials, constitute a governmental agency. Other illustrations of a similar nature are given. In all of the illustrations given in the majority opinion, however, the agency involved was not only designated by statute, but its duties and functions were fixed by law. (See the provisions of the National Bank Act, 12 U.S.C.A. § 21 et seq.; and the provisions of Art. IX, § 9, of the State Constitution, relating to the Regents of the University.) It is because of duties and functions imposed upon them by the statute that they are state agencies or instrumentalities, and not simply because the statute provides for their appointment. In the instant case neither section 1037(e) of the Insurance Code nor any other provision of law imposes any duties on the trustees. Their duties and functions are fixed by contract—the voting trust agreement. Except as provided in that contract their duties are no different from those of any private trustee, and they no more constitute a governmental agency than do trustees appointed by will or contract.

The argument that the voting trustees constitute a governmental agency overlooks the nature and source of their functions under the voting trust. The commissioner's rights, powers and duties over the stock of the new company were not defined by statute—those rights, powers and duties arose out of and had their sole source in the contractual obligations and provisions of the rehabilitation agreement. It was these rights, powers and duties that were voluntarily transferred to the voting trustees by the commissioner. The rights, powers and duties of the voting trustees over the stock of the new company are not defined by statute. They have their sole source in the rehabilitation agreement. This being so the transfer by the commissioner to the voting trustees of a purely contractual power cannot make the trustees a governmental agency. They are contractual trustees appointed pursuant to statute. The only governmental function the commissioner exercised over the stock of the new company was as conservator or liquidator of the old company. The stock of the new company is the principal asset of the creditors of the old company. The commissioner still possesses all of his powers and duties as conservator and liquidator of the old company. None of those official duties have been transferred to the voting trustees. The commissioner is still the liquidator or conservator of the old company. Certainly it is not to be assumed that by the authorization to create a voting trust the Legislature intended to remove the commissioner as conservator or liquidator, and to substitute in his place the voting trustees. Yet the only way the voting trustees can be held to be a governmental agency is to hold, contrary to the fact, that the voting trustees have been substituted as conservator or liquidator in place of the commissioner. The true fact is that the voting trustees in voting the stock are not performing a governmental function at all, but are performing duties created solely by contract. That being so they are not in any sense a governmental agency.

When the Superior Court was asked to approve the rehabilitation agreement setting up a new company to take over the assets of the old company one of the major problems presented to the court and to the creditors of the old company was the selection of a trustee for the stock of the new company. After due consideration, the parties to the agreement, and the court, determined that it was in the interest of all concerned to select a public official with the qualifications, experience, duties, functions and staff of the insurance commissioner. They could have selected a bank, a corporation, or private trustees, but, as a matter of contract, they selected the insurance commissioner as trustee. The legislature has no more power to permit that selected trustee to appoint another trustee in his place than it would have to provide that a private trustee selected by the trustor and beneficiaries could, without the consent of the trustor and beneficiaries, appoint another trustee. If this statute is constitutional, the trustor and beneficiaries of the trust, without their consent, are compelled to accept trustees that they never have selected, and, as this case demonstrates, that some of them do not want. Viewed in this aspect it makes no difference in result whether the voting trustees be considered a private board or a governmental agency. Where parties have, by contract, selected one public official as a contractual trustee, the Legislature is without power to authorize him to appoint another public agency in his stead without the consent of the contracting parties. The parties selected the insurance commissioner as trustee. They did not select the state corporation commissioner, the fish and game commissioner or any other official to serve as trustee, and the Legislature, against the will of the contracting parties and without their consent, cannot substitute other trustees for the one agreed upon. In fact, the famous

Dartmouth College case (Dartmouth College v. Woodward, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629) established this principle. In that case the Legislature of New Hampshire attempted to change the trustees of Dartmouth College and to substitute new and different trustees. It was held, and there has been no deviation from that rule, that such legislative enactment was unconstitutional as an impairment of the obligation of contracts. It is apparent, therefore, that, at least in a case not falling within the police power, the rule that the state may lawfully transfer statutory functions from one state official or department to another, has no application to functions conferred upon the state official or department not by statute but by contract.

The majority opinion next holds that even if it be assumed that the voting trust impairs the obligations of the rehabilitation agreement, such impairment is justified under the police power. The majority opinion states that "it is settled that contract and property rights must yield to legislation in the interest of the general welfare". 139 P.2d 917. It is undoubtedly the law that contract rights are subject to alteration, without violating the impairment of obligation of contracts and due process clauses of the constitution, when such alteration is necessary in the public interest. It is also undoubtedly the law that the state, under its regulatory power, may regulate the insurance business, and under certain circumstances, affect private contract rights. The cases cited in the majority opinion establish these general principles beyond doubt. The principle was clearly stated in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, at p. 434, 54 S.Ct. 231, at page 238, 78 L.Ed. 413, 88 A.L.R. 1481, where the court stated: "Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288 [301, 87 A.L.R. 721]. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." See, also, Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609.

It is imperative, however, that the impairment of contract rights be in the public interest. But what public interest could be served in the present case by relinquishing commissioner control and returning the management to private control? What public interest impelled changing the voting trust from one where the commissioner, as trustee, exercised sole power over the stock, to a private self perpetuating irrevocable voting trust? The Superior Court, this court and the United States Supreme Court approved the rehabilitation agreement because they were of the opinion that it was in the general welfare of the policyholders, creditors and the public that the commissioner retain the stock for the protection of all concerned. No sound reason has been suggested why the public interest would be benefited or the general welfare advanced by a change in this policy. No emergency existed. There was no change in conditions between the time of the rehabilitation agreement and the time section 1037(e) was passed. The majority opinion suggests the possibility that the statute was passed to enable the commissioner to avoid a possible position of "conflicting interests." The argument proves too much. Section 1037(e) is not mandatory. It leaves it to the discretion of the very person in whom the conflict is alleged to exist—the commissioner—to determine whether the assumed conflicting interest shall be continued or settled. Had the legislature been of the view that the general welfare required an impairment of vested rights because of an assumed conflict of interest it would have made the voting trust form of management mandatory and not discretionary. It is also suggested that the amendment might have been intended to permit the commissioner to avoid the burden of exercising the voting power. Had that been the intention of the legislature it would have provided for the appointment of a person or persons responsible to him to perform this duty. But this amendment, according to the majority, permits the creation of a self perpetuating board independent of the commissioner for twenty-one years. Moreover, the time to consider whether the burden of voting the stock was too onerous or whether that duty might conflict with his other duties was when the rehabilitation agreement was under consideration. At that time the commissioner, the Superior Court, this court and the United States Supreme Court determined that the duties under the rehabilitation agreement were not too onerous and that they did not conflict with his other duties. The very basis of the rehabilitation agreement was that the commissioner was the best informed, qualified, and impartial agency in the state to vote that stock. Of course, the legislature could prohibit the insurance commissioner from accepting the position of trustee of such a trust, or could compel him to resign from trusteeships already accepted, if it determined that such duties were incompatible with the commissioner's statutory duties. In that event, however, the Legislature could not compel the contracting parties to accept a new trustee selected by the commissioner without their consent. Until the selection of a new trustee the trust would not fail, but, under accepted principles, would continue under the supervision of a court of equity.

Respondents also suggest the possibility that the Legislature may have believed that from a practical standpoint the commissioner might be unqualified, because of lack of knowledge, to elect competent directors. If the commissioner were unqualified to select directors whom he could replace at pleasure, he would be equally unqualified to select voting trustees, and in this latter situation any error in judgment would be irreparable for twenty-one years. The majority opinion also suggests that the legislation may have been intended to secure continuity in management. Such a contention assumes that the commissioner would arbitrarily and capriciously change the board. Had that concept motivated the legislation, the Legislature would have made the change mandatory and not discretionary.

A case directly in point on this issue is In re Bond & Mortgage Guarantee Co., 157 Misc. 240, 283 N.Y.S. 623, interpreting the New York statutes dealing with rehabilitation from which most of our statutes on this subject were copied. There the New York commissioner of insurance took over the assets of an insolvent insurance company, and from its assets, with court approval, organized a new company as a guarantee corporation. This new corporation was to carry on the business of the old company retaining, as here, all its capital stock for the benefit of creditors. By court order the commissioner was authorized to enter into a contract with the guarantee corporation to service all mortgages of the old company. Thereafter the legislature, purporting to act in an emergency, expressly provided that the Mortgage Commission should take over from the guarantee corporation all of the mortgages being serviced by it under the court's decree. The court held that the legislation, insofar as it purported to be applicable to rights vested pursuant to court decree, was unconstitutional. The court (283 N.Y.S. at page 648) stated: "When the language of a statute clearly requires a retroactive construction, it must be so construed though thereby it is held to be unconstitutional. Westervelt v. Gregg, 12 N.Y. 202, 62 Am.Dec. 160. Retroactive statutes are not of themselves unconstitutional, but when they are in conflict with the provisions of either the Federal or the State Constitutions, a different result may follow. Such result follows where, as here, such a statute violates the right of the parties to such a servicing contract made part of any such order, to perform and to have performed the provisions of such contract, or it interferes with a vested right conferred by an order in the nature of a decree of which a servicing contract is made a part, finally adjudging the rights of the parties and the provisions of such contract. After a final determination of the rights of the parties to such a proceeding has been rendered, such rights 'have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the reach of legislative power to affect.' Gilman v. Tucker, 128 N.Y. 190, at page 204, 28 N.E. 1040, 1044, 13 L.R.A. 304, 26 Am.St.Rep. 464. * * * The provisions of chapter 638 of the Laws of 1935, in so far as they purport to require turning over such servicing contracts made part of any final court order entered prior to May 1, 1935, deprive the guarantee corporation and the certificate holders, the real parties in interest, of their property without due process of law in conflict with article 1, § 6 of the Constitution of this state (Livingston v. Livingston, 173 N.Y. 377, 66 N.E. 123, 61 L.R.A. 800, 93 Am.St.Rep. 600; Gilman v. Tucker, supra; Germania Savings Bank of Kings County v. Village of Suspension Bridge, 159 N.Y. 362, 54 N.E. 33; Burch v. Newbury, 10 N.Y. 374) and are in conflict with the Fourteenth Amendment to the Constitution of the United States. Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866; Memphis v. United States ex rel. Brown, 97 U.S. 293, 24 L.Ed. 920; McCullough v. Virginia, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed. 382. Moreover, the aforesaid provisions of said amendment impair the obligations of contracts in violation of article 1, § 10, clause 1 of the Constitution of the United States. Delmas v. Merchants' Mut. Ins. Co., 14 Wall. 661, 81 U.S. [661], 20 L.Ed. 757; Red Rock v. Henry, 106 U.S. 596, 1 S.Ct. 434, 27 L.Ed. 251; County of Clay v. Society for Savings, 104 U.S. 579, 26 L.Ed. 856; Danolds v. State of New York, 89 N.Y. 36, 42 Am. Rep. 277; New York Sanitary Utilization Co. v. Department of Health, 61 App.Div. 106, 70 N.Y.S. 510; In re Cook, 86 App. Div. 586, 83 N.Y.S. 1009." This reasoning is directly applicable to the statute here involved.

The majority opinion attempts to distinguish this case on the ground that all that the New York case decided was that the Legislature could not take assets away from a new company set up pursuant to a court approved rehabilitation plan and turn them over to a state agency created as the result of an existing emergency. The point is that if the due process and contract clauses protect the parties to a court approved rehabilitation contract even in the face of an "emergency" alleged to exist by the Legislature, they certainly protect the parties when, as in the present case, no public interest is served by the impairment.

Construction of Section 1037(e)

Independently of the constitutional argument, section 1037(e) requires that there be court approval of any voting trust adopted pursuant to its provisions. There was no such approval of the present voting trust and it is, therefore, invalid.

Subsection (e) of section 1037 of the Insurance Code is but one of six subsections. The entire section enumerates the major powers of the commissioner when acting as conservator or liquidator. Subsection (d), which was part of the section long before subsection (e) was added in 1937, expressly provides "that no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of one thousand dollars without first obtaining permission of said court, and then only in accordance with such terms as said court may prescribe." Obviously, the relinquishment of legal title to all the capital stock of the new company for which the commissioner had paid $3,000,000 was a "transaction involving * * * personal property * * * where the market value of the property involved exceeds the sum of one thousand dollars. * * *" The majority opinion emphasizes that subdivision (e), dealing exclusively with voting trusts, has no provision for court approval. This is not conclusive. A separate provision for court approval in subdivision (e) would be redundant in view of the broad provisions of subsection (d). The section must be read in its entirety, and effect, if possible, be given to each part thereof. To give subsection (e) the interpretation given to it by the majority of this court is to read subsection (d) out of the section in one significant type of "transaction"—transfer of title to personal property by the creation of a voting trust.

Court approval of this voting trust is necessary for another reason. Subdivision (e) of section 1037 is a general provision dealing with the powers of the commissioner as conservator or liquidator. It does not deal specifically with reorganizations and rehabilitation agreements. The section permitting such agreements and the section under which the commissioner acted in executing the rehabilitation agreement here involved, is section 1043 of the Insurance Code. That section permits the commissioner, as conservator or liquidator "subject to the approval of said court" to enter into rehabilitation agreements. As already pointed out, the voting trust modified and altered the court approved rehabilitation plan. If a rehabilitation agreement requires court approval to be effective, any modification thereof requires court approval, for a modified plan is, in fact, a new and different plan. Any other construction would permit a material change in the rehabilitation plan without court approval and would thus nullify the requirement of court approval in the first instance. The majority opinion by construction reads the requirement for court approval out of section 1043.

A holding that the voting trust is invalid does not render void the actions of the board of directors elected by the voting trustees.

In the event this voting trust were held to be invalid it would not jeopardize the actions of the board of directors of the new company that had been elected by the voting trustees. There can be no doubt that the acts of the present board after their election are valid, even though the voting trust is void. Under our law the right to vote stock is dependent upon the records of the corporation, and since the voting trustees appeared in the books as shareholders, their right to vote the stock cannot be questioned. § 320a, Civil Code; Lawrence v. I. N. Parlier Estate Co., 15 Cal.2d 220, 100 P.2d 765; Los Angeles v. Owens River Canal Co., 120 Cal.App. 380, 7 P.2d 1064; Dedrick v. California Whaling Co., 16 Cal.App.2d 284, 60 P.2d 551. A stockholder not appearing on the books who asserts his right to vote must seek the aid of a court either to secure a statutory review of the election, or to secure a re-transfer of the stock to himself. § 315, Civ. Code; Moore v. Bowes, 8 Cal.2d 162, 64 P.2d 423; Bowes v. Superior Court, 13 Cal.App.2d 656, 57 P.2d 583; Los Angeles v. Owens River Canal Co., supra; Dedrick v. California Whaling Co., supra; Smith v. California Thorn Cordage, Inc., 129 Cal. App. 93, 18 P.2d 393; Lawrence v. I. N. Parlier Estate Co., supra. Even if it be assumed that the particular election of the board of directors by the voting trustees was invalid, they are at least *de facto* officers of the corporation, and have the same powers as a *de jure* board. No attack can be successfully made on their corporate acts or on their status by collateral action. See cases collected 6A Cal.Jur. 1068, et seq.; Storrs v. Belmont Gold Min. & Mill. Co., 24 Cal.App.2d 551, 76 P.2d 197; Farbstein v. Pacific Oil Tool Co., Ltd., 127 Cal.App. 157, 15 P.2d 766; Consumers Salt Co. v. Riggins, 208 Cal. 537, 282 P. 954; 2 Fletcher, Cyclopedia of Private Corporations (1931), p. 142, et seq.; Stevens on Corporations (1936), p. 618, et seq.; California Corporation Laws (1938 Ed.) by Ballantine, p. 90, § 82. Thus no argument of expediency can justify the interpretation given the section in the majority opinion.

The judgment should be reversed.

TRAYNOR, J., concurred.

Rehearing denied; TRAYNOR, J., and PETERS, J. pro tem., dissenting.

22 Cal.2d 386

CAMINETTI, Insurance Commissioner, v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

L. A. 17680.

Supreme Court of California.

June 25, 1943.

Rehearing Denied July 22, 1943.

1. Judges 🔑53

The legislature has power to permit a waiver of disqualification of judges.

2. Judges 🔑53

Under statute relating to disqualification of judges which was amended to provide that disqualification must be urged at earliest practicable opportunity failure to act at earliest practicable opportunity constitutes a "waiver" of the disqualification. Code Civ.Proc. § 170, subds. 2–5.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

3. Judges 🔑54

Where parties aware of disqualification of judge to try separate statutory and equity proceedings to set aside transfer of stock to voting trust because of sister's ownership of stock joined in a written stipulation waiving the disqualification in the equity action, and failed to challenge judge's qualification to preside in the statutory action until three months after discovery of disqualification, and after adverse ruling, under statute providing that disqualification must be urged at earliest practicable opportunity disqualification of judge was waived. Code Civ.Proc. § 170, subd. 2–5.

PETERS, J. pro tem., and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceedings by A. Caminetti, Jr., as insurance commissioner, etc., and by William H. Neblett and others against Pacific Mutual Life Insurance Company of California, a corporation, and others to set aside a voting trust. From an order denying a motion to vacate orders refusing to set aside voting trust, William H. Neblett and others appeal.

Affirmed.

Wm. H. Neblett in pro. per., Josiah Brill, E. Walter Guthrie, and James P. Nunnelley, all of Los Angeles, E. W. Miller, of San Diego, and Vernon Bettin and Alfred F. MacDonald, both of Los Angeles, for appellants.

Mitchell, Silberberg, Roth & Knupp, Eugene P. Fay, and Peery Price, all of Los Angeles, for petitioner.

Overton, Lyman & Plumb, Donald H. Ford, Lyman P. Robertson, Cosgrove & O'Neil, and John N. Cramer, all of Los Angeles, for respondents.

Hobson & Garrett, J. M. Mannon, Jr., and Harold A. Black, all of Los Angeles, for voting trustees.

GIBSON, Chief Justice.

This is an appeal from an order refusing to vacate certain orders affirmed in a companion case decided herewith (Caminetti v. Pacific Mutual Life Ins. Co. of California, Cal.Sup., 139 P.2d 908, all of which orders were made by the Superior Court of Los Angeles County in a statutory proceeding involving the Pacific Mutual Life Insurance Company of California.

As more fully appears in the companion case, Cal.Sup., 139 P.2d 908, in accordance with a plan of rehabilitation of the Pacific Mutual Life Insurance Company of California, a new company known as the Pacific Mutual Life Insurance Company was organized and its entire stock was held by the then insurance commissioner. Later, however, the stock of the new company was transferred by a voting trust agreement to five persons named therein as voting trustees. When the present commissioner succeeded to the office he sought an order invalidating the voting trust agreement. The appellants, Neblett and others, also sought similar relief by motion. On May 8, 1940, the superior court, Judge Vickers presiding, denied both motions. Appellants Neblett, et al., thereupon moved to vacate the above orders on the ground that Judge Vickers was disqualified by reason of relationship to a party, and upon other grounds relating to the jurisdiction of the court. The motion to vacate was heard before a different judge and was denied on June 3, 1940. In the companion case this day filed, Cal.Sup., 139 P.2d 908, we have affirmed the orders made by Judge Vickers denying the motions of the commissioner and of Neblett, et al., to set aside the voting trust agreement. In the present appeal, appellants Neblett, et al., challenge the order denying their motion to vacate Judge Vickers' orders because of his alleged disqualification.

In denying the motion to vacate the orders refusing to set aside the voting trust, the court refrained from determining whether Judge Vickers was disqualified to make such orders and found that such disqualification, if any existed, had been waived by the appellants.

Whether the disqualification was waived turns upon the construction and application to be given to section 170 of the Code of Civil Procedure. The section provides in part that "No justice, judge or justice of the peace shall sit or act as such in any action or proceeding: 1. * * * To which he is a party; or in which he is interested other than as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation; 2. In which he is interested as a holder or owner of any capital stock of a corporation, or of any bond, note or other security issued by a corporation; 3. * * * *When he is related to either party,* or to an officer of a corporation, which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity within the third degree * * *; provided, however, that if the parties appearing in the action and not then in default * * * or the attorney for any of the above named, or the party or his attorney in all other or special proceedings, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification mentioned in this subdivision or in

Subdivisions 2 or 4 hereof, the judge or court may proceed with the trial or hearing and the performance of all other duties connected therewith with the same legal effect as if no such disqualification existed * * *." (Italics added.) Subdivision 4 of section 170 disqualifies a judge who has been an attorney for any party and subdivision 5 a judge who is biased or prejudiced.

Prior to and at the time of making the orders refusing to set aside the voting trust, which orders are here sought to be vacated, there also was pending before Judge Vickers an independent action in equity brought by Neblett and others to vacate and set aside all orders theretofore made in this, the statutory proceeding. The equity action (Neblett v. Pacific Mutual Life Ins. Co., Cal.Sup., 139 P.2d 934, this day decided, likewise challenged the legality of the voting trust. On February 14, 1940, during trial of that action, Judge Vickers announced that he had discovered that his sister was a stockholder in Pacific Mutual. Two days thereafter the parties filed a written stipulation *in the equity action* waiving any disqualification of Judge Vickers arising under subdivisions 2, 3, 4, or 5 of section 170, supra. The trial of that action was resumed and on March 12, 1940, Judge Vickers delivered an oral opinion in favor of the defendants therein upon all issues except validity of the voting trust, the latter issue having been reserved by agreement of the parties to be tried with the same issue in this statutory proceeding. Thereupon Judge Vickers heard together all matters urged in the equity action and in this proceeding pertaining to the validity of the voting trust. On May 8, 1940, as stated above, he entered herein the orders refusing to set aside the voting trust, affirmed 139 P.2d 908, and on the following day appellants filed their motion to vacate based on disqualification and other grounds. It appears to be conceded for the purposes of this appeal that Judge Vickers' sister, by reason of stock ownership, was a party to the proceeding pending before him within the meaning of subdivision 3 of section 170, supra. Judge Vickers was therefore disqualified, and the orders of May 8 must be vacated unless appellants have waived and are now estopped to assert the disqualification.

In 1927, St.1927, p. 1403, section 170, supra, was amended to provide that "The statement of a party objecting to the judge, on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge." Appellants did not raise the question of disqualification until May 9, 1940, the day following the adverse orders refusing to set aside the voting trust, although they were aware of the ground of disqualification on February, 14, 1940, which was approximately one month before the start of hearings on validity of the voting trust and some three months before the orders were made. It is contended, however, that regardless of the 1927 amendment there can be no estoppel to show that a judge is disqualified, that the filing of a written stipulation in the action constitutes the exclusive method of waiver, and that in the absence of such a waiver all decisions and orders of a disqualified judge are void. Appellants also assert that they are not bound in this proceeding by the written waiver they filed in the equity action.

[1] The power of the Legislature to permit a waiver of disqualification cannot be questioned. The Constitution does not prevent the exercise of such power, and reasonable legislative regulations with respect to disqualification of judges have been approved by the courts. See Austin v. Lambert, 11 Cal.2d 73, 75, 77 P.2d 849, 115 A.L.R. 849; Daigh v. Shaffer, 23 Cal. App.2d 449, 455, 73 P.2d 927. None of the cases cited by appellants indicates that disqualification arising under subdivision 3 of section 170 cannot be waived by failure to urge it at the "earliest practicable opportunity" as required by the 1927 amendment of the section. Three of the cases, decided before enactment of the amendment, hold that a judgment rendered by a judge disqualified because of *personal interest under subdivision 1* of section 170, which, as distinguished from subdivision 3, contains no provision permitting a written waiver, is invalid, and that no waiver or estoppel by conduct could arise under *that subdivision.* Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084, 48 A.L.R. 610. These decisions are based upon the theory that the subdivision relating

to a personal interest of a judge in litigation was intended to protect the state and judiciary as well as the parties to the suit and that therefore a waiver of the provision by a party is immaterial. The reasons of policy there relied upon can have no application to a disqualification arising under subdivision 3 of the section, as the Legislature has declared therein that the parties may avoid its operation by filing a written waiver or consent.

The cases of Briggs v. Superior Court, 215 Cal. 336, 10 P.2d 1003; Giometti v. Etienne, 219 Cal. 687, 28 P.2d 913, and Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 323, 324, 74 P.2d 761, did not involve questions of waiver, estoppel or construction of that part of the 1927 amendment with which we are here concerned. The decision in Johnson v. German American Ins. Co., 150 Cal. 336, 88 P. 985, was based upon the statute as it existed before waiver by written stipulation was permitted. The case of Cadenasso v. Bank of Italy, 214 Cal. 562, 6 P.2d 944, also relied on by appellants, is distinguishable because the disqualification there involved arose under subdivision 1 of the section and was not discovered until after trial of the action, whereupon the parties took steps to have the judgment vacated at the first opportunity. Thus, the effect of that part of the 1927 amendment here involved was there left undecided. Similarly, in Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 61 P.2d 931, the effect of the 1927 amendment upon subdivision I was left open. No case has been cited or found that renders the amendment inapplicable to subdivision 3.

[2] While the 1927 amendment does not specify in so many words a penalty for failure to urge disqualification at the "earliest practicable opportunity," the intention is clear that failure to comply with the provision constitutes a waiver. Any other construction would render the amendment ineffective. Appellants cite Emerson v. Superior Court, 7 Cal.2d 685, 62 P.2d 363, and other cases, to the effect that a waiver by conduct of equitable estoppel may not be urged as a substitute for a statutory requirement of a written stipulation. These cases are inapplicable, since the 1927 amendment affords an additional statutory means by which a disqualification arising under subdivision 3 of section 170 may be waived, viz., failure to urge such disqualification at the "earliest practicable opportunity."

As stated above, appellants were aware of Judge Vickers' alleged disqualification on February 14, 1940, at which time they joined in a written stipulation waiving such disqualification in the equity action. Appellants failed to challenge Judge Vickers' qualification to preside in this companion statutory proceeding, pending contemporaneously with the equity action, until some three months after discovery of the fact underlying the disqualification and then only after Judge Vickers had ruled adversely to them in denying their motion to set aside the voting trust. The 1927 amendment was aimed at such dilatory tactics.

[3] Appellants cannot excuse their delay in urging Judge Vickers' disqualification by contending that until May 20, 1940, they were unaware that his sister had given proxies to stockholders' committees, one of which had intervened. The record shows that before appellants assertedly first learned of the proxies they had filed a verified statement of disqualification alleging that Judge Vickers' sister "is now and has been at all times since July 22, 1936, a party to the within proceeding." In support of their motion they had urged that "all stockholders are parties to the proceeding." The record also discloses that the stockholders' committee intervened before February 14, 1940, when appellants first learned that the judge's sister was a stockholder, and they could have ascertained at that time that she was one of the stockholders represented by the committee That they were not disturbed by her ownership of stock is, of course, evidenced by the stipulation filed in the equity action two days later specifically waiving any such disqualification.

Under all the circumstances, the following from the concurring opinion in the Lindsay-Strathmore case, supra [182 Cal. 315, 187 P. 1065], appears appropriate: "It would seem * * * intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not." We conclude, therefore, that appellants did not present their objection at the "earliest practicable opportunity" as required by section 170, supra, and that any disqualification of Judge Vickers was waived by their failure to comply with the provisions of the statute.

Others grounds relating to the jurisdiction of the court to make the orders of May 8 have been decided adversely to appellants in the companion case, Cal.Sup., 139 P.2d 908.

The order is affirmed.

SHENK and CURTIS, JJ., and SPENCE, J. pro tem., concurred.

PETERS, Justice pro tem. (dissenting).

I dissent. I agree with the holding of the majority that Judge Vickers was not disqualified. The motion to vacate was properly denied on that ground, but should have been granted for the reasons set forth in full in the dissent in Caminetti v. Pacific Mut. Life Ins. Co. (Neblett), supra, Cal. Sup., 139 P.2d 921, this day filed.

TRAYNOR, J., concurred.

Rehearing denied; TRAYNOR, J., and PETERS, J., pro tem., dissenting.

22 Cal.2d 393

NEBLETT et al. v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.

L. A. 17995, 18008.

Supreme Court of California.

June 25, 1943.

Rehearing Denied July 22, 1943.

1. Judgment 🔑443(1, 3)

A final judgment may not be attacked in equity for fraud unless the alleged fraud is extrinsic or collateral, such as where an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein.

2. Insurance 🔑44

Where stockholders and policyholders of old insurance company in statutory rehabilitation proceeding knew of alleged conspiracy and false representations of insolvency which led to rehabilitation agreement, had notice of hearings upon petition for approval of rehabilitation agreement and were represented in court, they were not prevented from fully litigating the question of insolvency so as to establish extrinsic fraud as ground for setting aside orders in the proceeding.

3. Trial 🔑45(1)

In action to set aside orders in statutory proceeding for rehabilitation of insurance company on ground of fraud in instituting statutory proceeding, wherein pleadings disclosed policyholders' knowledge of alleged fraud and there was no explanation of failure to fully litigate issue, offers of proof which did not tend to show that defendants had prevented policyholders from proving the alleged collusion and fraud were properly rejected.

4. Insurance 🔑44

Notice to stockholders and policyholders of order appointing insurance commissioner conservator of insurance company was not essential to validity of proceeding.

5. Insurance 🔑44

Order appointing insurance commissioner conservator of insurance company was not subject to attack for fraud unless subsequent order approving acts of commissioner were first set aside for fraud.

6. Trial 🔑59(2)

In action to set aside orders in statutory rehabilitation proceeding for fraud, trial court properly permitted placing in evidence a printed copy of judgment roll used on appeal from an order approving acts of insurance commissioner as conservator, as against objection that offer was premature, under statute providing that the order of proof is in the sound discretion of the trial court. Code Civ.Proc. § 2042.

7. Appeal and error 🔑1052(2)

Objection that transcript of related appeal was incomplete became immaterial when trial court permitted copies of omitted orders to be placed in evidence.

8. Appeal and error 🔑1052(2)

Where transcript of judgment roll used in related appeal was certified by clerk of Supreme Court as true copy of original transcript which theretofore had been certified by clerk of trial court in related appeal, error, if any, in admitting transcript was not prejudicial.

9. Insurance 🔑44

Where record showed that issue of insolvency or hazardous financial condition of insurance company seized by insurance commissioner for rehabilitation purposes was in fact litigated, orders in statutory proceeding for rehabilitation of insurance company were not void on the ground of absence of jurisdictional fact of insolvency.

10. Insurance ⚷44

In action to set aside orders in statutory proceeding for rehabilitation of insurance company based on insolvency of company, amended answers alleging a good will value of approximately one-third of value alleged in original answer and that good will value did not constitute assets for purpose of determining solvency did not constitute admission of solvency so as to permit setting aside orders.

11. Insurance ⚷44

Fact of ownership by insurance commissioner of policies in delinquent insurer did not disqualify commissioner from transferring stock of company organized for rehabilitation purposes to voting trust. Pol.Code, §§ 920, 922; St.1935, pp. 547, 773, §§ 1043, 12901; St.1941, p. 2935, § 12901.

12. Insurance ⚷44

Pendency of appeals in statutory proceeding for rehabilitation of insurance company did not suspend trial court's jurisdiction to enter judgment in action to set aside orders in statutory proceeding, where no abatement or continuance was sought in the later action.

13. Abatement and revival ⚷16

Pendency of an appeal in one action is not a bar to the maintenance of a second action raising similar issues if no abatement or continuance is sought at trial of the second action.

14. Judgment ⚷9

Where parties to proceedings to set aside orders in statutory rehabilitation proceeding stipulated to waiver of disqualification of judge whose sister owned stock in delinquent insurer under statute relating to disqualification of judges, and waiver was not specifically limited to ownership by sister of stock, unawareness of plaintiff when signing stipulation that sister was a member of two stockholders' committees, one of which was a party to proceedings to set aside orders, did not render judgment void. Code Civ.Proc. § 170, subds. 2–5.

15. Judges ⚷51(4)

In action to set aside orders in statutory proceeding for rehabilitation of insurance company, trial court properly granted a motion to strike statement of disqualification where statement disclosed on its face that it was without substance.

16. Judges ⚷51(4)

A judge has no jurisdiction to pass upon his own disqualification, but where the statement of disqualification is legally insufficient, he may disregard it or strike it from the record.

PETERS, J. pro tem., and TRAYNOR, J., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by William H. Neblett and others against the Pacific Mutual Life Insurance Company of California and others to annul on grounds of extrinsic fraud orders made on a statutory proceeding by which the insurance commissioner took over assets of an insurance company. From a judgment for certain defendants, plaintiffs appeal.

Affirmed.

Wm. H. Neblett in pro. per., Josiah Brill, both of Los Angeles, E. W. Miller, of San Diego, and Vernon Bettin and Alfred F. MacDonald, both of Los Angeles, for appellant Neblett et al.

Earl Warren, Atty. Gen., and Mitchell, Silberberg, Roth & Knupp and Peery Price, all of Los Angeles, for appellant Insurance Commissioner.

Overton, Lyman & Plumb, Donald H. Ford, Cosgrove & O'Neil, John N. Cramer, Edward R. Young, J. M. Mannon, Jr., Harold A. Black, Burnham Enersen, Hobson & Garrett, Finlayson, Bennett & Morrow, Gibson, Dunn & Crutcher, and Harry F. Prince, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

This appeal presents another phase of the protracted litigation which has followed the seizure of the business and assets of the Pacific Mutual Life Insurance Company of California by the insurance commissioner for purposes of rehabilitation or liquidation. Since that time the legality of the seizure, the lawfulness of the plan of rehabilitation through organization of a new company, the propriety of an order providing for liquidation of the old company, and the validity of a voting trust agreement under which the stock of the new company was transferred from the commissioner to five voting trustees, have been upheld in a sequence of decisions on appeal. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, affirmed in Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182; Id., 13 Cal.2d 306, 89 P.2d 637; Id., 14 Cal.2d 704, 711, 96 P.2d 796; Caminetti v. Pacific Mutual Life Ins. Co., Cal.Sup., 139 P.2d 908, and Id., Cal.Sup., 139 P.2d 930, this day filed. All prior attacks were made in the statutory proceeding. The present appeal, however, arises out of a contemporaneous, independent action in equity in which certain policyholders and stockholders of the old company seek to annul all orders and steps taken in that proceeding. After an extended trial, judgment went against plaintiffs and they noticed an appeal. The separate appeal of the commissioner from that portion of the judgment sustaining the validity of the voting trust is controlled and determined by our decision in Caminetti v. Pacific Mutual Life Ins. Co., 139 P.2d 908. That decision is also determinative of all questions raised by plaintiffs with respect to validity of the voting trust.

[1, 2] Plaintiffs' principal contention is that all orders in the statutory proceeding should be set aside for fraud. It is well settled that a final judgment may not be attacked in equity upon this ground unless the alleged fraud is extrinsic or collateral, such as where "an unsuccessful party to an action has been kept in ignorance thereof * * * or has been prevented from fully participating therein." Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107; see, also, Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605. In an effort to bring the present action within this rule plaintiffs urge that certain of the defendants conspired to deprive them of their rights in the assets of the old company by falsely declaring it insolvent and instituting the statutory proceeding wherein court approval was obtained of the commissioner's acts and the rehabilitation plan, and that the stockholders and policyholders were prevented from showing in the statutory proceeding the facts as to the conspiracy and lack of insolvency of the old company.

Portions of the record in the statutory proceeding were introduced upon the trial of this cause. It appears therefrom that the alleged conspiracy and false representations of insolvency here relied on were advanced in that proceeding by plaintiffs herein and other intervening stockholders and policyholders, including appellant Neblett, and were presented to the court on October 8, 1936. Certain of the policyholders and stockholders, however, then withdrew all objections on these grounds. Neblett and others produced no evidence of fraud and conspiracy in support of their objections, which were rejected by the court upon motion of the commissioner. The order of December 4, 1936, approving the rehabilitation agreement and all acts of the commissioner, recites that the court had considered all objections and had afforded full opportunity to all persons to be heard. Even if we were to accept plaintiffs' contention that the issues had been completely withdrawn from the statutory proceeding and that absence of fraud was not a necessary incident to the matters determined by the order of December 4, 1936, it would avail them nothing. The record therein shows that the plaintiffs then knew of the alleged conspiracy and false representations of insolvency, that they had notice of the hearings upon the petition for approval of the rehabilitation agreement, and, further, that they were represented in court. It follows that they were not prevented from fully litigating these matters, and the trial court herein correctly concluded that plaintiffs did not establish extrinsic fraud. (See 3 Freeman on Judgments, 5th Ed. 1925, 2533, § 1218).

[3] Nor do we find any error in the rulings of the trial court in rejecting certain offers of proof directed to the fraud issue. These offers did not tend to show that defendants had prevented plaintiffs from proving the alleged collusion and fraud in the statutory proceeding. And no effort is made to explain the fact that the pleadings in that proceeding disclose that plaintiffs then knew of the alleged fraud, nor do they explain the failure to there fully litigate the issue. Hammell

v. Britton, supra, 19 Cal.2d at page 80, 119 P.2d 333. It must be concluded therefore that no prejudice resulted from the rulings.

[4, 5] Plaintiffs cannot make out a case of extrinsic fraud by asserting that the order of August 11, 1936, appointing the commissioner conservator, was obtained by collusion and false representation and without notice to the stockholders or policyholders. Notice thereof was not essential (Carpenter v. Pacific Mutual Life Ins. Co., 13 Cal.2d 306, 89 P.2d 637), and the order was merely preliminary to the order of December 4, 1936, in which the acts of the commissioner were approved (see Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 323, 74 P.2d 761), and it is not subject to attack unless the latter order is first set aside for fraud.

[6-8] We find no error in the ruling permitting defendants to place in evidence a printed copy of the judgment roll used on the appeal from the order of December 4, 1936. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761. Plaintiffs' objection that the offer was premature is disposed of by a reference to section 2042 of the Code of Civil Procedure which provides that the order of proof is in the sound discretion of the trial court. The objection that the transcript was incomplete became immaterial when the trial court permitted plaintiffs to place in evidence copies of the omitted orders. Equally without merit is plaintiffs' contention that the transcript was not properly certified. Examination discloses that it was certified by the clerk of this court as a true copy of the original transcript which theretofore had been certified by the clerk of the trial court, and the error, if any, in admitting it in this form was not prejudicial.

[9] There is no merit in plaintiffs' contention that all orders in the statutory proceeding are void because of the absence of a jurisdictional fact, namely, insolvency or hazardous financial condition of the old company when seized in 1936. Contrary to plaintiffs' argument, the transcript of that proceeding discloses that the issue was there raised and litigated. The initial petition under which the commissioner was appointed conservator alleged insolvency, and the petition for approval of the rehabilitation agreement and of all acts of the commissioner alleged that further transaction of business by the company would be hazardous. The pleadings and objections in opposition thereto alleged solvency of the old company. Evidence was adduced upon the matter, and, finally, the order of December 4, 1936, recited that at the time of its seizure the old company was in such condition that further transaction of business would be hazardous to all concerned. The issue of insolvency was not removed from the statutory proceeding, as contended by plaintiffs, by reason of orders made therein on September 25 and October 8, 1936. The order of September 25, together with a petition filed on the same day, was but a means of amending the petition to approve the rehabilitation agreement and does not evidence an intent to remove the insolvency issue. The order of October 8 merely corrected a prior order nunc pro tunc to conform to the facts by indicating that the issue had not then been determined by the court. The record in the statutory proceeding discloses that the issue was in fact litigated. Cf. Carpenter v. Pacific Mutual Life Ins. Co., 13 Cal.2d 306, 315, 89 P.2d 637.

[10] It is claimed that defendant's answers herein admit the company was solvent, thus bringing this case within the rule that where a party admits facts showing invalidity of a judgment valid on its face it must be set aside. Akley v. Bassett, 189 Cal. 625, 630-639, 209 P. 576; Thompson v. Cook, 20 Cal.2d 564, 569-573, 127 P.2d 909. As originally filed the answers alleged a good will or going concern value but made no mention of the company's liabilities which may have been greater. As amended, the answers alleged that these intangibles were worth approximately one-third of the value first alleged and that they did not constitute assets for the purpose of determining solvency, hazardous condition, etc. It is clear, therefore, that the amended answers do not constitute admissions of solvency.

[11] The contention that ownership of policies in the company by the former commissioner invalidated the rehabilitation agreement is completely answered by our holding in Caminetti v. Pacific Mutual Life Insurance Co., 139 P.2d 908, disposing of a similar attack upon the validity of the voting trust.

[12, 13] Plaintiffs contend that the pendency of appeals in the statutory proceeding served to suspend or terminate the

trial court's jurisdiction to enter the judgment in this action. The cases cited by plaintiffs are distinguishable in that they relate to the suspension of a trial court's jurisdiction in the *same* case in which the appeal was pending. Pendency of an appeal in one action is not a bar to the maintenance of a second action raising similar issues if, as here, no abatement or continuance is sought at trial of the second action. Pellissier v. Title Guarantee etc. Co., 208 Cal. 172, 280 P. 947.

[14] Finally, plaintiffs urge that the judgment is void because entered by a judge who was disqualified by relationship to one of the parties. There is no merit in this contention. Shortly after commencement of the trial the judge announced that he had discovered that his sister owned stock in the old company. Two days thereafter the parties signed and filed a stipulation waiving any disqualification of the judge "which may now exist under subdivisions 2, 3, 4 or 5 of section 170 of the Code of Civil Procedure, or which may arise under those subdivisions * * * specifically including but not limited to, the ownership by his sister of stock" in the company. Plaintiffs attempt to escape the effect of the stipulation by stating that when signed they were unaware that the judge's sister was a "member" of two stockholders' committees, one of which is a party herein. A similar contention was determined adversely in Caminetti v. Pacific Mutual Life Insurance Co., Cal. Sup., 139 P. 2d 930.

The terms of the stipulation are sufficiently broad to embrace any disqualification resulting from such stock ownership, including the sister's participation in the activities of the stockholders' committee. And, as must have been known by plaintiffs, the committee was a party of record at the time the stipulation was signed.

[15, 16] Nor do we find any error in the trial court's action granting a motion to strike the statement of disqualification. It is true a judge has no jurisdiction to pass upon his own disqualification, but where the statement of disqualification is legally insufficient and is based on frivolous grounds, he may disregard it or strike it from the record. People v. Hooper, 16 Cal.App.2d 704, 61 P.2d 370; People v. Sweet, 19 Cal.App.2d 392, 65 P.2d 899; Ephraim v. Superior Court, 42 Cal.App.2d 578, 109 P.2d 378. The statement of disqualification filed in this case recited the stipulation above referred to and disclosed on its face that it was without substance. The trial judge therefore properly granted the motion to strike the statement of disqualification.

The judgment is affirmed.

SHENK and CURTIS, JJ., and SPENCE, J. pro tem., concurred.

PETERS, Justice pro tem. (dissenting).

I dissent.

By this independent action in equity certain policyholders and stockholders of the Pacific Mutual Life Insurance Company of California seek to annul, on the ground of extrinsic fraud, all orders made in the statutory proceeding by which the commissioner took over the assets of that company and sought to rehabilitate it. These plaintiffs appeal from the judgment upholding all of such orders. The commissioner separately appeals from that portion of the judgment sustaining the validity of the orders relating to the voting trust fully discussed in Caminetti v. Pacific Mutual Life Ins. Co. (Neblett), Cal.Sup., 139 P.2d 908. I agree with the majority opinion insofar as it affirms the judgment holding that none of the orders was affected by extrinsic fraud. I disagree with that opinion insofar as it affirms that portion of the judgment upholding the orders relating to the voting trust. For reasons fully stated in the dissent in Caminetti v. Pacific Mutual Life Ins. Co. (Neblett), supra, 139 P.2d 921, that portion of the judgment should be reversed.

TRAYNOR, J., concurred.

Rehearing denied; TRAYNOR, J., and PETERS, J. pro tem., dissenting.

22 Cal.2d 531

TIFFANY v. SHORT et al.

L. A. 18415.

Supreme Court of California.

July 15, 1943.

1. Appeal and error ⚷1008(1)

In plaintiff partner's action for dissolution of partnership and for an accounting, wherein defendant partner filed cross-complaint seeking rescission of contract on ground of plaintiff's fraud in the inducement, evidence on issue of fraud was for trial court.

2. Joint adventures ⚷4(4)

On dissolution of joint venture, in absence of express agreement to contract, person advancing capital is entitled to its return before there is a division of income or profits.

3. Partnership ⚷333

Where there was no specific agreement regarding division of assets on dissolution of partnership, advances of one partner were "debts" of the firm, so that a division and distribution into equal parts before return of capital all of which had been advanced by one partner would be improper.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt".

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Frank Emery Tiffany against George A. Short and others for dissolution of a partnership, for an accounting, and for appointment of a receiver, wherein the defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Judgment modified, and as modified, affirmed.

For prior opinion of District Court of Appeal, see 131 P.2d 627.

Allan J. Carter and Carroll Weberg, both of Pamona, for appellants.

Stead & Boileau and Chas. R. Stead, all of Pamona, for respondent.

SHENK, Justice.

The plaintiff commenced this action for the dissolution of a partnership, for an accounting and for the appointment of a receiver. Defendants filed a cross-complaint seeking rescission of the contract. The court decreed a dissolution of the partnership, and made an order settling the account. On their appeal the defendants contend that the evidence supports the issue raised by their cross-complaint and that the trial court erred in finding that fraud was not committed by the plaintiff. They also urge error in the trial court's division of the assets of the partnership upon dissolution.

On February 17, 1940, the plaintiff, Tiffany, and the defendants Short and Hill, entered into a written "Joint Venture Agreement" for the production and sale of an ultraviolet ray device designed to "prevent and cure and alleviate deafness." The device had been developed by Tiffany and he was to supervise its manufacture in his own laboratory. Short was to advance sums from time to time to carry on the work. Hill was to assist with the sale of the product. The "Net income" was to be shared equally by the parties. Short advanced $2,060 before the dissension arose, which was about four months after the agreement had been signed and work on the enterprise had commenced. In June Hill asked Tiffany for an accounting. The request was not complied with. Tiffany suggested a purchase by him of the interests of Short and Hill for $2,060 plus interest at 7% from March 1, 1940. Tiffany was given an option to purchase until August 20, 1940. The option was not exercised. Negotiations continued until some time in March, 1941, when counsel for Hill and Short demanded an accounting. Tiffany thereupon filed the present action.

The defendants contend that they are entitled to a rescission not only on the ground of fraud but on the additional ground of failure of consideration. They charged fraud in that Tiffany had represented that the instrument or device was already perfected and would be demonstrated at the Hard of Hearing Congress in June 1940, but that no such demonstration was made; that he would obtain Letters Patent covering the ultra-violet ray device, but that no steps were taken to that end; that certain tools were his own property which he had in fact purchased with partnership funds; and that he claimed to have paid prices for tubes and transformers higher than he actually paid. Tiffany's account charged the joint venture with an expenditure of $750 during the first five months of operations for rental of his own laboratory and for his own services. The written agreement did not provide for those items. There was evidence that one of the devices had been sold, but that it was not manufactured from partnership materials. The manufacture of five or six other sets had been completed.

[1] The evidence on the issue of fraud was in substantial conflict. It was therefore an issue for the trial court to determine. It found that there was no fraud in the inducement of the contract and concluded that the defendants were not entitled to rescission.

There is merit in the defendants' contention that the court's division of assets was erroneous. It was found that of the $2,060 advanced by Short, the plaintiff had paid out $1,506.04 with authority, and was chargeable with a balance of $553.96 as unauthorized expenditures, but that the latter expenditures had not been made with fraudulent intent. The court rendered judgment in favor of the defendants for $369.47, a two-thirds share of the $553.96 and allowed the plaintiff to retain one-third thereof. The court appointed a receiver to sell the assets of the partnership and ordered distribution of the proceeds one-third to each party.

[2, 3] The trial court found that the agreement was a joint venture. The general rule applicable to dissolution in such cases is that in the absence of an express agreement to the contrary, the person advancing capital is entitled to its return before there is a division of income or profits. The rule is stated in 47 Corpus Juris 1172, section 861 as follows: "Upon dissolution of a firm the capital remaining after payment of the debts should be divided in accordance with the respective interests of the partners. While it has been said that, in the absence of any evidence showing a contrary intent, capital will be divided equally the general rule is that each partner is entitled to the amount of capital that he contributed, this being regarded as a debt of the firm to be repaid in whole if the firm assets are sufficient, and pro rata if firm assets are insufficient." It is further stated (page 1173) that a partner contributing only services is ordinarily not entitled to a share of capital on dissolution. See also 47 C.J. 1163-1164, secs. 848, 849; 30 Am. Jur. 690, 704, secs. 27, 51, and cases cited. The decision in Guldstrand v. Johnson, Carvell & Murphy (a corporation), 37 Cal. App.2d 610, 99 P.2d 1065, is in accord with this general rule. That was an action for an accounting in a joint venture. The trial court found that the defendant by the terms of the agreement was to furnish the capital necessary to make all purchases of stock and materials and that it was not entitled to a refund of the money spent for that purpose. On appeal the judgment was reversed. The reviewing court concluded from the terms of the agreement and the statements rendered in the previous four and one-half years' business that the funds were to be considered as an advance, and that therefore the defendant was to receive credit and be reimbursed for such expenditures. Since the amount remaining was insufficient to reimburse the defendant, plaintiff recovered nothing. In the present case there was no specific agreement as to division of assets upon dissolution. Therefore a division and distribution into equal parts before the return of capital, all of which had been advanced by one partner, would be improper. None of the manufactured devices had been distributed by the partnership. There had been no sales. It is clear from the terms of the agreement that the funds furnished by defendant Short were in the nature of advances, since they were to be furnished by him "until such time as the revenues and net income from the above-mentioned enterprises shall suffice to make further investment unnecessary." On dissolution the profits could be measured only after Short had been reimbursed. There was no agreement to the contrary and his advancements were therefore a debt of the firm.

The judgment should be and it is hereby modified to provide that, in lieu of the present provision relating to money judgment and division of proceeds from the sale of assets, the defendant George A. Short is entitled to the sum of $553.96 as against the plaintiff Tiffany; that the receiver shall proceed to sell the assets of the partnership and apply the proceeds first to the payment of the sum of $1,506.04 to the defendant Short, and that any remaining proceeds be distributed one-third to each of the parties, the one-third share of the plaintiff to be applied on the judgment of $553.96 in favor of the defendant Short until such judgment is satisfied.

As so modified, the judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

22 Cal.2d 436

HUMPHREYS v. SAN FRANCISCO AREA COUNCIL, BOY SCOUTS OF AMERICA, et al.

S. F. 16860.

Supreme Court of California.
July 8, 1943.

As Amended on Denial of Rehearing
Aug. 5, 1943.

1. Automobiles 🔑181(2)

The designations "passenger" and "guest" have been adopted for purpose of distinguishing person giving compensation for vehicle ride from one carried gratuituously within statute providing that no person has right of action against vehicle driver for injury to or death of person accepting ride in vehicle without giving compensation therefor, unless injury or death proximately resulted from driver's intoxication or willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest" and "Passenger".

2. Automobiles 🔑181(2)

Though benefits or considerations other than cash or its equivalent may be "compensation" within provision of Vehicle Code, that no person has right of action against vehicle driver for injury to or death of person accepting ride in vehicle as guest without giving compensation therefor, unless injury or death proximately resulted from driver's intoxication or willful misconduct, no compensation is given if transportation is intended and received as mere gratuity. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

3. Appeal and error 🔑1008(1)

Whether transportation of person in automobile is intended and received as mere gratuity, so as to preclude recovery of damages from driver for injury to or death of such person under automobile guest statute, is question for trier of facts on proper evidence. Vehicle Code, § 403, St.1935, p. 154.

4. Automobiles 🔑245(24)

A privilege, extended to boy scout camp junior staff members, to ride on scout council's truck between camp and nearby city, *held* not, as matter of law, an inducement to their employment or otherwise part of business relationship, rather than gratuity, under evidence in action against council for death of one of such members from injuries sustained while riding on such truck. Vehicle Code, § 403, St.1935, p. 154.

5. Automobiles 🔑181(1, 2)
Master and servant 🔑88(1)

A boy scout, enjoying vacation, paid for partly by services performed by him as junior staff member at boy scout camp conducted by scout council, was not mere "employee" of council, so that it was not liable for death of such scout from injuries sustained while riding in council's truck between camp and nearby city on personal mission.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

6. Automobiles 🔑245(24)

That truck of boy scout council was maintained in part for purpose of permitting staff members to ride thereon to and from camp did not require court to conclude as a matter of law that compensation was given for the ride of a boy scout serving as a junior staff member so as to permit recovery for his death while riding on the truck.

7. Automobiles 🔑244(20)

In action against boy scout council for death of boy scout, serving as junior staff member at scout camp, as result of injuries sustained while riding in defendant's truck from camp to nearby city on personal mission, evidence *held* to justify trial court's conclusions that permission given such members to ride on truck to and from camp was a gratuity and that deceased was a "guest without giving compensation for ride" within statute barring recovery for injury to or death of such guest, unless it proximately resulted from driver's intoxication or willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest Without Giving Compensation for Ride".

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Robert Humphreys against the San Francisco Area Council, Boy Scouts of America, a corporation, and others, for the death of plaintiff's minor son from injuries sustained while riding in defendant's motor truck from a Boy Scout Camp, at which deceased was attending and employed, to a nearby city. Judgment for defendants and plaintiff appeals.

Prior opinion, 129 P.2d 118.

A. E. Bagshaw, of San Rafael, and Harold F. Riede, of San Francisco, for appellant.

D. J. O'Brien, Jr., of San Francisco, and John H. Corning, Freitas, Duffy & Keating, Carlos R. Freitas, and Jerome A. Duffy, all of San Rafael, for respondents.

GIBSON, Chief Justice.

This action was brought for damages arising out of the death of plaintiff's 15 year old son, Robert Humphreys, Jr. The boy was attending an encampment of boy scouts conducted by the defendant San Francisco Area Council, Boy Scouts of America, a charitable corporation, at Camp Lilienthal, located about two miles from Fairfax in Marin County. At the time of the accident he was riding in a truck driven by another boy scout, Francis Kuckein, who was employed by defendant council and at the time was operating the truck in the scope of such employment. The court, trying the case without a jury, concluded that although the driver of the truck was negligent, Robert "was a guest * * * and not a passenger," and accordingly rendered judgment for the defendants. Since it is not claimed that the death of the boy resulted from the intoxication or wilful misconduct of the driver, the judgment must be affirmed if the court correctly concluded Robert accepted the ride as a guest without giving compensation therefor. (Vehicle Code, § 403, St.1935, p. 154.)

Boy Scouts attending Camp Lilienthal who supplied and cooked their own food were furnished lodging and other camp facilities without charge. Those scouts who received their meals from the camp paid seven dollars weekly. It was the practice to select some of the more mature scouts to act as "staff members" who were classified as "seniors" and "juniors," also called "leaders." The members of the senior staff were young men between 19 and 22 years of age who acted as vocational directors, health and safety counselors or in similar capacities. They received a small wage in addition to board and lodging. The junior staff members were younger scouts, selected by the camp director from among boys who possessed particular qualifications and whom he was grooming for senior staff duties. The juniors acted as assistants to the seniors and performed various other duties about the camp. They received only board and lodging for their work. Robert was a junior staff member and he acted as bugler and operated the camp canteen where candy, ice-cream and soda water were sold.

Privileges not enjoyed by other boys were granted to staff members as a group. They were given a watermelon or ice-cream "feed" at staff meetings held on Sunday nights and were privileged to have affairs in the lodge to the exclusion of other boys. They were allowed to remain up later at night than others and were permitted, when going to and from Fairfax, to ride on the camp "pick-up truck" which was used to carry baggage and supplies. Seven staff members were called as witnesses by the defendants and testified to facts concerning the accident. In response to questions asked on direct examination, three seniors testified they received as compensation board and room plus a small salary. Four juniors testified that the only compensation they received for services was room and board. One junior member questioned on cross-examination as to whether the practice of allowing staff members to ride in the truck was the result of a "blanket permission" given by the camp director or if it was necessary "to go to him in each instance and ask him for specific permission" stated, "I have always asked him personally." Concerning the purposes for which the truck was maintained, the camp director, Dickieson, testified as follows:

"Q. What was that Plymouth truck used for in the year 1939? A. It was used principally for bringing baggage from the gas station where the boys would leave it when they came to camp, so that they wouldn't have to pack their baggage up; to drive to Fairfax and pick up mail and provisions the boys doing their own cooking would want bought, and that was all.

"Q. They picked up the baggage of the boys coming into camp and took the baggage for the boys leaving? A. Yes."

"Q. Was the main purpose of the pickup truck to give the staff members transportation, or was the main purpose something other than that? A. You mean the reason for us having that?

"Q. Yes. A. No. The reason for the pickup truck was to—pardon—to move—pick up the boys' baggage down town, to pick up the supplies—commissary supplies—in the city, week-ends when I would go in. No; the truck was not used—I mean, we did not have the truck for the purpose of carrying the leaders at all."

With reference to the practice or policy of permitting the staff members transportation on the truck, Mr. Dickieson testified: "there was no particular arrangement at all * * * if the staff members wanted to go down to town once in a while, why, we had no objection to them getting a lift down * * * there was nothing said about it. I mean, we didn't make any provision to that effect but they were at least, at any rate, permitted to go down. It was a common practice * * * that they did go back and forth in the truck. * * * Boys were permitted to ride on the pickup truck * * * on regular trips only * * * a special trip would not be made to give any boy a ride except in case of an emergency." Dickieson testified further that at the time Robert was selected as a junior staff member there was no "agreement, discussion, or talk of any kind about his being entitled, as a part of his compensation, to ride up and down the hill on this truck."

It is conceded that on the day of the accident Robert was on a purely personal mission. Plaintiff states in his opening brief "that the purpose of [Robert's] trip was not connected with his employment and was for his own benefit." Plaintiff also concedes that the privilege of riding in the truck "is not a matter of right in the sense that the privileges thus enjoyed are part of the contract of employment and are enforceable as such. * * *" There is no evidence that at the time the staff members were selected anything was said about permission being given them to ride on the truck on its regular trips to and from Fairfax, nor is there any direct evidence that such privilege served to induce scouts to seek or retain staff membership or was considered a part of the compensation for services performed by them.

The court found "that * * * Robert Humphreys, Jr., and Francis Kuckein were members of the Boys Scouts of America and were, and each of them was employed by the San Francisco Area Council, Inc., Boy Scouts of America, a corporation, at the said 'Camp Lilienthal' in the capacity of Junior Staff Members; that the duties of the said Robert Humphreys, Jr. by virtue of the said employment consisted of operating the canteen and assisting in the supervision and training of members of Boy Scouts of America, and the duties of said Francis Kuckein by virtue thereof consisted, in part, of operating the said Plymouth truck automobile between the said camp and the said city of Fairfax; * * * that the services performed by the said Robert Humphreys, Jr. were rendered in consideration of his receiving from said defendant, as a matter of contractual right, board and lodgings only at said Camp Lilienthal; that it is true that all junior staff members of said camp, including the said Robert Humphreys, Jr., and all of whom performed services for said defendant, were privileged to receive, and actually did receive transportation to and from Camp Lilienthal in the said Plymouth truck automobile which was maintained, in part, for said purpose, and that all other members of the said Camp Lilienthal not performing services of some sort, and therefore not having the status of Junior Staff Members, did not have said privilege and actually did not receive said transportation; that said privilege was revocable at any time at the will of said defendants or either of them."

It was further found: "that at said time the said Robert Humphreys, Jr. was riding in said truck from Camp Lilienthal to the city of Fairfax on a misson personal to himself; that * * * the said Robert Humphreys, Jr. was riding in said truck by virtue of the privilege afforded him by the defendant San Francisco Area Council, Inc., Boy Scouts of America * * * that * * * while acting in the scope of his said employment * * * the said Francis Kuckein did then and there drive the said Plymouth truck automobile in a negligent and careless manner and by reason thereof the automobile did leave said highway, overturn and fall with great force and violence into a ravine adjacent thereto."

The court concluded: "that at said time Robert Humphreys, Jr. was a guest in said Plymouth truck automobile and not a passenger therein by virtue of his employment by the said San Francisco Area Council, Inc., Boy Scouts of America, a corporation, or otherwise * * * that plaintiff is not entitled to judgment against defendants or either of them."

Plaintiff does not contend that the quoted findings are not supported by the evidence, but argues that the conclusion that the deceased was a "guest" and not a "passenger" is erroneous under the facts found. The question thus presented is whether as a matter of law the record compels a contrary conclusion.

[1-3] Section 403 of the Vehicle Code provides that: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." The designations "passenger" and "guest" have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of the statute from one carried gratuitously. Cf. McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Whitechat v. Guyette, 19 Cal.2d 428, 430, 122 P.2d 47. Although benefits or considerations other than cash or its equivalent may be "compensation," there is no compensation if the transportation is intended and received as a mere gratuity—a question for the trier of fact upon proper evidence. See Restatement, Torts § 490; Darling v. Dreamland B. & U. Co., 44 Cal.App.2d 253, 256-258, 112 P.2d 338; Carey v. City of Oakland, 44 Cal.App.2d 503, 508-510, 112 P.2d 714; cf. McCann v. Hoffman, supra; Whitechat v. Guyette, supra; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Jenkins v. National Paint & Varnish Co., 17 Cal.App.2d 161, 61 P.2d 780. A benefit would be received if the transportation was within the terms of the employment, or part of the agreed consideration for the work, or was directed by the employer during working hours, or was furnished to facilitate or speed a task the employee was to perform (see (1938) 26 Cal.L.Rev. 251, 254-255; (1938) 51 Harvard L.Rev. 545; Knutson v. Lurie, 217 Iowa 192, 251 N.W. 147; Hall v. Smith, 283 Mass. 166, 185 N.E. 850; Kruy v. Smith, 108 Conn. 628, 144 A. 304; Russell v. Parlee, 115 Conn. 687, 163 A. 404; Monison v. McCoy, 266 Mich. 693, 256 N.W. 49; White v. Gregory, 161 Va. 414, 170 S.E. 739; cf. McGrath v. Parson, 312 Mass. 476, 45 N.E.2d 384); but none of these factors are found in the present case, for it is conceded that the trip "was not connected with [Robert's] employment" and constituted no part of his contractual compensation. Plaintiff cites California Cas. Indem. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 132 P.2d 815, in which this court affirmed an award of compensation under the Workmen's Compensation Act for an injury suffered by an employee while riding home in the employer's automobile where the transportation was regularly furnished to employees. In that case, however, there was testimony that the employee, when hired, understood that transportation to and from work would be provided by the employer, and the court held that the facts were sufficient to support an inference there was an implied agreement to furnish such transportation.

Plaintiff argues that it is reasonable to infer that the continued practice or custom of permitting staff members (a privilege restricted to them alone) to ride in the truck to and from Fairfax was known to all potential staff members and served as an inducement for them to accept employment and to keep them satisfied in their employment and that this, as part of a business relationship, constituted "giving compensation" within the meaning of section 403, supra. The trial court, however, refused to so infer, and the question is not whether it is reasonable to draw the inference but whether the court was compelled to do so as a matter of law because of the existence of the practice or custom here involved.

[4, 5] It is true, of course, that in some situations the existence of a practice or custom of furnishing transportation to employees might permit or even require the drawing of an inference that all rides were given not as a mere gratuity but with the purpose of inducing employees to accept or retain employment. Under the facts of the present case, however, we cannot hold as a matter of law that the privilege extended to junior staff members to ride on

the truck was not a gratuity but was an inducement to the employment or was otherwise a part of a business relationship. In this connection we must keep in mind that, as stipulated at the trial, the defendant council is a charitable corporation "not conducted for any profit whatsoever" and that in none of its operations "is it in anywise akin to a business enterprise." This organization is engaged in the spiritual, physical and mental development of the youth of America. While attending this encampment Robert was not just an employee. He was a boy scout enjoying a vacation paid for in part by services performed and receiving at the same time training as a member of this organization. And no doubt junior staff members, like certain other scouts, were to some extent recipients of charitable benefits. The charitable functions of defendant council are considered, of course, only in connection with the nature of the relationship existing between it and the scouts attending Camp Lilienthal as one of the circumstances tending to show that the privileges accorded staff members might reasonably be regarded as gratuities rather than something bought and paid for. These privileges or preferences, as indicated by their nature, appear to have been small courtesies that went with rank. They included permission to have staff affairs in the lodge and the liberty to remain up later at night than other boys, as well as leave to ride on the truck. The privileges were not related to duties connected with employment, and although only staff members had jobs, the character and nature of their work was varied while the privileges went to the staff as a group. These advantages might more properly be considered a part of scout training and a reward for faithful application of the principles they had been taught in their boy scout work rather than a part of a business relationship.

[6] In support of the contention that the trial court was bound as a matter of law to infer from the practice of permitting staff members or leaders to ride on the truck that the custom served as an inducement to Robert to accept or retain employment with defendant council, appellant calls attention to the finding of the court, in referring to such practice, that the truck "was maintained in part for said purpose." Although the uncontradicted evidence is to the contrary, the finding is supported by an admission in the pleadings. The fact, however, that the truck was maintained in part for the purpose of permitting staff members to ride thereon to and from camp did not require the court to conclude as a matter of law that compensation was given for the ride. The refusal of the court to draw the inference that the custom served as an inducement for Robert to accept or retain employment is a complete answer to appellant's argument. And regardless of whether or not the trier of fact reasonably could have inferred that the privilege was intended to or did foster a business relationship, we cannot hold that this must be true as a matter of law.

[7] Under the evidence the court was justified in concluding that the preference accorded staff members in permitting them to ride on the truck to and from the camp was a gratuity and that Robert Humphreys, Jr., was a guest "without giving compensation for such ride" within the meaning of section 403 supra. This conclusion forecloses recovery by plaintiff and makes unnecessary any discussion of other issues presented.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. In my opinion the facts of this case as found by the trial court do not bring the deceased, Robert Humphreys, Jr., within the purview of the guest statute (Vehicle Code, sec. 403) and plaintiff is therefore entitled to recover damages for his wrongful death which was admittedly caused as the result of the negligence of an employee of the defendant corporation.

The trial court found that deceased was an employee of defendant corporation, and as such employee was privileged to receive transportation to and from Camp Lilienthal in the Plymouth truck which was maintained, in part, for said purpose; that on the 2nd day of July, 1939, while deceased was riding in said Plymouth truck pursuant to such privilege an accident happened as the result of the negligence of the driver of the truck who was an employee of the defendant corporation, which resulted in the death of said deceased. The conclusion of law which must necessarily be deduced from these facts is that the deceased was a passenger in said Plymouth truck and was therefore not subject to the provisions of the so-called guest statute.

The majority opinion appears to be based in part upon the theory that because the defendant council is a charitable corporation, not conducted for profit, a different rule should be applied to it in determining whether or not persons transported in its motor vehicles are guests or passengers. In my opinion, this is a false quantity and is injected into the majority opinion for the purpose of supporting an obviously untenable conclusion. While it is true that the defendant corporation is not operated for profit, it is nevertheless liable in damages to those wrongfully injured as the result of the negligence of its employees in the operation of its motor vehicles where such injured persons do not come within the purview of the guest statute.

The sole question is whether or not the deceased was a passenger and not a guest in defendant's automobile at the time of the injury which resulted in his death.

The appeal of this case was first heard and determined by the District Court of Appeal, First Appellate District, Division Two, and an opinion filed therein prepared by the Honorable Maurice T. Dooling, Justice, pro tem., and concurred in by Presiding Justice Nourse and Associate Justice Spence of that division. By this opinion the judgment of the trial court was reversed as to respondent San Francisco Area Council Boy Scouts of America with directions to the trial court to try the issue of damages and enter judgment against such defendant for damages suffered by plaintiff as the result of the death of his son. I am in full accord with the views expressed in the opinion prepared by Mr. Justice Dooling, pro tem., in this case and consider said opinion an excellent example of judicial craftsmanship. I am adopting the following portion of said opinion as a part of this dissent [129 P.2d 118, 120]:

"This appeal presents primarily the question whether the facts found by the trial court support the conclusion of law above quoted. In approaching this question certain rules of law which have been worked out by the courts in construing the so-called guest statutes of this and other states should be borne in mind. Among these may be mentioned the following: 1. Being in derogation of the common law the guest laws must be construed strictly. Vehicle Code, § 403, St.1935, p. 154. Rocha v. Hulen, 6 Cal.App.2d 245, 254, 44 P.2d 478; Prager v. Isreal, 15 Cal.2d 89, 93, 98 P.2d 729. 2. In construing the law the courts should consider not only the language of the statute itself, but also the purpose of the enactment and the nature of the evil against which it was directed. McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Rocha v. Hulen, supra; Crawford v. Foster, 110 Cal.App. 81, 87, 293 P. 841. 3. That in order to take a person riding in an automobile out of the guest status it is not necessary that the compensation for the ride be a strict contractual consideration or that an enforceable contract relation relative to the ride should exist between the parties. Haney v. Takakura, 2 Cal.App.2d 1, 7, 37 P.2d 170, 38 P.2d 160; Scholz v. Leuer, 7 Wash.2d 76, 109 P.2d 294, 299; Peronto v. Cootware, 281 Mich. 664, 275 N.W. 724; Russell v. Parlee, 115 Conn. 687, 163 A. 404, 406. 4. That in construing such statutes consideration should not only be given to the meaning of the language 'without giving compensation for the ride' or its equivalent in other statutes, but also to the meaning of the word 'guest' as used in such statutes. Rocha v. Hulen, supra; Knutson v. Lurie, 217 Iowa 192, 251 N.W. 147, 149; Smith v. Clute, 277 N.Y. 407, 14 N.E.2d 455, 458. 5. That where the excursion is not purely social any benefit to the driver or owner of the automobile conferred or anticipated, or mutual benefit present or anticipated to the driver or owner and the person carried, is sufficient to take the case out of the statute. Crawford v. Foster, supra; Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P.2d 714; Duclos v. Tashjian, 32 Cal.App.2d 444, 90 P.2d 140; Boyson v. Porter, 10 Cal.App.2d 431, 52 P.2d 582.

"Thus, to enlarge somewhat upon the principles above stated, the court said in Crawford v. Foster, supra, 110 Cal.App. at page 87, 293 P. at page 843:

" 'It has been held that the terms of a statute should be construed with their intent and purpose in view. Evans v. Selma Union High School Dist., 193 Cal. 54, 222 P. 801, 31 A.L.R. 1121. The purpose and object that the Legislature had in mind sometimes throws light upon the meaning of the language used. The situation that this section was apparently designed to prevent is well known. As the use of automobiles became almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. Neither this feeling nor the reasons therefor apply to a situation arising out of an ordinary business transaction, such as the efforts of a dealer to sell an automobile to a customer.'

"In Rocha v. Hulen, supra, 6 Cal.App.2d at page 254, 44 P.2d at page 483, we find the following language:

" 'In all the cases having to do with guest statutes, it appears that the various courts have had distinctly in thought the question of whether the circumstances presented bring the case within the intent and purpose to be accomplished, and the evils to be remedied by the enactment of such statutes, as well as whether the plaintiff is within the language appearing in the statutes being considered.

" 'The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also, that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined.'

"In construing the guest law Vehicle Code, § 403, St.1935, p. 154, our courts have determined that persons, in the following situations, among many others, were not within the meaning of the statute: A plumber being taken by the owner of land to look at a broken pump, although he had not contracted to repair it (Duclos v. Tashjian, supra); a person engaged with the driver in a joint business venture (Walker v. Adamson, supra); a friend accompanying a patient in an ambulance at the request of the ambulance driver (Carey v. City of Oakland, supra); a person who shared in the driving where the driver otherwise would not have undertaken the trip (Druzanich v. Criley, supra); a supporter of a candidate for public office while riding in an automobile loaned for the purpose of furthering the campaign (Boyson v. Porter, supra); a child riding in a school bus (Smith v. Fall River, etc., School Dist., 118 Cal.App. 673, 5 P.2d 930); a body riding with another to learn a paper route in the expectation that he might later take it over if a vacancy occurred. Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159.

"It may be said of these cases generally that they show a marked tendency on the part of our courts in construing our guest law to take a broad and realistic and not a narrow or technical legalistic view of the situation and relation of the parties in determining whether an injured occupant of an automobile was or was not a guest within the meaning of the statute at the time of receiving an injury.

"Turning to cases dealing directly with the transportation of an employee to or from his place of employment, where the carriage of the employee was not a matter of contract right, we have found the following: Kruy v. Smith, 108 Conn. 628, 144 A. 304; Russell v. Parlee, supra; White v. Gregory, 161 Va. 414, 170 S.E. 739; Garrett v. Hammack, 162 Va. 42, 173 S.E. 535; Monison v. McCoy, 266 Mich. 693, 256 N.W. 49; Peronto v. Cootware, supra; Knutson v. Lurie, supra; Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 120 P.2d 672.

"In Kruy v. Smith, supra, a laundress was being transported to her employer's home in the employer's automobile when injured, instead of travelling by street railway as she was accustomed to do. The court reversed a judgment on a directed verdict for defendant. In construing the Connecticut guest law the court said at page 305 of 144 A.:

" 'The Legislature, when it used the word "guest," did not intend to include persons who are being transported for the mutual benefit of both the passenger and the operator or owner of the car, and, in determining whether the transportation was for the mutual benefit of both, not merely the act of transportation must be considered, but also any contract or relationship between the parties to which it was an incident.'

"In Russell v. Parlee, supra, the defendant owned a farm which was worked by one Grant. Grant employed the plaintiff to help him in the farm work and plaintiff was injured while being conveyed to the farm by defendant in defendant's automobile. The supreme court of errors of Connecticut in affirming a judgment for plaintiff based on simple negligence said at page 406 of 163 A.:

" 'We are here concerned, not with a relationship growing out of contract, as in the case of a bailment, but with the construction of a statute denying to a certain class of passengers in an automobile a right to recover compensation for injuries resulting from negligence in its operation, to which, prior to its enactment, they were entitled.

Its operation should not be extended beyond the correction of the evils and the attainment of the permissible social objects which, it may be assumed, were the inducing reasons for its enactment. Silver v. Silver, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221, 65 A.L.R. 939. It may well have appeared to the Legislature that there were sound social reasons for denying a recovery for negligence against one who was transporting in his automobile a member of his family or a social guest or casual invitee, in an action brought by the recipient of his hospitality, which would not exist where a mutual benefit growing out of the relationship of the parties was contemplated, even though the benefit to be received was incidental, and not a technical legal benefit which the parties by their contract had bargained for as the consideration for the transportation. * * * The person transported is not a guest within the meaning of the statute if the transportation is for the mutual benefit of both parties, and in determining whether it was for their mutual benefit the relationship between the parties to which it was an incident may be considered. * * *

" 'The arrangement between the defendant and Grant created an identity of interest between them in the cultivation of the garden, and the transportation of the plaintiff contemplated a benefit to her by expediting the necessary work in her garden, though the actual wages of the plaintiff were to be paid by Grant instead of herself.'

"In Monison v. McCoy, the supreme court of Michigan held by a divided court that a woman being driven to her home by defendant after having spent a week in defendant's home nursing his wife was entitled to recover for injuries received through simple negligence under the guest statute of that state. The majority opinion quoted from and relied on the case of Kruy v. Smith, supra.

"In the later case of Peronto v. Cootware, supra (281 Mich. 664, 275 N.W. 725), the supreme court of Michigan was called upon to apply its guest statute to the following facts, quoting from the opinion of the court:

" 'On December 15, 1935, Clarence's wife was sick. Clarence asked Leslie to go to Hardwood, get their mother, and bring her back to take care of his wife, authorizing Leslie to tell the mother that Clarence would pay her what it was worth. Leslie drove to Hardwood and told plaintiff what Clarence wanted and agreed to do. Plaintiff acquiesced in the request, and the next day, on the return trip, the car struck an icy spot in the road, ran over an embankment, and plaintiff was injured. She sued Leslie.

" 'The court held plaintiff not a guest passenger, submitted the case to the jury upon the issue of ordinary negligence, and plaintiff had verdict and judgment of $2,000 damages.

" 'No arrangement was made nor suggested that Leslie be paid for making the trip or for transporting plaintiff. His act was wholly gratuitous and as a favor to Clarence. The sole question upon liability is whether plaintiff was a guest passenger.

" 'Plaintiff made the trip, not for her own pleasure or on her own business, but in order to render a requested service for Clarence. Her presence in the car had no social aspect; nor did Leslie extend the invitation to ride as a matter of hospitality. The transportation was a business proposition. If Clarence had been in the place of Leslie, the case would be clear that plaintiff was not a guest (citing Monison v. McCoy, supra * * *). The fact that Leslie was an uncompensated volunteer can make no difference in his relations to plaintiff.'

"In White v. Gregory, 161 Va. 414, 170 S.E. 739, 740, the plaintiff was an employee of defendant Gregory. Gregory was an undertaker and plaintiff was at Gregory's funeral home to help care for the body of a woman. There being some delay Gregory said to plaintiff: 'How about you going and getting something to eat?' He then instructed another employee, the defendant Miller, to 'drive Mrs. White home.' The accident occurred on the way to plaintiff's home. The supreme court of appeals of Virginia said:

" 'The court is of opinion that these facts are sufficient to support a finding that the plaintiff was not a mere guest of either Miller or Gregory.'

"In Garrett v. Hammack [supra], the plaintiff was employed by defendant both in his home and his store. While defendant was driving her from home to store plaintiff was injured. The court said:

" 'The jury was warranted in finding that plaintiff was a passenger in the automobile of Garrett, and this court is unanimously of opinion that her right, if any, to recover against Garrett, should be based upon proof of ordinary negligence.'

"In Knutson v. Lurie, supra, plaintiff was a domestic servant in the home of defendant. She was injured through defendant's negligence while defendant was taking her to get a pair of shoes which plaintiff had left at a shop to be repaired. The supreme court of Iowa affirmed a judgment for plaintiff. While the court laid some emphasis on the fact that plaintiff took care of defendant's baby during the ride the court cited and quoted from Kruy v. Smith, supra, and Russell v. Parlee, supra, and commented:

"'After reading the foregoing cases, it becomes apparent that one may be an occupant of an automobile without being a guest or a mere invitee, and yet not be a passenger for hire. * * * Furthermore, it is manifest that in determining the benefit, it is proper to take into consideration "not merely the act of transportation * * * but also any contract or relationship between the parties to which it was an incident."' * * *

"We have discussed and quoted from these cases at length because in a variety of circumstances, and for somewhat divergent reasons, as is natural in the construction of a new type of legislation, these decisions have all shown a trend of judicial thought in one direction, that a servant or employee being carried to or from his place of employment in his employer's automobile is not a guest within the meaning of the guest statutes even though the carriage is a matter of privilege or accommodation and not of strict contractual right.

"Directly opposed to this trend of judicial thought is Bummer v. Liberty Laundry Co., 48 Cal.App.2d 648, 120 P.2d 672, 673. In that case an employee of the defendant after a change of the opening time of the laundry from 7 a.m. to 6 a.m. was informed by defendant's foreman that he would thereafter pick her up and bring her to work. This he did thereafter with one or two exceptions when he had another employee, Taylor, pick her up. On the date of injury Taylor, at the foreman's request, picked up plaintiff in a truck of the defendant and by his ordinary negligence she was injured on the way to the laundry. The trial court gave plaintiff judgment which was reversed by the District Court of Appeal. The court said:

"'Plaintiff testified that she had made no arrangement with the defendant to be furnished transportation to her work and there was no other evidence of compensation. Therefore, from the evidence which was received, defendant was merely extending a courtesy to plaintiff in providing transportation, for which she was not furnishing compensation.'

"The District Court of Appeal cited no authority for this conclusion, and did not consider or discuss any of the cases involving the master-servant relationship from other jurisdictions which we have enlarged upon above. No petition for hearing by our Supreme Court was filed in that case. Much as we hesitate to disagree with the conclusion of another court of equal jurisdiction, in the circumstances here present we feel that we should examine the proposition presented by this appeal in the light of the cited cases from other jurisdictions and the purpose and spirit of our guest law without feeling bound by the Bummer case as a controlling precedent.

"In assaying the factors pro and con in the case before us it is to be observed that the court found that one of the purposes for which the Plymouth truck was operated was to transport Junior Staff Members between the camp and Fairfax, that Junior Staff Members were privileged to receive and actually did receive such transportation to the exclusion of members of the camp not performing some sort of services, and that Humphreys, Jr., was riding in the truck by virtue of such privilege at the time that he received his fatal injuries. On the other side are the factors that Humphreys, Jr., was riding on a mission personal to himself, and that the privilege of riding was a revocable one and not a matter of contractual right.

"In weighing these factors one conclusion seems to us too clear for argument, that the ordinary boy accepting employment as a Junior Staff Member in the camp, in weighing the advantages, would take into consideration the fact that as an incident to his employment he would be furnished transportation in the camp truck to and from the town two miles distant and would not be apt to consider nor be at all concerned with the question whether such transportation was afforded him as a mere revocable privilege or as a matter of strict contractual right. The transportation, if not a consideration for, was at least an inducement to the employment. It must also be remembered as pointed out in Crawford v. Foster, supra, 110 Cal.App. at page 86, 293 P. at page 843:

"'While there are exceptions, notably in the case of persons staying at a hotel, in its ordinary use the word "guest" connotes something other than a business transaction.'

"Here as a part of the business of operating the camp the truck was maintained, according to the findings, partly for the very purpose of transporting Junior Staff Members to and from the town. The analogy of the hotel bus seems not inapt. The operation of such busses between hotel and station, as an accommodation to patrons but not as a matter of contract right, is not uncommon. Assume a patron who has paid his bill and checked out of the hotel injured by the negligence of the bus driver on the way to the station. Would any court countenance the defense that he had accepted a ride as a guest without giving compensation for such ride?

"Without going further than the facts of this case we are satisfied that where, as here, an employer not as an isolated or spontaneous single act of courtesy, but as a regular practice, affords transportation to its employees to and from the nearest town, and maintains an automobile in part for that very purpose, an employee riding to such town on an errand of his own by virtue of the privilege so afforded him is not within the spirit or the letter of our guest law, although the transportation is not a matter of contract right but a mere revocable privilege. The established and continuous character of the transportation so furnished to the employees indicates that it was regarded by the employer not as a mere social courtesy but as a business arrangement incident to the employment and of mutual benefit both to employer and employee.

"Respondent San Francisco Bay Area Council, Inc., Boy Scouts of America urges in support of the judgment that it is a charitable non-profit corporation and should as such be exempt from liability for the torts of its employees. A careful reading of Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798 and England v. Good Samaritan Hospital, 14 Cal.2d 791, 97 P.2d 813, satisfies us that, while the precise question before the court in those cases was the liability of a charitable hospital to a paying patient, the effect of those decisions is to impose on charitable organizations in general the same liability for the negligence of employees as exists in the case of other employers."

In my opinion the judgment should be reversed.

59 Cal.App.2d 840

WILEY v. WILEY.

Civ. No. 2900.

District Court of Appeal, Fourth District, California.

July 26, 1943.

1. Marriage 🔑**58(7)**

Finding that husband would not have entered into marriage if he had know of wife's previously existing intention not to have reasonable matrimonial intercourse with husband and that thereafter wife refused without cause to have such intercourse with husband supported decree annulling marriage on ground of "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Equity 🔑**65(2)**

The act upon which equity may refuse relief to plaintiff because he did not come into court with "clean hands" must prejudicially affect defendant's rights, so that it would be inequitable to grant such relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

3. Equity 🔑**65(2)**

Every wrongful act and every fraud do not prevent a suitor in equity from obtaining relief, but his misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief as to make it inequitable to accord him such relief, and it must have been conduct which if permitted inequitably affects the relationship between the parties.

4. Equity ⚿65(2)

Where husband at wife's request was sterilized before their marriage, husband under "clean hands" doctrine was not precluded from annullment of marriage on ground of wife's fraud in intending not to have reasonable matrimonial intercourse with him.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by John W. Wiley against Patricia Gross Wiley to annul a marriage. Judgment for defendant, and plaintiff appeals.

Reversed.

George R. Baird, of San Diego, (Robert W. Patterson, of San Francisco, of counsel), for appellant.

No appearance for respondent.

MARKS, Justice.

This is an appeal from a judgment refusing to annul the marriage of the parties because of alleged fraud of defendant. Defendant was regularly served with summons but did not appear in the action. The cause was heard as a default matter and defendant has made no appearance here.

The complaint contained the formal allegations usually found in cases of this kind. It was there alleged that prior to and at the time of the marriage ceremony defendant did not intend to have reasonable matrimonial intercourse with the plaintiff; that she concealed this intention from him; that thereafter she refused to have such intercourse with him without any cause or reason therefor, although plaintiff was able, ready and anxious to so consummate the marriage; that this refusal was against the will and without the consent of plaintiff who would not have entered into the marriage relationship with defendant had he known of her intention in this regard.

[1] The trial court found these allegations of the complaint to be true. This finding was sufficient to support a decree annulling the marriage. Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184.

It was also found that prior to the marriage defendant represented to plaintiff that because of the condition of her health she feared to have children; that she made it a condition of marriage that he be sterilized; that he was so sterilized prior to the marriage ceremony.

The trial court drew the conclusion of law from this last finding to the effect that plaintiff came into court with unclean hands and as a consequence was not entitled to a decree annulling the marriage.

[2, 3] It is settled that the act upon which equity may refuse relief to a plaintiff because he does not come into court with clean hands must prejudicially affect the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief. Pomeroy's Equity Jurisprudence, 5th Ed., vol. 2, p. 95, § 399; Germo Mfg. Co. v. McClellan, 107 Cal.App. 532, 290 P. 534. In speaking on this subject the Supreme Court, in Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750, 752, said: "It is not every wrongful act nor even every fraud, which prevents a suitor in equity from obtaining relief. His misconduct must be so intimately connected to the injury of another with the matter for which he seeks relief, as to make it inequitable to accord him such relief. It must have been conduct which, if permitted, inequitably affects the relationship between the plaintiff and the defendant, * * *."

[4] We have no such situation here. The operation was performed at the request of defendant who had full knowledge of that fact before the marriage. She was not deceived and there is no inequity as far as she is concerned in granting the relief sought by plaintiff.

The findings neither support the conclusions of law drawn by the trial court, nor the judgment.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

59 Cal.App.2d 572

SHIVERS v. PALMER et al.

Civ. No. 14029.

District Court of Appeal, Second District, Division 1, California.

July 7, 1943.

As Modified on Denial of Rehearing Aug. 6, 1943.

Hearing Denied Sept. 1, 1943.

1. New trial ⚷102(3)

The claim of newly discovered evidence as a ground for new trial is looked upon with disfavor, and the very strictest showing of diligence is required by the court. Code Civ.Proc. § 657, subd. 4.

2. New trial ⚷102(1)

For reasons of public policy a litigant is required to exhaust every diligent and reasonable effort to produce at his trial all existing evidence in his behalf. Code Civ. Proc. § 657, subd. 4.

3. New trial ⚷102(1)

Public interest requires that there be an end to litigation and a new trial is not warranted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. Code Civ.Proc. § 657, subd. 4.

4. New trial ⚷108(1)

To be entitled to new trial there must be a clear and convincing showing that the newly discovered evidence is of such nature that its introduction upon another trial would render a different result reasonably probable. Code Civ.Proc. § 657, subd. 4.

5. New trial ⚷102(3)

The term "diligence", within rule that diligence to produce all the evidence at original trial must be shown to be entitled to new trial on ground of newly discovered evidence, is a relative term incapable of exact definition, and recourse must be had to the particular circumstances in each case in which the question whether it was used arises. Code Civ.Proc. § 657, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Diligence".

6. New trial ⚷99

Court's discretion in determining whether due diligence has been exercised to procure the newly discovered evidence before trial is a legal one and the proper exercise thereof presents a "question of law". Code Civ.Proc. § 657, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

7. New trial ⚷102(3)

Record revealed due diligence on part of plaintiff's counsel to discover and produce evidence as to the claimed intoxication of defendant at time of automobile accident involved in personal injury action. Code Civ.Proc. § 657, subd. 4.

8. New trial ⚷99

Where plaintiff's newly discovered evidence as to intoxication of defendant at time of automobile accident involved, although material and not impeaching or cumulative, was contested by counter affidavits, denial of plaintiff's motion for new trial was not a manifest abuse of discretion. Code Civ.Proc. § 657, subd. 4.

9. Appeal and error ⚷981

Only when the showing made on motion for new trial is of such a character as to make it manifest that the case would or should result differently on a retrial, in view of newly discovered evidence, is the appellate court authorized to say that the discretion vested in trial court has been abused. Code Civ.Proc. § 657, subd. 4.

10. Appeal and error ⚷977(1)

Appellate court is not authorized to interfere with ruling of trial court whenever the case presents a reasonable or even debatable justification under the law for the ruling made in the trial term, regardless of appellate court's view as to the propriety of trial court's action. Code Civ.Proc. § 657, subd. 4.

11. Appeal and error ⚷981

Where plaintiff's newly discovered evidence as to intoxication of defendant at time of automobile accident involved was denied by counter affidavits, and question whether the newly discovered evidence would change result on a new trial was debatable, appellate court was not authorized to interfere with trial court's discretion in denying plaintiff's motion for new trial. Code Civ.Proc. § 657, subd. 4.

12. Appeal and error ⚷277

Trial court's statement to the jury on voir dire examination that an insurance company was not involved in personal injury action, was not an "instruction" which was deemed to have been excepted to under statute. Code Civ.Proc. § 647.

See Words and Phrases, Permanent Edition, for all other definitions of "Instruction".

13. Appeal and error ⚷259

In order to avail a party claimed to have been injured by an improper statement or remark made during a trial by the trial judge, an exception thereto must be taken by such party at the time the remark or statement was made, or at some time thereafter prior to the close of trial.

14. Appeal and error ⚷201(2)

Where trial court stated to jury on voir dire examination that an insurance company was not involved in personal injury action, but no objection thereto or request to correct the claimed error was made, when an appropriate admonition would have been sufficient to obviate any prejudicial effect, the claimed error would not be considered on appeal.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Kate E. Shivers to recover for the wrongful death of her husband, John Hyman Shivers, allegedly resulting from negligence of defendant Warren B. Palmer in the operation of his automobile. The jury returned a verdict for the defendant Palmer, plaintiff's motion for new trial was denied and, from the judgment entered for defendant, plaintiff appeals.

Affirmed.

Kiggens & Hoffman and Elmer H. V. Hoffman, all of Los Angeles, for appellant.

Paul Nourse, of Los Angeles (Pat A. McCormick, of Los Angeles, of counsel), for respondent.

WHITE, Justice.

Plaintiff commenced this action to recover damages for the wrongful death of her husband, John Hyman Shivers, allegedly resulting from the negligence of defendant Warren B. Palmer in the operation of his automobile. Because he refused to join with plaintiff in the action, Gilbert Shivers, a brother of the decedent, and the surviving heir at law, was also named as a party defendant.

By her amended complaint plaintiff alleged that about 7 o'clock on the evening of September 20, 1940, the decedent was driving his Packard automobile in a westerly direction along Garvey Boulevard, West Covina, in the County of Los Angeles. That defendant Palmer was operating his Hudson automobile on the same highway in an easterly direction in a negligent, careless and reckless manner; at an excessive rate of speed; without due or any regard for the safety or convenience of other users of the highway. That as a result of defendant Palmer's negligence, his automobile collided head on with the vehicle operated by plaintiff's husband, resulting in the death of the latter. By his answer defendant Palmer denied plaintiff's allegations of negligence and by way of separate defense pleaded contributory negligence on the part of the decedent. This affirmative defense of contributory negligence, however, may be disregarded as it is conceded that in view of the evidence thereon, the court correctly directed the jury to find against the defendant upon such issue.

The trial was had before a jury which returned a verdict for the defendant Palmer. Plaintiff moved for a new trial on the ground of newly discovered evidence and for the asserted reason that the court erred in its instruction to the jury that no insurance company was "a party to or involved in this lawsuit". The motion for a new trial was denied and this appeal is prosecuted by plaintiff from the judgment entered upon the verdict.

The facts disclosed by the record may be thus epitomized: Defendant Palmer testified that on the evening in question he was driving his sedan easterly on Garvey Boulevard near the intersection of Willow Avenue; that his headlights were on, and that he was traveling in the center of lane 3, as indicated on a map used at the trial. On this map the lanes were designated 1, 2, 3, and 4; number 1 lane being the most northerly lane, lane 2 being between lane 1 and the center of the highway, lane 3 being the first lane south of the center of the highway, and lane 4 being the most southerly lane. When he was about 300 feet from the point of the first impact (with a vehicle driven by one Louis Somers) he particularly noticed a car approaching him from the east, which car was on the southerly side of the center lane; that to avoid hitting the car so approaching, he veered to the south but discovered that if he continued in that direction he would collide with this vehicle, so he abruptly turned to the left or north. He then sideswiped the car on its right side and went over the double center line into lane 2 and almost into lane 1. He then swung around and came back into lane 3 when he was struck by a second car (the vehicle operated by the deceased). At the time of the impact with the first car (Somers' car) "my entire car was south of the double center line" and the other car in its entirety was south of the double center line. After my car collided with Mr. Somers' car, I tried to get it under control and get it back in my lane. That is what I was doing when the collision with Mr. Shivers' car occurred". Defendant testified his health was good, that he had nothing to drink, that he was not sleepy or suffering from drowsiness.

Two witnesses for plaintiff testified that they saw defendant's car east bound, swerve over the double line and go into lane 1, but that they did not observe any collision between the vehicles of defendant and Mr. Somers.

Mr. Somers' version of the accident, testifying as a witness for plaintiff, was that he was traveling in lane 2 in a westerly direction when he first observed defendant's car approaching in an easterly direction in lane 3, when it was about 400 feet down the road. That suddenly defendant whirled to the left, going over into lane 1; then he came back between lane 1 and lane 2 "almost directly toward me". That there was an impact and defendant's front right-hand wheel ran up on Somers' left-hand running board, and spun his car around so that when it came to rest it was headed east. That this impact occurred on the north side of the center line. Defendant Palmer testified it occurred on the south side of the center line.

The evidence indicates that after Palmer's car collided with the Somers car, a second collision took place between Palmer's car and that operated by the deceased, and that deceased's car was then hit by a fourth car operated by Anthony Graves, who was following immediately behind the deceased's car. Mr. Graves testified he did not see the collision between the Palmer car and the Somers car, but that he did see some "cars up ahead kind of swaying I think about—it seemed like about 300 to 400 feet ahead" * * * in lanes 1 and 2.

[1-4] We shall first give consideration to appellant's contention that the trial court fell into error in denying her motion for a new trial on the ground of newly discovered evidence; and which claim is presented by counsel with great earnestness. At the outset we are confronted with the settled rule that the claim of newly discovered evidence as a ground for, or warranting, a new trial is universally looked upon by the courts with distrust and disfavor. For reasons of public policy, a litigant is required to exhaust every diligent and reasonable effort to produce at his trial all existing evidence in his behalf. The fact that the testimony has just been discovered when it is too late to introduce it, has been characterized as a circumstance so suspicious that the very strictest showing of diligence is required by the courts. People v. Freeman, 92 Cal. 359, 366, 28 P. 261. It is, however, recognized that cases will occur where, after trial, despite the exercise of such effort, new evidence most material to the issues and which would probably have produced a different result, is discovered. The remedy of a motion for a new trial on the ground of newly discovered evidence has been given and is afforded for such cases. As declared by subdivision 4 of Section 657 of the Code of Civil Procedure, the court may grant a new trial when there is presented "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial". Public interest requires that there be an end to litigation and a new trial is not warranted for the purpose of enabling a party to produce further evidence unless he has shown some legally justifiable excuse for not having produced such evidence at the former trial. With reference to the degree of reasonable diligence required in such cases, we need but cite Bennington v. National Packing Co., 122 Cal.App. 313, 9 P.2d 857. We think it may be conceded that the newly discovered evidence in the instant case was competent and material; that it was not solely impeaching; certainly not cumulative, and was in fact discovered after the rendition of the verdict. However, the law also requires the use of due diligence on the part of the moving party to discover the evidence prior to the trial,

and a clear and convincing showing under all the circumstances of the case that the newly discovered evidence is produced in such a way, and is of such a nature, that its introduction upon another trial would render a different result reasonably probable.

With regard to the diligence exercised by appellant, it should here be noted that at the trial a witness, Rial Dennison, an investigating police officer, was asked by respondent's counsel, "There was no liquor involved on anybody's part?" to which he answered "Not as far as I knew", while defendant Palmer testified directly and unequivocally that on the day of the accident he had taken nothing intoxicating to drink. Appellant's counsel concede that from the first day they undertook the prosecution of this cause, more than a year prior to the trial thereof, they harbored the belief that the defendant Palmer, because of the circumstances surrounding the accident "must have been drunk or asleep". By their affidavits in support of the motion for a new trial, appellant's counsel represented that in preparing the case for trial they employed a paid investigator, examined the transcript of testimony taken at the coroner's inquest concerning the death of decedent; also the transcript of testimony presented at the preliminary examination of defendant Palmer on a criminal charge of negligent homicide; that they also attended the trial of defendant Palmer on the criminal charge in the superior court, but that none of those activities upon their part were rewarded with any information to indicate that defendant Palmer was under the influence of liquor or had been drinking at all on the day of the accident here in question. The affidavits filed by appellant's counsel further show that prior to the trial they learned that the accident had been investigated by the sheriff of Los Angeles County and by police officer Rial Dennison of the West Covina Police Department; that they learned that respondent had been taken by private ambulance operated by the Taylor Ambulance Company from the scene of the accident to the West Covina Hospital. The affidavits of appellant's counsel also set forth that inquiry by them of defendant's immediate superior in the office where he was employed elicited the information that defendant Palmer was a "man of temperate habits and not addicted to the use of liquor so far as he knew". That prior to the trial they interviewed Officer Rial Dennison on several occasions and were advised by him that he had found no evidence that respondent was drinking before the accident. The affidavits do not disclose whether the driver of the ambulance was interviewed prior to the trial. That it was not until two days before the trial herein that one of appellant's counsel received any indication that Palmer was drinking on the day of the accident, but upon investigation both persons to whom he had been directed denied that they knew anything about the matter. Two days after the trial, Somers told this affiant that he had heard that Palmer had been previously arrested for drunk driving in San Bernardino but that the charge had been reduced to a misdemeanor and Palmer pleaded guilty, and that Palmer had been drinking on the day of the accident. This information, the affidavits of appellant's counsel aver, was denied to them prior to trial, as Somers refused to make any statement to them and had referred one of appellant's counsel to Somers' attorney. Somers told appellant's counsel that the source of his information was an investigator in the sheriff's office who originally had charge of the accident case and who had been previously interviewed by affiant's investigator but had failed to divulge the information. That one of appellant's counsel then secured information as to the identity of the party who had been drinking with Palmer on the afternoon of the accident. Vernon Lee's affidavit averred that he and Palmer had spent the afternoon together and they had four or five bottles of beer and three or four cocktails. Lee, according to the affidavit of appellant's attorney, was induced to make a statement only when he was informed that plaintiff had not secured any remuneration on account of the death of her husband, but that prior to the trial Lee had stated, when asked whether he smelled liquor on Palmer's breath just prior to the accident, "Well he was smoking a strong pipe—and it would have been hard to tell—you know he could have had a drink and I wouldn't have smelled it". As a further result of their post-trial investigation appellant's counsel obtained and filed an affidavit made by Norman Whitlatch wherein he stated that he was in charge of the ambulance that conveyed Palmer to a private hospital following the accident here in question, and that he concluded, "Palmer had been drinking intoxicating liquor as the smell of liquor was very distinct about his breath. The odor of liquor was strong. I could and did smell it when we put Palmer on a cot, preparatory to loading him into the ambulance and when we loaded him into and out of the ambulance at the hospital". This affiant further stated that he did not consider himself privileged to divulge these facts while he was employed by the ambulance company, but that such employment had been terminated at the time he signed the affidavit. Appellant's counsel in their affidavits stated that they did not make inquiry at the hospital or of the ambulance company because they were advised by the police and sheriff's departments that neither the ambulance company nor the attending physician would give any information as to respondent Palmer's sobriety. There was also filed an affidavit by Mrs. H. M. Walker that "Some time in the fall of 1940 when the Pomona Fair was in progress—exact date I don't remember Warren Palmer & Vernon Lee came to our office at 10:30 Garvey Blvd. El Monte and invited us to have a drink so my husband and I accompanied them over to the Golda Lee Bar at 5 Points El Monte—we all had a cocktail—we stayed a few minutes then went outside where Lee got into Palmers car and drove away". Because of its uncertainty, little evidentiary value can be attached to the contents of this affidavit.

The averments contained in the affidavits of Vernon Lee, Norman Whitlatch and Mrs. H. M. Walker as to his drinking were categorically and specifically denied by respondent Palmer in a counter-affidavit filed by him, while Officer Rial Dennison in his affidavit filed in opposition to the motion for a new trial, deposed that within a week following the accident he had a conversation with Vernon Lee wherein he, the affiant, "particularly asked Mr. Lee as to whether or not the said Lee had seen Mr. Palmer on the day of the accident and the said Lee told your affiant that he had seen the defendant Palmer and he further stated unqualifiedly to your affiant that the said Palmer had not been drinking in his presence and further that to his knowledge the said Palmer had had nothing to drink at the time he, the said Lee, had last seen him."

[5-7] The term "diligence" has been said to be incapable of exact definition because it is a relative term, and therefore, in defining it, recourse must be had to the particular circumstances of each case in which the question of whether it was used arises. Parker v. So. Pacific Co., 204 Cal. 609, 618, 269 P. 622. Conceding to the trial court a wide discretion, upon a motion for a new trial, in determining whether due diligence has been exercised to procure the newly discovered evidence before the trial, nevertheless, that discretion is a legal one and the proper exercise thereof presents a question of law. On the record in this case and the facts and circumstances reflected thereby, it must be concluded that appellant through her counsel did use due diligence prior to trial in an attempt to discover and produce evidence as to the claimed drinking or intoxication of respondent Palmer at the time of the accident. Upon every avenue of investigation made by appellant's counsel, one has but to read of the efforts made by them, to be impressed with the persistency and thoroughness thereof and the fact that they were constantly met either with a refusal to give any information or confronted with the statement by all concerned that no liquor "was involved" in the accident. To exact a more thorough or painstaking investigation than was made by appellant's counsel in the instant case would be to require a degree of "diligence" rarely if ever attainable under the difficulties encountered and the circumstances herein presented.

We now pass to a consideration of two questions which we feel are in themselves determinative of the question as to whether the order denying a new trial on the ground of newly discovered evidence should be reversed.

Firstly: The credence and weight to be given to the affidavits and counter-affidavits presented on the motion for a new trial is a matter confided to the sound discretion of the trial court. In the instant case the affidavits of Vernon Lee, Norman Whitlatch and Mrs. H. M. Walker were flatly contradicted by the counter-affidavit of respondent Palmer, while the credibility and weight to which the averments contained in Vernon Lee's affidavit were entitled, is specifically impaired by the affidavit of Police Officer Rial Dennison. As to the affidavit of Vernon Lee, it further appears that he executed the same only after he was assured by a representative of appellant that the latter "had at no time had any part in the criminal prosecution (of defendant Palmer) and that we were not really after Palmer personally, and had never expected to get anything except from his insurance carrier, to get the widow of the man who was killed what she might have coming" and to which statement affiant Lee replied, "That puts a different angle on it. You know I lost my eye a while back. I am thinking about my wife and kids now."

[8] Conceding that the newly discovered evidence was competent, material, not impeaching or cumulative, nevertheless the verity and the credibility of the makers thereof was contested by counter-affidavits. Evidently the court, after balancing the affidavits on the one side presented by appellant against those of respondent and Officer Dennison, decided in favor of the credibility of the facts sworn to in the latters' affidavits. Under all the facts and circumstances present, this court is not prepared to say that there was a manifest abuse of discretion on the part of the trial court in so doing.

[9-11] Secondly: We are confronted with the question which was primarily addressed to the discretion of the trial court, as to whether the evidence offered as newly discovered would, if produced on a retrial of the case, likely and probably bring about a different verdict or result. It is only when the showing made on the motion for a new trial is of such a character as to make it manifest that the case would or should result differently on a retrial, in view of the newly discovered evidence, that the appellate court is authorized to say that the discretion vested in the trial court has been abused. People v. Sing Yow, 145 Cal. 1, 78 P. 235; Waer v. Waer, 189 Cal. 178, 182, 207 P. 891; Monnette v. Title Insurance & Trust Co., 107 Cal.App. 313, 324, 290 P. 668; Berkowitz v. Kiener Co., 37 Cal.App.2d 419, 427, 99 P.2d 578; Smith v. Schwartz, 14 Cal.App.2d 160, 166, 57 P.2d 1386. The trial court heard the witnesses testify. While there was a conflict in the evidence, there was nevertheless testimony which, if believed by the triers of fact, would support a finding that the proximate cause of the accident was the negligence of Somers. With reference to the newly discovered evidence, the trial court was entitled to take into consideration the circumstances under which such testimony was procured, the representations made in its procurement and also the fact that the witness Lee had on other occasions made statements in contradiction of and at complete variance with the averments contained in his affidavit presented on the motion for a new trial. Because the trial court is obviously in a much better position to reach a just conclusion on the hearing of such a motion than we can possibly be, we are not authorized to interfere with the ruling of the trial court whenever the case presents a reasonable or even debatable justification under the law for the ruling made in the trial forum, regardless of what our ideas might be as to the propriety of the court's action. Such a rule is grounded on the fact that the trial court has seen and heard the witnesses and observed the jury. The propriety of the trial court's action in the case at bar under all the circumstances to which we have herein adverted clearly presents a debatable question. We are, therefore, without authority to set our judgment against that of the trial judge.

[12-14] Lastly: Appellant complains that she was seriously prejudiced by a statement of the court advising the prospective jurors on their voir dire examination that an insurance company was not involved in this action. In that regard the record discloses that early in their voir dire examination of the veniremen appellant's counsel inquired "Are any of you now, or have any of you ever been employed by any company engaged in the business of writing casualty insurance on automobiles? Or have any of you ever been or are you now, or any member of your immediate families, connected as a stockholder, officer or otherwise, with any such company?" Thereupon the court stated: "The court will inform all the jurors in the court room now that there is no insurance company a party to or involved in this lawsuit".

Notwithstanding appellant's claim to the contrary, we do not regard the foregoing remarks of the court as an instruction within the purview and meaning of section 647 of the Code of Civil Procedure and, therefore, "deemed to have been excepted to". We are impressed that the statement of the trial judge was no more an instruction than would be the remarks of a trial judge concerning the materiality or effect of evidence as a trial proceeded, while ruling upon objections (Loeb v. Kimmerle, 215 Cal. 143, 154, 9 P.2d 199); or remarks by the court bringing to the attention of the jury that the defendants were insured (Swartz

v. Acme Express & Drayage Co., 102 Cal. App. 615, 619, 283 P. 358); or statements by the court that a witness is a person of respectability (Ward v. DeMartini, 108 Cal. App. 745, 750, 292 P. 192); in all of which cited cases the statements just mentioned were treated as conduct on the part of the court requiring that the error thereof, if any there was, be called to the court's attention by objection so that it might, by instruction or otherwise, correct its error. In order to avail a party claimed to have been injured by an improper statement or remark made during a trial by the trial judge, an exception thereto must be taken by such party at the time the remark or statement was made, or at some time thereafter prior to the close of the trial. Hughes v. Hartman, 206 Cal. 199, 206, 273 P. 560, 563. As was said in the case just cited: "If thus taken, an opportunity is given to the trial judge by an instruction to the jury or otherwise to cure the injury occasioned by such remark. This rule might not apply where the remark was of such a character that its prejudicial effect could not be cured by any subsequent action by the trial court. The remark of the court in the present action, of which complaint is made, is not of such character. Defendant therefore must be held to have waived any right to except to the action of the court in making the remark attributed to it, and quoted above, by his failure to object to the same during the trial of the action".

If, therefore, counsel for appellant regarded the statement made by the trial judge as detrimental to their client's cause they should have offered complaint thereto; requested the court to instruct the jury to disregard the remarks made from the bench; or to declare a mistrial. In Swartz v. Acme Express & Drayage Co., supra, wherein appellants claimed that remarks of the trial judge brought to the attention of the jury that the defendants were insured, it was held, at page 619 of 102 Cal.App., at page 360 of 283 P.: "But they did not object or request an instruction and this forecloses consideration of the point on appeal".

Appellant concedes that there was no impropriety in the court's statement to the jury that no insurance company was a party to the action. Her objection goes solely to that part of the statement which informed the jury that no insurance company was "involved" in the litigation.

We are here confronted with the fact that appellant for the first time on appeal challenges the conduct of the trial court in making the statement complained of. Where, as here, appellant failed by motion, objection or otherwise to call upon the trial court to cure the error and nullify the allegedly prejudicial effect thereof to declare a mistrial or to summon a new venire no question can be presented for consideration by the appellate court. That a party deeming himself prejudiced by improper questions, statements or admonitions by the court as to the existence of liability insurance made in the course of an action for personal injury or wrongful death must act promptly in the trial court to protect his rights, and his failure so to do forecloses him from complaint on appeal, was the direct holding in Crawford v. Rose, 2 Cal.App.2d 734, 39 P.2d 217. Where the error is such that its effect would be obviated by an appropriate instruction to the jury by declaring a mistrial or by summoning a new venire and no such aid is invoked, error cannot be complained of on appeal. Inasmuch as the court was not once, during the impanelment of the jury or during the trial, requested to correct the claimed error, nor was any objection made thereto, when an appropriate admonition would doubtless have been sufficient to obviate any prejudicial effect the court's remarks might have produced, or where the court could have otherwise cured the error, the claimed prejudicial error cannot be considered on appeal.

From the foregoing it follows that the judgment must be affirmed, and it is so ordered.

YORK, P. J., and DORAN, J., concur.

59 Cal.App.2d 724

McARTHUR v. SHAFFER, Judge, et al.

Civ. 6961.

District Court of Appeal, Third District, California.

July 21, 1943.

1. Trial 🔑2, 3

Whether separate actions shall be consolidated for trial, or whether there shall be a severance and separate trials of issues in a single action, is matter within discretion of trial court.

2. Appeal and error 🔑1046(1)
Mandamus 🔑32, 48

Trial court's discretion, in matter of consolidating separate actions for trial or in granting severance and separate trials of issues in a single action, will not be interfered with either on appeal or by writ of mandate except where there has been a manifest abuse of such discretion.

3. Trial 🔑3

In action by corporation against several defendants to determine ownership of five shares of stock in plaintiff corporation, denial of request of one of defendants who claimed a one-half interest in one of the five shares for a severance and separate trial was not an abuse of discretion under circumstances.

4. Army and navy 🔑34

Although under provision of Soldiers' and Sailors' Civil Relief Act, courts may, in exercise of their discretion, refuse to stay proceedings, courts are obligated not to do so unless they are of opinion that interests of person in military or naval service will not be materially affected by refusal. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

5. Army and navy 🔑34

The Soldiers' and Sailors' Civil Relief Act is to be liberally construed. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

6. Army and navy 🔑34

In action by corporation against several defendants to determine ownership of five shares of stock in plaintiff corporation, granting of motion of one of defendants who was also owner of majority of stock in plaintiff corporation to abate whole proceedings so long as he remained in military service of United States was not an abuse of discretion under circumstances. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

◆

Proceedings by Jennie A. McArthur against Honorable H. S. Shaffer, as Judge of the Superior Court of the State of California in and for the County of Merced, and the Superior Court of the State of California, in and for the County of Merced, for a writ of mandate to compel respondent Superior Court to order a severance as to petitioner and to set down for immediate trial the issues created between her and the East Coalinga Oil Field Corporation in an action brought by the latter against petitioner and others to determine the ownership of the capital stock of the corporation.

Writ of mandamus denied, and alternative writ hereinbefore issued discharged.

Courtney L. Moore, of San Francisco, for petitioner.

Dean S. Lesher and Loraine B. Rogers, both of Merced, for respondents.

ADAMS, Presiding Justice.

Petitioner herein seeks the issuance of a writ of mandate to compel respondent Superior Court to order a severance as to her, and to set down for immediate trial the issues created between her and the East Coalinga Oil Field Corporation, a corporation, in an action brought by the latter against petitioner and others to determine the ownership of the capital stock of said corporation.

The petition alleges the commencement of the aforesaid action on May 28, 1940; that plaintiff corporation alleged therein that certain named persons, made defendants in the case, were the owners of the five shares of plaintiff's capital stock issued and outstanding; that certain others named as defendants, including petitioner, claimed some right, title or interest in said five shares, but that their claims were without right; that plaintiff prayed therein that defendants be required to set forth the nature of their several claims, and that the court determine the ownership of said five shares of stock; that petitioner appeared in said action and filed an amended answer on March 10, 1941, claiming to be the owner of one-half share of said stock which she had acquired by assignment from one Ira L. Goodrich on February 3, 1925; and that, as to her, said cause is, and has been since March 10, 1941, at issue and ready for trial.

It is further alleged by petitioner that said corporation is under the domination and control of C. Ray Robinson, named as one of the defendants in said action, and that said C. Ray Robinson owns a majority of the stock, is president of said corporation and one of its attorneys; that said defendant Robinson demurred to the complaint of the corporation, and, his demurrer having been overruled on June 10, 1940, he was granted twenty days to answer, but that no notice of the overruling of his said demurrer was given said defendant until petitioner herself gave such notice on August 14, 1942, at which time she also gave notice to the corporation of her intention to move for a separate trial, said notice being supported by her affidavit setting forth the source of her title to a one-half interest in one share of stock, and alleging that defendant C. Ray Robinson claimed the one share which had formerly belonged to Ira L. Goodrich, and that she had no dispute with any of the defendants other than said C. Ray Robinson; that when her said motion came on for hearing on August 24, 1942, said C. Ray Robinson had been inducted into the military service, but that he and the corporation appeared in opposition to said motion on the ground that the said C. Ray Robinson desired to file an answer and a cross-complaint; that petitioner's motion for a separate trial was denied, and said defendant C. Ray Robinson was granted permission to file his answer and cross-complaint, which he did, alleging therein that petitioner had no interest in any of the stock of the corporation, and that he was the owner of four shares thereof; that on September 3, 1942, petitioner answered the said cross-complaint, and on January 18, 1943, again served and filed a notice of motion for a severance and a separate trial, supported by an affidavit of her attorney and a disclaimer by petitioner of any interest in the stock of said corporation except the one-half share transferred to her by Goodrich; that in reply to her motion for severance said C. Ray Robinson gave written notice of motion to abate the trial so long as said C. Ray Robinson remained in the military service of the United States; that the latter's notice of motion was accompanied by an affidavit of C. Ray Robinson alleging that he was on active duty with the Pacific Fleet, and stationed outside the continental limits of the United States, that he was unable to be present at the trial of the said action or any proceedings in connection therewith, and that his presence was vitally necessary and essential to such trial or proceedings; that his notice of motion was also supported by an affidavit of one of his office associates to the same effect; that in reply thereto petitioner filed an affidavit by her attorney, asserting therein that petitioner had a separate and distinct claim against the corporation, and requesting that the case proceed so far as said corporation and petitioner were concerned, also asserting that the trial of the action had been deliberately delayed by C. Ray Robinson; that on January 27, 1943, the trial court entered an order abating the proceedings submitted to it on January 25th, and denied the motion of petitioner to proceed.

It is here contended that the trial court erred in so ruling; that the corporation has no right to have the action stayed, that petitioner asked a trial only of issues between the corporation and herself, and did not request that it proceed to a determination of any dispute with C. Ray Robinson, that the two disputes are legally distinct and separate and that the mere fact that defendant Robinson is a majority stockholder and president of the corporation does not entitle him or the corporation to the benefits of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 501 et seq.; and that the trial court has abused its discretion in its rulings aforesaid.

Preliminarily we note that petitioner alleges that her claim of title to one-half interest in a share of the capital stock of said corporation arises out of an assignment of same to her on February 3, 1925, and that it does not appear that at any time prior to the filing of suit by the corporation she had ever taken any action in regard to same, or that she was suffering or would suffer any injury or any change in her status in regard to said stock if a determination of the issues created by the action of the corporation and the cross-action filed by defendant C. Ray Robinson were longer deferred; also that even if the issues between the corporation and petitioner were determined there would still remain for determination the issues between petitioner and cross-complainant Robinson.

[1, 2] Whether separate actions shall be consolidated for trial, or whether there shall be a severance and separate trials of issues in a single action, is matter within the discretion of the trial court. Section 1048, C.C.P.; 24 Cal.Jur. 720, sec. 5; 38 C.J. 631; 26 R.C.L. 1011; Caldwell v. Regents of University, 35 Cal.App. 639, 640, 170 P. 666; Seidell v. Tuxedo Land Co., 1 Cal.App.2d 406, 409, 36 P.2d 1102; Hill v. Peres, 136 Cal.App. 132, 143, 28 P.2d 946; Osmak v. American Car & Foundry Co., 328 Mo. 159, 40 S.W.2d 714, 719, 77 A.L.R. 722; Cleveland v. Laclede-Christy, etc., Co., Mo.App., 113 S.W.2d 1065, 1070. And a trial court's discretion in this as in other discretionary matters will not be interfered with either on appeal or by writ of mandate except when there has been a manifest abuse of such discretion. Hays v. Superior Court, 16 Cal.2d 260, 105 P.2d 975; Rundberg v. Belcher, 118 Cal. 589, 590, 50 P. 670; California C. C. Corporation v. Superior Court, 127 Cal.App. 472, 476, 15 P.2d 1108; Bashore v. Superior Court, 152 Cal. 1, 3, 91 P. 801; Beardsley Land, etc., Co. v. Superior Court, 104 Cal. App. 255, 257, 285 P. 908.

[3] Petitioner relies upon Caldwell v. Regents of University, 35 Cal.App. 639, 170 P. 666, and Judson v. Malloy, 40 Cal. 299. In the former case, on appeal the court sustained the action of the trial court in refusing a continuance of the action under the circumstances of the case; but it there said that: "It is a matter of discretion on the part of the trial court to grant separate trials as between the plaintiff and separate defendants, which discretion will not be interfered with on appeal except in the case of abuse which is not made manifest here." We find nothing in the Judson case that compels a conclusion that the trial court erred in the instant case in denying a severance. While it was there said that had the defendants moved for separate trials it would have been the duty of the court to so order, the facts of that case are entirely different from those presented herein, and that was not a mandamus proceeding. We cannot say from the allegations of the petition herein that the trial court abused its discretion in denying the severance and the separate trial requested by petitioner.

[4] The remaining question is whether the trial court abused its discretion in granting the motion of defendant Robinson to abate the whole proceeding so long as he remained in the military service of the United States. The Soldiers' and Sailors' Civil Relief Act of 1940 provides in section 521, 54 Stat. 1181: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." This statute was enacted in the interests of those in the naval and military service of the United States; and while under its provision courts may, in the exercise of their discretion, refuse to stay proceedings, they are obligated not to do so unless they are of the opinion that the interests of the person in the military or naval service will not be materially affected by a refusal.

In a recent case the United States Supreme Court said that the judicial discretion conferred on trial courts by the Soldiers' and Sailors' Civil Relief Act is the very heart of the policy of the Act; that "The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial." Boone v. Lightner, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587.

[5, 6] In Royster v. Lederle, 6 Cir., 128 F.2d 197, the court said that the act is to be liberally construed to effectuate its purpose. There a writ of mandamus was sought to compel the trial court to set aside an order of continuance which it had made in the exercise of its discretion under the provisions of the act; but the issuance of the writ was denied, the court saying that it could not say, as matter of law, that defendant's rights would not be affected by proceeding to trial during his absence in the armed service of the United States. Also in State v. McCabe, 140 Ohio St. 535, 45 N.E.2d 763, mandamus was sought to compel vacation of an order of a lower court which had granted a continuance of an action against a soldier on foreign duty with the Canadian army. The Soldiers' and Sailors' Act did not apply to him, but the court said that independently of statute courts have power to grant continuances, that granting or refusing same is within a court's sound discretion, and that an appellate court will not interfere with such exercise of discretion unless the action of the lower court is plainly erroneous and constitutes a clear abuse of discretion.

Petitioner cites several cases wherein denials of requests for continuances under the provisions of the Soldiers' and Sailors' Civil Relief Act have been sustained by appellate courts; but such decisions only confirm the rule applied herein that the discretion of a trial court will not be interfered with on appeal, unless an abuse of discretion is made to appear.

As we cannot say that in this case the trial court abused its discretion, the writ of mandamus is denied and the alternative writ hereinbefore issued is discharged.

PEEK and THOMPSON, JJ., concur.

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60 Cal.App.2d 47

CREDIT BUREAU OF SAN DIEGO, Inc., v. HORETH.

Civ. 2897.

District Court of Appeal, Fourth District, California.

July 28, 1943.

1. Replevin 🔑58

Generally, a complaint for recovery of personalty must allege ownership and right of possession, or facts showing right of possession at time action was filed.

2. Appeal and error 🔑931(3)

Where findings are waived, it must be presumed on appeal that trial court, in effect, found all facts necessary to support the judgment.

3. Appeal and error 🔑907(3), 916(1)

When appeal is on judgment roll alone, appellate court must presume, in support of judgment, that pleadings were treated as sufficient and that evidence on issues sufficient to support the judgment was introduced without objection.

4. Appeal and error 🔑916(1)

When appeal is on judgment roll alone, appellate court may presume that parties in open court waived any insufficiency in pleadings, thus preventing either party from presenting question of insufficiency on appeal.

5. Appeal and error 🔑1170(3)

A judgment awarding plaintiff possession of personalty and special damages for its detention was not reversible because of alleged failure of plaintiff to allege ownership or right of possession of personalty at time action was filed, where appeal was on the judgment roll alone, findings of fact were waived, and defendant did not point out any miscarriage of justice. Const. art. 6, § 4½.

6. Appeal and error 🔑1031(1)

Under constitutional provision prohibiting reversal of judgment for error in pleading unless error has resulted in miscarriage of justice, appellate court cannot presume that there has been a miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by the Credit Bureau of San Diego, Inc., against Reta Horeth to recover possession of personal property and special damages for its detention. From a judgment for plaintiff, defendant appeals.

Affirmed.

Vincent Whelan, of San Diego, for appellant.

Liggett & Liggett, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff possession of personal property and special damages for its detention. The appeal is on the judgment roll alone. Findings of fact were waived.

The sole ground urged for a reversal of the judgment is that the complaint does not allege facts sufficient to constitute a cause of action as it failed to allege ownership in plaintiff or right to possession of the property at the time the action was filed on June 5, 1942. The only allegation on the question of ownership and right of possession is the following: "That on or about the 17th day of February, 1942, and at all times hereinafter mentioned, plaintiff's assignor, R. A. Wright, was the owner and entitled to the immediate possession of the following goods and chattels, to-wit:". Defendant did not demur to the complaint and admits its insufficiency was not raised in the trial court.

[1] The general rule is that a complaint for the recovery of personal property must allege ownership and right of possession, or facts showing right of possession at the time the action was filed. Stanley W. Smith, Inc., v. Pilgrim, 93 Cal.App. 539, 269 P. 765; Affierbach v. McGovern, 79 Cal. 268, 21 P. 837.

Plaintiff cites the case of Stevens v. Weisbaum, 87 Cal.App. 664, 262 P. 762, where it is held that an allegation in a complaint to the effect that C. C. Stevens, plaintiff's assignor, etc., was owner and entitled to possession of personal property, was a sufficient inferential allegation of an assignment to make the pleading good against a general demurrer.

Should we agree with defendant that the allegations of the complaint failed to state a cause of action, we could not reverse the judgment under the facts before us.

[2] Where findings are waived it must be presumed on appeal that the trial court, in effect, found all facts necessary to support the judgment. Gordon v. Mount, 125 Cal.App. 701, 13 P.2d 932; Jensen v. Burton, 117 Cal.App. 66, 3 P.2d 324.

[3, 4] When the appeal is on the judgment roll alone, we must presume, in support of the judgment, that the pleadings were treated as sufficient and that evidence on issues sufficient to support the judgment was introduced without objection. Kirk v. Culley, 202 Cal. 501, 261 P. 994; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Consolidated Produce Co. v. Takahashi, 52 Cal.App.2d 753, 127 P.2d 281. We may also presume that the parties in open court "expressly waived any insufficiency in the pleadings" (Turner v. Stock, 79 Cal.App. 662, 251 P. 814, 816), thus preventing either party from presenting the question of their insufficiency on appeal.

[5, 6] Further, section 4½ of Article VI of the Constitution prohibits us from reversing a judgment "for any error as to any matter of pleading, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." We cannot examine the evidence because it is not before us. Defendant has not attempted to point out any miscarriage of justice in this case. Under these circumstances we cannot reverse the judgment. Turner v. Stock, supra; Clinch v. Shafer, 89 Cal.App. 423, 264 P. 794; Hougland v. Roth Blum Packing Co., 99 Cal. App. 631, 279 P. 159; Mahoney v. Atchison, etc., R. Co., 101 Cal.App. 652, 281 P. 1108. We are not permitted to presume that there has been a miscarriage of justice.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

PARK & TILFORD IMPORT CORPORATION v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 848, A. F. OF L., et al.

Civ. 14076.

District Court of Appeal, Second District, Division 2, California.

June 28, 1943.

Hearing Granted Aug. 26, 1943.

1. Courts 🔑**1**

"Jurisdiction" is the power to hear and determine, and jurisdiction of a particular case is the power to hear and determine that case. Code Civ.Proc. § 1917.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

2. Injunction 🔑**110**

The "jurisdiction" sufficient to sustain record in employer's action to enjoin labor unions from picketing and boycotting plaintiff's business is jurisdiction over the cause and over the parties. Code Civ.Proc. § 1917.

3. Injunction 🔑106, 110

An action to enjoin labor union from picketing and boycotting of plaintiff's business in furtherance of an unlawful purpose is an "action in equity" of which superior court has original jurisdiction, and where the court has jurisdiction of the parties it has jurisdiction to determine the case. Code Civ.Proc. § 1917; Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Action in Equity".

4. Courts 🔑26

Where a court has jurisdiction of the subject matter, it has a right to decide every question which occurs in the cause. Code Civ.Proc., § 1917.

5. Commerce 🔑16, 40(1)

An employer engaged in business of manufacturing and selling distilled spirits, and which imported all merchandise from other states and foreign countries and sold about 4 per cent. of its goods to outside states, was engaged in "interstate commerce" within meaning of the National Labor Relations Act and was subject to the provisions thereof. National Labor Relations Act §§ 1, 2(6), 29 U.S.C.A. §§ 151, 152(6).

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

6. Injunction 🔑101(1)

Labor unions maintaining peaceful picket line at plaintiff's place of business and carrying on a secondary boycott of plaintiff's business relations with its customers for purpose of coercing plaintiff to persuade its employees to join the unions, which would have rendered employer guilty of "unfair labor practices" under the National Labor Relations Act, were guilty of unlawful practices which could be enjoined. National Labor Relations Act, § 10(a), 29 U.S.C.A. § 160(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Labor Practice".

7. Master and servant 🔑16

The obligation imposed upon employer by the National Labor Relations Act to treat only with the true representatives of employees is exclusive, and hence imposes the negative duty to treat with no other. National Labor Relations Act, § 10(a), 29 U.S.C.A. § 160(a).

8. Injunction 🔑101(1)

Picketing or boycotting of employer by labor unions for purpose of coercing employer into signing a contract with labor unions which did not represent a majority of employees, execution of which contract would have constituted the commission of an "unfair labor practice" by employer, constituted illegal "coercion" and could be enjoined.

See Words and Phrases, Permanent Edition, for all other definitions of "Coercion".

9. Torts 🔑10

A secondary boycott of an employer by labor union must be exercised in pursuit of a lawful end.

10. Torts 🔑10

A strike, boycott, or other form of economic pressure activities, however peaceable and innocent on their face, may be without legal justification and unlawful if the purpose behind and motivating such action is unlawful.

11. Torts 🔑10

Collective labor activity, represented by picketing and boycotting, is permissible only when conducted according to law, and, if in violation thereof, the picketing and boycotting are subject under ordinary circumstances to the restraint of a court of equity.

12. Commerce 🔑8(1)

California law that peaceful picketing or boycotting for the purpose of securing a closed shop contract were activities in pursuit of a lawful end has no application to employers subject to the provisions of the Wagner Act. National Labor Relations Act, §§ 1, 2(6), 10(a), 29 U.S.C.A. §§ 151, 152(6), 160(a).

13. Torts 🔑10

The word "unfair" ordinarily conveys the idea that the employer has refused to comply with conditions upon which union men would consent to remain in his employ, or other employers under contract with, or sympathetic to organized labor, would consent to purchase or handle material or merchandise supplied by him.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair".

14. Torts ⚷10

The term "unfair" or "unfair to organized labor" does not mean that the employer so charged has been guilty of any fraud, breach of faith or dishonorable conduct, but that he has refused to comply with reasonable, honest, and lawful conditions imposed or demanded by a labor organization.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair to Organized Labor".

15. Torts ⚷10

It is a prime requisite, to support and give truth to charge that employer is "unfair", that in some recognized lawful respect the employer has refused to comply with proper and lawful demands of a labor union, and if the demand is opposed to reason, public policy, or law, and cannot be assented to without violating public policy or law, it cannot truthfully be said that employer is "unfair to organized labor".

16. Injunction ⚷98(1), 101(1)

Where labor unions were furnished with every requested opportunity to organize employees and employer placed no obstacles in their way to secure applications for membership or to act as bargaining agent and upon failure to persuade employer to sign contract with unions, which did not represent a majority of employees, called a strike of two teamsters of employer, established a picket line, and placed employer's name on an "unfair list", the publication of employer's name and business as unfair was untrue, deceptive, and dishonest, and would be enjoined.

17. Torts ⚷10

Picketing which is not honest or truthful is "unlawful picketing".

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Picketing".

18. Injunction ⚷98(1), 101(1)

Although the publication of false statements alone will not justify equitable relief, equity will generally intervene where false or fraudulent statements are combined with picketing and where under local policy this renders the picketing illegal and enjoinable.

19. Injunction ⚷98(1), 101(1)

Ordinarily, false or fraudulent statements may be disassociated from picketing, but not from boycotting when made in connection or combination with boycott activities, and, where picketing is founded on and maintained in direct combination with the false charge of unfairness, the picketing cannot stand if the false charge is eliminated by injunction.

20. Injunction ⚷101(4)

Where labor unions by peaceful picketing and boycotting sought to coerce employer engaged in interstate commerce to influence its employees to join the unions against their will and to execute closed shop contracts with the unions which did not represent a majority of the employees by appropriate unit, the purpose of such activities was unlawful and subject to injunction in a state court.

21. Injunction ⚷98(1), 101(1)

Where labor unions' charge, that employer was "unfair", was false and was being published in combination with picketing and boycott activities of the union, such picketing and boycotting were rendered untruthful and dishonest and therefore unlawful and enjoinable in a state court.

22. Equity ⚷1

The sanction granted a court of equity to administer justice and enforce rights in novel and unprecedented cases arising under changes in the social and business world, where there is no remedy save in a court of equity, is as broad as the necessities of the case demand.

23. Injunction ⚷101(4)

Where picketing and boycotting of employer's business, by labor unions not representing majority of employees, was unlawful, employer was entitled to injunction restraining unions from such activities during pendency of proceedings before the National Labor Relations Board for investigation and certification of bargaining agent for employees.

24. Commerce ⚷9

The National Labor Relations Act provided for the protection of the collective bargaining rights of employees, but the matter of the protection of employer was left for state control. National Labor Relations Act § 1 et seq., 29 U.S.C.A. § 151 et seq.

25. Commerce ⚷8(1)

Where labor union's boycotting and picketing activities and publication of employer's name on an unfair list was unlawful, state court decree enjoining such activities did not infringe upon jurisdiction of National Labor Relations Board. National Labor Relations Act, § 10(a), 29 U.S.C.A. § 160(a).

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Park & Tilford Import Corporation against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., and others, to enjoin defendants from listing plaintiff as unfair to organized labor and from picketing and boycotting plaintiff and its business. From a judgment granting an injunction, defendants appeal.

Affirmed.

V. P. Lucas and David Sokol, both of Los Angeles, for appellants.

O'Melveny & Myers, of Los Angeles, by Pierce Works, of Los Angeles, and Franklin N. Smith, of Lompoc, for respondent.

W. J. WOOD, Justice.

Defendant labor unions have appealed from a judgment whereby they were enjoined from listing plaintiff as unfair to organized labor and from picketing and boycotting plaintiff and its business during the pendency of proceedings before the National Labor Relations Board for investigation and certification of a bargaining agent for plaintiff's employees. At the time of the rendition of the judgment from which the appeal is being prosecuted, Judge Henry M. Willis, who presided at the trial, filed with the clerk of the superior court a memorandum opinion in which he clearly set forth the pertinent facts, the issues and the principles of law involved and the reasons for the judgment. We are in accord with the views therein expressed and, with additions which will hereinafter appear, we adopt the opinion of Judge Willis as and for the opinion of this court. It is as follows:

"Plaintiff, a New York corporation, qualified to do business in California, brought this action against Wholesale Delivery Drivers and Salesmen's Union, Local 848, and Grocery Warehousemen's Union, Local 595 (both incorrectly named in the above caption), and Los Angeles Food and Drug Council to secure an injunction restraining defendants and their officers and agents and members from listing plaintiff as unfair to organized labor, from making any false or fraudulent statement, in connection with picketing or boycotting, concerning plaintiff or its officers or business, or concerning the wages, hours or conditions of labor at plaintiff's place of business; and from interfering with or preventing the sale or delivery of plaintiff's products by picket, boycott, strike or by threats thereof or by other concerted action for the purpose of inducing or compelling plaintiff to violate the National Labor Relations Act, commonly called the Wagner Act, 29 U.S.C.A. § 151 et seq.

"Within the scope of the pleadings and under admissions, stipulations and proofs the following facts are established:

"Plaintiff is engaged in the business of manufacturing, bottling, importing, distributing and selling distilled spirits and alcoholic liquors, maintaining its local and Western Division offices and place of business in Los Angeles, California, with charge over business in the eleven western states. It receives no merchandise from within the State of California, but imports all thereof from other states and some foreign countries. It sells and delivers from its warehouse approximately four per cent of its goods and products to outside states, the balance being sold and delivered to customers in California. It employs fifteen salesmen who solicit business in California, and four office clerks, a private secretary to the Division Manager, a confidential bookkeeper, a Branch Manager, a warehouse superintendent and two teamster-warehousemen. None of the salesmen or clerks were members of either of defendant unions, and none of them had authorized either of such unions to bargain for them with their employer. Sometime in 1941, without opposition from plaintiff, the defendant unions had 'organized' the two teamster employees. Of these two teamsters one was a member of Local 848 and the other was a member of Local 595.

"Beginning in January, 1942, and continuing thereafter, representatives of Local 595 approached plaintiff's Division Manager and its Branch Manager and asked permission to interview the four clerks with a view of inducing them to join Local 595. This permission was granted and several interviews were held with the clerks but they all declined to join the local. In the latter part of February, 1942, representatives of Local 595 presented to plaintiff a form of contract covering the office clerks as a unit with a request that plaintiff sign the same with the local. This form of contract (Ex. 1) is clearly what is called a union closed-shop contract. Plaintiff refused to sign such contract for the reason that the local's representatives admitted that it did not represent a majority of said clerks,—in fact, none of them. There upon said representatives stated that unless the plaintiff signed and the clerks became members of Local 595, the firm would be crucified, that there would be a picket line, the teamsters would be called out, and a boycott instituted. Upon the continued refusal of plaintiff to sign such contract, the representatives of Local 595, about March 15, 1942, informed plaintiff that if it did not persuade the office clerks to come into the union, they would call in the aid of Local 848, and proceed to organize the salesmen as well as the clerks. Shortly thereafter the representatives of Local 848 called with those of Local 595 and discussions concerning the salesmen were had. Permission was asked and granted to interview the salesmen and they were interviewed and all declined to join Local 848. At this juncture, Local 848 also presented its form of closed shop contract covering the salesmen (Ex. 2) to plaintiff with request for signature. This was refused on the ground that Local 848 did not represent a majority of the salesmen—in fact, none of them—and that plaintiff would violate the National Labor Relations Act if it signed such contract. After some further urgent requests by Local 595 and 848 that plaintiff persuade its clerks and salesmen to join those respective locals, which requests were refused, the locals called the two warehousemen-teamsters out on strike, established a picket line at plaintiff's place of business and began a secondary boycott on June 14, 1942, and such picketing and boycotting has continued up to date of submission of this case. At the same time the Los Angeles Food and Drug Council published plaintiff's name and business in its 'Unfair List' and the defendants jointly notified a large number of plaintiff's customers, orally and by circular letter; that plaintiff was 'unfair' and requested them not to purchase plaintiff's products. Many of such customers have ceased to patronize plaintiff and as a result of the concerted action above described, it has suffered irreparable damage and will continue to suffer such damages unless the picketing and boycotting ceases. In this connection it should be stated that all such concerted activities have been peaceful, and no violence or threats of violence have occurred, nor any false or fraudulent statements published by the locals, other than the questioned statement that plaintiff was 'unfair to organized labor,' and the publication of plaintiff's name and business on the 'Unfair List' of the Food and Drug Council, concerning which more will be said hereinafter.

"Incidental to the foregoing facts, it is established that in January, 1941, the salesmen employees of plaintiff had organized a labor union under the name of Park & Tilford Mutual Association as an unincorporated association, and informed plaintiff through its president that it represented the salesmen as a bargaining agent. No formal contract had ever been made between this association and plaintiff but discussions had been had in respect to certain wages. At the time that Locals 595 and 848 were pressing their demands for a contract they were informed of the existence of this association and that it had recently taken in the clerks also for bargaining purposes. Plaintiff had suggested to the defendant unions that the National Labor Relations Board be petitioned to call an election and for certification of a bargaining agent, but defendants refused to unite in such procedure. Then on September 1, 1942, plaintiff filed such a petition with the National Labor Board which assumed jurisdiction and started an investigation and on the next day, September 2, 1942, plaintiff commenced this action. However, on September 4, 1942, defendant Local 595 filed with such Labor Board its charges accusing plaintiff of committing an unfair labor practice as defined in the National Labor Relations Act, in that it interfered with and dominated the Park & Tilford Mutual Association and coerced its employees to become members thereof. By a rule of the Board it is provided that investigation on a petition for certification is temporarily suspended until such charges may be determined.

"The essentials of these same charges were pleaded by defendant Local 595 in its answer as a special defense, but at the trial such defense (which may be characterized as that of 'unclean hands') was deliberately abandoned by defendant, and this feature of the case may be closed by stating that there is no evidence whatever in the record of the trial of this case relating to the facts constituting the basis of such charge, and that in so far as the issues in this case are concerned we may eliminate all further reference to or consideration of the origin or history of the Park & Tilford Mutual Association, other than its existence as such, and for the same reason all consideration of the charges filed by Local 595.

"On this state of the facts herein, defendant Local 595 claims that this court has no jurisdiction of the subject of this action on the stated ground that the National Labor Relations Board has exclusive jurisdiction to determine the issues herein by virtue of Section 10(a) of the National Labor Relations Act. Defendant Local 848 contends that this state court has no jurisdiction to enforce or administer the provisions of the National Labor Relations Act, nor to find on the question of commission of an unfair labor practice affecting commerce.

[1-3] "Jurisdiction is the power to hear and determine, and jurisdiction of a particular case is the power to hear and determine that case. 7 Cal.Jur. 584. The jurisdiction sufficient to sustain a record in this case is jurisdiction over the cause and over the parties. Sec. 1917, Code Civ. Proc. It is manifest that this court has jurisdiction over the parties. The cause is one of injunctive relief from all picketing and boycotting by the appearing defendants in furtherance of an unlawful purpose and in violation of plaintiff's property rights. An action for injunction is a case in equity of which this court has original jurisdiction under Article VI, Section 5, of the State Constitution, Rickey Land & Cattle Co. v. Glader, 6 Cal.App. 113, 91 P. 414; County of Yuba v. North American, etc., Min. Co., 12 Cal.App. 121, 107 P. 138. In the case of Armstrong v. Superior Court, 173 Cal. 341, 159 P. 1176, on certiorari the jurisdiction of the Superior Court to enjoin 'all picketing' was challenged. Therein the court stated: '* * * We are satisfied that it cannot be held that a court of equity is without jurisdiction to enjoin any and all picketing, as it has done in this case, and that if there be any error in this regard, * * * it is simply error in the exercise of jurisdiction which can be reviewed by a higher court only upon direct appeal from the order.'

[4] "Where a court has jurisdiction of the subject matter, as must be held in this case, it has a right to decide every question which occurs in the cause. Hibernia S. & L. Society v. Lewis, 117 Cal. 577, 582, 47 P. 602, 49 P. 714.

"There are three outstanding questions arising herein. (1) Is plaintiff corporation engaged in interstate commerce so as to render it subject to the provisions of the National Labor Relations Act? (2) Were the picket and boycott activities of defendants engaged in and prosecuted for an unlawful purpose? (3) Was the publication of the charge that plaintiff was 'unfair to organized labor' false, fraudulent or dishonest?

"(1) Is plaintiff subject to the Wagner Act?

"The declared policy of the United States as stated in the National Labor Relations Act is to eliminate the causes of certain substantial obstructions to the free flow of commerce, resulting from denial by employers of the right of employees to self-organization and of collective bargaining, having the effect of burdening or obstructing commerce, or materially affecting the flow of raw materials or manufactured or processed goods from or into the channels of commerce. Sec. 1. The term 'commerce' is defined in the Act as meaning 'trade, traffic, commerce, transportation, or communication among the several States * * * or between any foreign country and any State.' Sec. 2, subd. 6.

[5] "Under the skeleton recitation of facts herein concerning plaintiff's area and method of business, amplified by the probative facts in evidence, it is quite clear that plaintiff was, during all the times included in this case, and still is engaged in interstate commerce within the meaning and purview of the National Labor Relations Act and was and is an employer subject to the provisions thereof.

"(2) Were defendants' activities for an unlawful purpose?

"By express terms of the act it is declared to be an unfair labor practice for an employer, subject to the Act, to interfere with, restrain or coerce employees in the exercise of their rights of self-organization or of collective bargaining through representatives of their own choosing. Also it is declared to be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment so as to encourage or discourage membership in any labor organization, provided, this does not preclude the employer from making an agreement with a labor organization requiring membership in such organization as a condition of employment, if such labor organization is the representative of a majority of the employees in the appropriate collective bargaining unit covered by such agreement.

[6, 7] "Under the proofs herein this court is constrained to find that the defendants, acting in concert of purpose and activities, established and have maintained a peaceful picket line at plaintiff's place of business, and have instituted and carried on a secondary boycott of plaintiff's business relations and dealings with its customers for the purpose of coercing plaintiff to persuade its employees, both clerks and salesmen, to join the defendant unions, respectively as to units, as a condition of retaining employment. This persuasion, if successful in its purpose, would render plaintiff guilty of an unfair labor practice and a direct violation of the National Labor Relations Act. Incidental to and as a basis of such persuasion, defendant unions, each for itself, demanded of plaintiff that it execute with the respective union a closed-shop contract, by the terms of which plaintiff would be required to influence its employees to join the respective union as a condition of continuing employment. As the defendant unions did not represent a majority of either the clerks or the salesmen, employees of plaintiff, neither of them was authorized to bargain for or to execute such an agreement on behalf of such employees in their respective units, and it would have constituted an unfair labor practice on the part of plaintiff to have acceded to such demand and to have executed such contract. Such contract would not only be void and unenforceable but its execution by plaintiff would have been tantamount to the unfair labor practice first mentioned above. The obligation imposed by the Wagner Act to treat only with the true representatives is exclusive and hence imposes the negative duty to treat with no other. N. L. R. B. v. Jones & Laughlin Steel Co., 301 U.S. 1, 44, 57 S.Ct. 615, 81 L.Ed. 893.

[8, 9] "The purpose of the picketing and boycotting is thus definitely shown to be the coercing of plaintiff into commission of unfair labor practices, which, if committed under such coercion, would subject plaintiff to prosecution before the Labor Board on charges. When viewed from any angle, this purpose of defendants constituted illegal coercion. Picketing or boycotting for such purpose are but the weapons of such illegal coercion, and may be enjoined. Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20. And a secondary boycott must be exercised in pursuit of a lawful end. C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 395, 106 P.2d 414.

[10] "A strike, boycott or other form of economic pressure activities, however peaceable and innocent on their face, may nevertheless be without legal justification and unlawful if the purpose behind and motivating such action is unlawful. Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L.Ed. 248; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 57 S.Ct. 857, 81 L.Ed. 1229; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 395, 399, 106 P.2d 414; McKay v. Retail Automobile Salesmen's Local, 16 Cal.2d 311, 331, 106 P.2d 373; R. H. White Co. v. Murphy, 310 Mass. 510, 38 N.E.2d 685.

[11] "Collective labor activity, represented by picketing and boycotting, is permissible only when conducted according to the requirements imposed by law, and if in violation of such requirements, picketing and boycotting are subject under ordinary circumstances to the restraint of a court of equity. Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 531, 535, 127 P.2d 542. The federal law, embodied in the Wagner Act forbids an employer, whose business subjects him to the provisions of such act, from interfering with or coercing his employees in their rights of self-organization and collective bargaining, and to negotiate or enter into contracts with a labor organization which does not represent a majority of his employees in the appropriate bargaining unit. By necessary implication all others are forbidden to compel him so to do. To picket or boycott such employer for the purpose of coercing him into signing such a contract

or to interfere with his employees' right of joining or not joining a union, is directly contrary to the spirit and purpose of the Wagner Act, and constitutes illegal coercion, and is subject to restraint by a state court of equity. Hudson Recreation Co. v. Bowling, etc., Union Local 209, 39 Pa.Dist.Co.R. 655; R. H. White Co. v. Murphy, 310 Mass. 510, 38 N.E.2d 685.

[12] "I am mindful of the decisions of our Supreme Court in the so-called McKay series of decisions of October 14, 1940 (McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38–44, 16 Cal.2d 369, 106 P.2d 1; Lund v. Auto Mechanics' Union No. 1414, 16 Cal.2d 374, 106 P.2d 408; Shafer v. Registered Pharmacists Union Local 1172, 16 Cal.2d 379, 106 P.2d 403; C. S. Smith Metropolitan Market Co., Ltd., v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Fortenbury v. Superior Court of Los Angeles County, 16 Cal.2d 405, 106 P.2d 411), the effect of which was to declare that the provisions of the California Labor Code had not had the effect of outlawing closed-shop contracts, and that peaceful picketing or boycotting for the purpose of securing such a contract were activities in pursuit of a lawful end. This is the law in California applicable to employers who are not subject to the provisions of the Wagner Act. That Act had outlawed closed-shop contracts between a labor organization and an employer engaged in interstate commerce, in all cases where the labor organization does not represent a majority of the employees in the affected unit. It follows logically that economic pressure applied by a labor union to coerce employers to execute such an outlawed contract, is unlawful because it is directed to an unlawful purpose, and to secure an unlawful result. This conclusion is not in conflict with that in the McKay cases, although it appears to present an anomaly. This, however, naturally results from the difference in statute law applicable to and binding on the two different classes of employers, namely, those engaged in intrastate business exclusively, subject only to state law as interpreted, and those engaged in interstate trade or commerce, subject to the Wagner Act.

"(3) Was the listing and publication of plaintiff's name and business on the unfair list truthful and honest?

[13] "The use of the word 'Unfair', as employed by labor organizations generally, carries a technical meaning commonly understood by the courts, the parties and by all persons to whom labor organizations send notices that a certain employer had been declared unfair. Such meaning, ordinarily conveys the idea that the employer has refused to comply with conditions upon which union men would consent to remain in his employ, or other employers under contract with, or sympathetic to organized labor, would consent to purchase or handle material or merchandise supplied by him. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 592, 98 P. 1027, 21 L.R.A., N.S., 550, 16 Ann.Cas. 1165.

[14, 15] "As commonly used by labor organizations the term 'unfair' or 'unfair to organized labor' does not mean and is not understood to mean that the employer, so charged, has been guilty of any fraud, breach of faith or dishonorable conduct, but that he has refused to comply with reasonable, honest and lawful conditions imposed or demanded by a labor organization. It is a prime prerequisite to support and give truth to such a charge that in some recognized lawful respect the employer has refused to comply with proper and lawful demands of a labor union. Thus if the demand made or condition imposed by the labor union upon an employer is opposed to reason, public policy or the law, and cannot be assented to without violating public policy or law, it cannot be truthfully and honestly said that the employer is unfair to organized labor, or unfair at all. Instead, to declare that an employer is unfair under such circumstances is clearly deceptive and fraudulent.

[16] "In this case the plaintiff is shown by the evidence to have been fair to the defendant unions at all times. It furnished them every requested opportunity to 'organize' the clerks and salesmen, and placed no obstacles in their way to secure their applications for membership in, or their authorization to defendant unions to act as their bargaining agent. Failing in these efforts to organize the employees of plaintiff, not through any fault or opposition of plaintiff, but solely because the employees in question refused to join defendant unions, preferring to self-organize in their own union, and failing to persuade plaintiff to commit acts in violation of the Wagner Act for the purpose of influencing

or coercing its employees to join such defendant unions, the defendants, acting in concert, called the strike of the two teamsters, established a picket line and published plaintiff's name on the Council 'unfair list,' and mailed to many customers of plaintiff a circular letter stating that plaintiff had been placed on the 'official "unfair" list of the Los Angeles Food and Drug Council to which body our unions belong,' and requesting such customers to cease patronizing plaintiff until the unions' dispute with plaintiff was settled.

"Under the facts and circumstances of this case it must be found that the publication of plaintiff's name and business as 'unfair' was untrue, deceptive and dishonest. It is manifest, and was equally manifest to the defendants, that plaintiff had not been, and is not unfair to organized labor in general or to these local unions in particular in any respect. No truthful or honest charge of 'unfair' or 'unfair to organized labor' can be predicated on refusal of an employer to accede to unlawful demands of a union. The picketing and secondary boycott which has occurred were founded exclusively on this refusal to commit unfair labor practices by plaintiff, and in combination with the publication of this charge of 'unfair,' and are inseparably entangled with such publication.

[17, 18] "'There can be no doubt that untruthful picketing is unlawful picketing. Cases involving the right of labor to picket peacefully have consistently held that the picketing must also be honest and truthful.' Magill Bros. v. Building Service etc. Union, 20 Cal.App. 506, 127 P.2d 542, 543. 'Despite theoretical criticism * * * and despite the fact that the publication of false statements alone will not justify equitable relief, it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal.' Id. 20 Cal.2d at page 509, 127 P.2d at page 544. 'We find no suggestion in these cases, therefore, that a state policy characterizing untruthful picketing as unlawful and enjoinable is in violation of the constitutional provision. [Free Speech]'. Id., 20 Cal.2d at page 512, 127 P.2d at page 545. 'Unless there is a statutory or constitutional restriction on the power of a court of equity under the circumstances here presented, therefore, it seems clear that plaintiff is entitled to a decree enjoining defendants from picketing falsely and untruthfully.' Id., 20 Cal. 2d at page 510, 127 P.2d at page 544.

"In the case, from which the above quotations are taken, it appeared that the defendant union, in an effort to organize the shop of plaintiff, placed a picket line at the shop, the pickets carrying signs stating: 'This house on strike. A. F. L.' In truth and in fact there was no strike on there and the statement was found to be false. The Supreme Court after declaring the law as above quoted concluded as follows: 'Under the facts set forth in this case, therefore, plaintiffs are entitled to a decree restraining defendants from the use of false or untruthful statements in the exercise of their right to picket.'

[19] "Ordinarily false or fraudulent statements, either oral or in writing, may be disassociated from picketing, but not from boycotting when made in connection or combination with boycott activities. In this case, however, the picketing is founded on and maintained in direct combination with the false charge of unfairness and cannot stand if the false charge is eliminated by decree of injunction. To use an old western adage, 'The tail goes with the hide.' As to the boycott it is manifest that the false charge cannot be disentangled from the boycott activities and both must stand or fall together.

"Recapitulation.

[20] "From the foregoing it is demonstrated that in no wise has this court encroached upon any subject of litigation committed to the exclusive jurisdiction of federal tribunals under the Wagner Act. Nor is this court in any wise proceeding to enforce or administer any of the provisions of that act. In a case in which it clearly has jurisdiction over the parties and subject matter, it has, in the exercise of its inherent equity powers, made findings on material facts which constitute the cause of action, and its conclusions based on such facts when viewed in the light of existing law. It has, in brief, only found that defendants are seeking, by conventional economic pressure activities, to coerce plaintiff, engaged in interstate commerce, to influence its employees to join the defendant unions, against their will, and to execute closed-shop contracts with local unions which do not in fact represent a majority of such employees by appropriate unit. Applying the existing law to these facts,

this court simply concludes that the purpose of such activities is unlawful and therefore subject to injunction in this state court of equity.

[21] "Also, and on a separate and distinct basis of equitable relief recognized by our state courts, this court has found that the charge that plaintiff was 'unfair' was false and dishonest, and being published in combination with the picketing and boycott activities, rendered such picketing and boycotting as untruthful and dishonest, and therefore unlawful and enjoinable.

[22] "The sanction granted a court of equity to administer justice and enforce rights in novel and unprecedented cases arising under changes in the social and business world, where there is no remedy save in a court of equity, is as broad as the necessities of the case demand. Dougherty v. Creary, 30 Cal. 290, 297, 89 Am.Dec. 116; Times-Mirror Co. v. Superior Court, 3 Cal. 2d 309, 331, 44 P.2d 547.

[23] "Under the facts and the law, measuring the necessities of this case, upon either or both of the grounds hereinabove set forth, plaintiff is entitled to an injunction restraining defendants from all picketing and boycotting of plaintiff and its business during the pendency of the proceedings before the National Labor Relations Board for investigation and certification of bargaining agent for plaintiff's employees, and thereafter until modification or vacation of such injunction, the court reserving the power so to do on application of any party accompanied by sufficient showing."

[24, 25] The judgment of the trial court does not infringe upon the jurisdiction of the National Labor Relations Board. In the Act by which the Board was created Congress provided for the protection of the collective bargaining rights of employees, but it did not protect the employer against such coercive action as is shown to exist in the present litigation. The matter of the protection of the employer was left open by Congress for state control. Allen-Bradley Local v. Wisconsin E. Rel. Bd., 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154. The prevention of the picketing and other activities condemned in the judgment does not impair any of the rights which are protected or granted by the federal Act. The trial court was within its jurisdiction in awarding the equitable relief granted in the judgment. The Allen-Bradley case, supra, arose in Wisconsin, where a state statute, the Wisconsin Employment Peace Act, Laws 1939, chap. 57, Wis.Stat.1939, chap. 111, pp. 1610–1618, resembles the National Labor Relations Act with the addition that it is therein declared to be unfair labor practice for employees to use methods of coercion. An employer filed a petition under the Act charging a union and its members with unfair labor practices. The Wisconsin Board entered an order in favor of the petitioner, which was sustained by the Supreme Court of Wisconsin. 237 Wis. 164, 295 N.W. 791. In affirming the order the Supreme Court of the United States held that Congress had not made such employee and union conduct as was involved in the case subject to regulation by the federal Board.

The judgment is affirmed.

McCOMB, J., concurs.

MOORE, Presiding Justice (concurring).

I concur in the judgment. In view of the circumstances presented by this case and of the authorities hereinafter cited as well as of the Wagner Act, there was no alternative other than to order the issuance of the injunction.

The question for decision is whether a state court, on the petition of an employer engaged in interstate commerce, can enter a valid judgment perpetually controlling a picketing union which seeks to coerce the employer to sign a contract with the union to employ only its members and to have the union act as the bargaining agent of the employer. By virtue of the sovereign powers reserved to the state, U.S. Constitution Xth Amendment, historically California has hitherto afforded injunctive relief against irreparable injury threatened to her citizens. By the same fundamental law the national government was granted full authority over interstate commerce, Art. I, Sec. 8. Pursuant to such granted power, exclusive in scope, the Congress enacted the National Labor Relations Act. By virtue of the Constitution the judges in every state are bound to uphold and follow that Act (Art. VI) in its exclusive control with respect to labor controversies of employers engaged in interstate commerce.

Appellants assert that because of the exclusive jurisdiction of the Board created by the Act the Superior Court of California has no power to enjoin unlawful picketing of such employer or to determine whether he is engaged in interstate commerce. Respondent on the contrary maintains that the court has unlimited power by final judgment to enjoin those who would disrupt the orderly processes provided by the federal statute. It is the purpose of this discussion to demonstrate that neither the thesis of appellants nor the conclusion of the majority is wholly in accord with the law.

Under the facts found, amply supported by the proof, plaintiff is engaged in interstate commerce and is therefore subject to national legislation affecting its relations with its employees or with those seeking to interfere with such relations. By section 160(a) of the Wagner Act, 29 U.S.C.A., section 10, the National Labor Relations Board, hereinafter referred to as the National Board, is granted "exclusive" power to prevent "any person from engaging in any unfair labor practice" and such power "shall not be affected by any other means of adjustment or prevention * * *."

The very fact that the jurisdiction of the Board is exclusive would appear to forbid a state court to enter a judgment whose design is to forestall the exercise of its jurisdiction by the National Board to enforce the federal statute. If the state court may entertain the suit, whence does it derive its power? Not from the federal constitution, for by that instrument such power was delegated to the central government with respect to matters affecting interstate commerce. The National Labor Relations Act hereinafter referred to as the Wagner Act specifically provides for the regulation or control of labor relations that affect the free flow of "commerce * * * among the several states," Subd. 6, sec. 152, 29 U.S.C.A., by the National Board according to the provisions of the Act. But because of the grant of such judicial power by the states to the national government in the federal constitution must it be said that an employer engaged in interstate commerce is to have no judicial relief from his threatened irreparable injuries when the national agency is inadequate for the task? It must have been the intention of Congress that all interstate employers should seek relief from their grievances arising out of employment relations through the medium of state courts or that the National Board should give the Act such a construction as would result in a fair administration of that law to all persons, groups or corporations that might become involved in labor disputes. In the light of the history of legislation framed to meet acute social problems, it is not reasonable that the Congress of the United States would have adopted an Act solely for the relief of one of two classes of disputants and leave the other to the mercies of other jurisdictions. In this view it was a rational act of the respondent first to petition the National Board for the order provided by section 160(b) before seeking an injunction from a state court. For the same reason it is not disappointing that, likewise, appellants are contending for a total want of jurisdiction in the state courts in support of their conclusion that the Act is the sole repository of both substantive and adjective law relating to the problem at hand. Confronted as it was with a grave peril to its survival because of its inability to effect speedy and adequate relief, respondent sought the aid of equity for an adjudication of major grievances that might beset such an institution in respect to its manifold relations within the commonwealth of California.

The superior court was thus faced with a situation where the threatened irreparable damage of plaintiff was without adequate and speedy remedy under the controlling national statute and was therefore constrained to issue the injunction. Three facts of compelling force operated upon the conscience of the chancellor. For two reasons is this true: (1) The successive sections of the Act provide for investigation and certification by the National Board upon the petition of the employees only when it is made to appear that the employer is guilty of some unfair labor practice toward his employees. 29 U.S.C.A. §§ 158, 160. (2) If the plaintiff has suffered and still suffers irreparable damage to the extent alleged and found by the court, its existence as a commercial entity would probably be erased before an effective order granting relief might be entered by the National Board. (3) The method of enforcing the orders of the National Board are so complicated as to render difficult if not impractical the realization of legislative aims.

The superior court was required to act. In the first place, it owed a duty under the supreme law of the land to make such orders as would maintain a free flow of commerce. Article VI supra. Also, there is no specific inhibition in the National Labor

Relations Act against the orders of state courts in the enforcement of the statute. Unless the act of Congress indicates an intention to displace local laws in the exercise of the commerce power, such intention is not to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. Maurer v. Hamilton, 309 U.S. 598, 60 S. Ct. 726, 84 L.Ed. 969, 980, 135 A.L.R. 1347. The purpose of Congress to displace the local law must be definitely expressed. Welch v. New Hampshire, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500, 504. In construing federal statutes enacted under the power conferred by the commerce clause, it must be borne in mind that Congress did not intend to supersede the exercise of the reserved powers of a State unless its purpose so to do is clearly manifested. Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U.S. 493, 510, 38 S.Ct. 170, 22 L.Ed. 425. In view of the reservation of all judicial power not granted to the National Government by the Federal Constitution and in view of the cumbersome procedure of the National Labor Relations Act it was incumbent upon the Superior court to enter, as in fact it did enter, such a judgment as would protect the injured party from further irreparable injuries and at the same time concede the paramount jurisdiction of the national agencies in the enforcement of the Wagner Act. While the authorities cited in the majority opinion exemplify the broad powers of equity as represented by state courts, it must be kept in mind that they are not authority for the displacement of the federal tribunals established for the interpretation, administration, and enforcement of a federal statute enacted for the purpose of resolving those economic and social problems the solution of which primarily devolve upon the central government. It was therefore proper that the relief granted by the judgment under review be confined to the period prior to the exercise of the jurisdiction by the National Board over the issues here involved.

Under the law of this state relating to controversies between labor unions of propagandic activities and employers of labor in a distinctly intra-state establishment, no conduct of appellants enjoyed by the court may be the subject of injunctive relief. The acts of defendants were found to have been peaceful. The right peacefully to picket is held to be a lawful means whereby organized labor may advertise its grievances or its advantages. Such picketing is not unlawful because it may coerce. The unions may bring such lawful pressure to bear as is within their control. The right of picketing may extend to and beyond a dispute between an employer and his employees. It is proper in any controversy which is reasonably related to employment and to the purposes of collective bargaining. McKay v. Retail Auto S. L. Union, and associated cases, 16 Cal.2d 311, 106 P.2d 373. In order to secure employment on more favorable terms for themselves, any persons or group may, in concert, attempt to prevent the employment of other individuals in order to gain such employment for themselves. They may be as bold in asserting their superior excellence as is any dealer on the Venice pier in acclaiming the qualities of his merchandise in competition with his neighbors. See concurring opinions of Justice Sloss and Chief Justice Beatty in Parkinson Co. v. Building Trades Council, infra.

Not only are unions allowed in California to compete with one another and with non-union workers in strictly intrastate affairs, but they may, when their requests with reference to employment subjects are denied, advertise the employer as "unfair to organized labor". Parkinson v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. Such holding was evidently based upon the recognition of either the limited vocabulary of strikers and picketers or on the poverty of our language, rendering difficult the appropriation of precise terms for indicating merely the existence of a dispute.

However, in applying a federal statute we pass to a new plane as if from the Code of Solon to the laws of Cyrus. In a situation controlled by a federal statute, state courts in awarding relief also are governed by the provisions of the federal statute. Under the Wagner Act it is declared to be unfair labor practice for an employer to coerce his employees in the exercise of their right to self organization or to bargain collectively and to engage in concerted activities or to dominate the formation of any labor organization. National Labor Relations Act, 29 U.S.C.A. §§ 157, 158. If an employer in interstate commerce may not do so, certainly any person or group who might engage in an economic pressure activity to coerce the employer to do what he is thus forbidden to do may be enjoined from continuing such activity. Such injunction is the only course to be pursued that may preserve from such illegal coercion the business of the employer and the employment at his disposal for the application of the federal Act. The injunction is issued "to protect against future irremedial harm." Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20, 25. A state court may give protection against future injuries on an inference from past misconduct that it will continue. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200. Since the Wagner Act professedly makes no provision for the protection of employers against injurious acts of labor unions, it might be so construed as to make it operable on behalf of either party when the enforcement of the Act is necessary to the achievement of justice, and in all fairness if such was not the intention, state courts should exercise their equity jurisdiction. So also must it have been intended that equity as administered by state courts should be invoked in aid of the preservation of rights of an employer existing at the commencement of a controversy. Inasmuch as the Act forbids the employer to coerce his employees, Congress must have intended that a union should not be permitted to compel an employer by economic pressure or otherwise to dominate his employees with respect to their self organization.

In holding that the superior court has jurisdiction we are not without precedent. The state of Wisconsin enacted a statute patterned after the Wagner Act. Under it a manufacturer procured an order to be made by the state board forbidding mass picketing or the threatening of its employees with bodily injury or the picketing of their homes. The petitioner was subject to the National Labor Relations Act. It was held by the United States Supreme Court that the federal statute was not designed to preclude a state from enacting legislation to govern the type of union activity condemned and that "state action should not be foreclosed in absence of a finding by the federal Board, * * * that an employer's labor practice so affects [the flow of] interstate commerce * * * that it should be prevented." No "employee was deprived of rights protected or granted by the federal Act." Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 S.Ct. 820, 824, 85 L.Ed. 1154. Appellants attempt to distinguish the Wisconsin case on the ground that the proceeding arose under a state statute providing for the regulation of industrial units and for settling controversies between labor and employer. There is no advantage gained by a state tribunal's acting under a special statute over the position of a state which leaves the solution of such problems to its courts. If the tribunal in one instance is the creature of a statute, the statute is no more than the expression of the sovereign power of the state while a court is the creature of the constitution which is the state's fundamental law. Until courts are stripped of jurisdiction of actions in equity by appropriate laws, their disposition of causes requiring injunctive relief has all the sanctity that might surround the decision of a board especially created to arbitrate causes formerly adjudicated by the courts. This is exemplified in a case litigated in Massachusetts which also has a labor relations law. R. H. White Co. v. Murphy, 310 Mass. 510, 38 N.E.2d 685. The company sued to enjoin certain unions and their members from picketing plaintiff's store. Two locals 829 and 82 demanded a contract for a closed shop and threatened a strike unless it be signed. On January 31, 1941, plaintiff yielded and signed, although neither union represented a majority of the employees and proceedings for certification were still pending with the state commission on the petition of the C. I. O. Union. The commission ordered an election which was held on February 21. The C. I. O. Union prevailed in the election and was, on February 25, certified as the bargaining representative of the employees. Three days later the two locals demanded compliance with their contract theretofore exacted. On plaintiff's refusal to discharge those employees not members of the locals, the defendants in concert attempted to compel plaintiff to discharge such employees, and to refuse to bargain with the representative, certified by the commission. Had plaintiff done as thus requested by defendants, it would have violated Sec. 4(5) of the state labor relations law. It was held that, under the state law, identical in its provisions with the National Labor Relations Act, the contract relied upon was inefficacious because the law determines which, as between competing unions, shall have the contract to be the collective bargaining agent of the employees. Citing International Association of Machinists v. National Labor Relations Board, 311 U.S. 72, 61 S.Ct. 83, 85 L.Ed. 50. The locals were enjoined because the picketing was unlawful. Its purpose was "to disrupt and disorganize a settled situation." It is thus demonstrated that the act of an employer in yielding to the demands of a maverick group in violation of the labor relations law is a nullity. "It was an unlawful act," said the Massachusetts' Court [310 Mass. 510, 38 N.E.2d 692], "for the defendants to picket the plaintiff's places of business for the purpose of persuading or inducing it to conform to the contract in question, and thus to engage in an unfair labor practice condemned by the governing statutes."

By the force and reasoning of the Wisconsin and Massachusetts' cases, one is convinced that not only was plaintiff herein entitled to an injunction to inhibit the practices condemned by the Wagner Act, but also that the superior court was a proper agency in California for upholding the integrity of the national statute when a dealer in interstate commerce is beset by picketers who have attempted to coerce him to disregard the provisions of that law. Appellants cite Brotherhood of Railroad Trainmen v. Owens, Tex.Civ.App., 165 S.W. 128, as authority for the want of jurisdiction of the state court. But that was an action by employees against the Brotherhood to enjoin it and its agent from acting as the bargaining agents for the plaintiffs or representing them before the National Labor Relations Board or contracting for them with the defendant Bus Company. That case presents just such a situation as was contemplated by the Wagner Act. It was an action by workers; not a suit by an employer against a union. There was no reason why the complainants should not have presented their claim directly to the federal board where the brotherhood was already the certified agent of the employees.

In view of what is said above, there seems to be no question of the propriety of the judgment which has been entered. A decree in similar form was entered by the United States Supreme Court in the case of State of Wisconsin v. State of Illinois, 281 U.S. 696, 698, 50 S.Ct. 331, 74 L.Ed. 1123 in an original proceeding. Upon the hearing of a written application, the scope of the judgment was subsequently enlarged. 289 U.S. 395, 710, 53 S.Ct. 671, 77 L.Ed. 1283, 1465. By such procedure state courts may render a service in the administration of a federal statute without a clash of the two jurisdictions.

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59 Cal.App.2d 682

MORGAN et al. v. VEACH et al.

Civ. 13829.

District Court of Appeal, Second District, Division 3, California.

July 14, 1943.

1. Injunction 🔑128

In action to enjoin violation of building set-back restrictions, evidence showed that construction in violation of restrictions, at least after foundation was in, was not the result of inadvertence or mistake.

2. Covenants 🔑103(3)

Property owners were not required at risk of waiving a violation of set-back restrictions to scrutinize activities of another lot owner to ascertain whether restrictions were being violated.

3. Covenants 🔑103(3)
Injunction 🔑112

Where it was difficult to determine before walls were started whether building set-back restrictions were being violated, and defendants were notified that restrictions were being violated when it could be determined with reasonable certainty that such was the fact, defendants' claim of "laches" or "estoppel" could not be sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Laches".

4. Injunction 🔑23

In view of drastic character of mandatory injunction, the rule as to balancing relative conveniences of the parties applies with special force to a prayer for mandatory relief.

5. Injunction ⟹23

Where by innocent mistake or oversight buildings slightly encroach and the damage to the owner of the buildings by their removal would be greatly disproportionate to the injury, the court may decline to order their removal.

6. Injunction ⟹23

Relief by way of mandatory injunction will not be denied on the ground that the loss caused by it will be disproportionate to the good accomplished, where it appears that the defendant acted with full knowledge of the complainant's rights and with an understanding of the consequences which might ensue.

7. Injunction ⟹195

In action to enjoin violation of building set-back restrictions, judgment requiring defendants to move building erected in violation of such restrictions or to pay $1,000 damages was not an abuse of discretion as against contention that plaintiffs had not proved any damages.

8. Trial ⟹395(3)

In action to enjoin violation of building set-back restrictions where court found that it was not true that building on certain lot owned by plaintiffs did not conform with the restrictions and made no finding concerning hedge or shrubbery which defendants alleged was also in violation of restrictions, court's finding in view of judgment for plaintiffs would be regarded as a general finding sufficient to include the item of landscaping.

9. Trial ⟹395(1)

In action to enjoin violation of building set-back restrictions, finding by court that it was not true that a building on a lot owned by one of the plaintiffs did not conform with the restrictions, included garage on such lot, and was sufficient in view of judgment for plaintiffs to include also a determination that the portion of the premises referred to as a wall or a part of a flowerbed was not a violation of such restrictions by such plaintiff.

10. Injunction ⟹109

Fact that some of the plaintiffs suing to enjoin violation of building set-back restrictions had violated such restrictions could not prevent the other plaintiffs from obtaining injunctive relief if they were otherwise entitled to it, and had no knowledge that restrictions had been violated by any person other than the defendants.

11. Appeal and error ⟹925(1)

Where parties requested trial judge to view property involved and judge stated that he would do so after the testimony had been received, and at the close of trial judge stated that he would view the property before he made up his mind as to whether building would be required to be moved or damages would be allowed, and record did not show that the judge had not viewed the property, it would be assumed on appeal that judge had done so.

12. Injunction ⟹130

Where defendants deliberately violated building set-back restrictions, fact that judgment ordering removal of building contained alternative provision for payment of $1,000 damages did not indicate that injunction should not have been granted.

13. Appeal and error ⟹1033(8)

Where it would cost appellants more to remove building in compliance with mandatory injunction than the $1,000 damages allowed in the alternative, appellants could not complain of such alternative provision.

14. Appeal and error ⟹184

Where action to enjoin violation of building set-back restrictions was tried upon theory that the issue of damages was involved and proof of actual or substantial injury was not essential to purely injunctive relief, and no demand for jury trial was made, contention on appeal that defendants were deprived of jury trial could not be sustained.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Virginia W. Morgan, Raymond R. Morgan, Karl Schneider, Edith Schneider, Pauli Hoffman, Jean Carson and Paul Carson against Russel A. Veach and Ursula A. Veach, to enjoin violation of building set-back restrictions. From a judgment requiring defendants to move building erected in violation of such restrictions or to pay $1,000 damages, the defendants appeal.

Judgment affirmed.

John L. Wheeler, of Los Angeles, for appellants.

Max E. Gilmore, of Hollywood, and Albert E. Marks, of Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action to enjoin the violation of building set-back restrictions, plaintiffs obtained judgment requiring defendants to move the building erected by them in violation of the restrictions or to pay $1,000 damages.

The tract of land involved herein, consisting of 12 lots, included 10 hillside lots, the fronts of which adjoined a semicircular street that extended up-grade in a northerly direction. Beginning at the southerly end of the tract and extending northerly, the lots fronting on that street were numbered from 1 to 10 inclusive. Generally stated, the lots faced as follows: lots 1, 2, 3, and 4, south; lots 5 and 6, southeast; and lots 7, 8, 9, and 10, east.

The lots owned by plaintiffs and the approximate values thereof were as follows: Raymond R. Morgan, lot 1 and house, $20,000; Karl and Edith Schneider, lot 2 and house, $23,000; Pauli Hoffman, lot 4 and house, value not stated; Virginia W. Morgan, lot 8 and house, $25,000; and Jean and Paul Carson, lot 9 vacant, $4,000. Defendants, husband and wife, owned lot 10, at the northerly end of the street.

All the parties held their lots under a deed which provided, pursuant to a general plan of improvement of said lots and tract, that the residences on the various lots "shall be placed not less than" the following mentioned distances from the front property lines of the lots: 45 feet on lots 1, 2, 3, and 4; 40 feet on lot 5; 35 feet on lot 6; 30 feet on lot 7; 25 feet on lot 8; and 20 feet on lots 9 and 10. The deed provided further that "no building * * * shall be erected or maintained within 5 feet of the sidelines of any of said lots nor any fence, wall or hedge nearer to the front line thereof than the setback hereinabove established or elsewhere thereon at a greater height than 5 feet"; and that said conditions "shall * * * terminate * * * after January 1, 1960. * * * Provided also that a breach of any of the foregoing conditions shall cause the lot * * * to revert to said grantor, or its successors * * * and as to the owner * * * of any other lot * * * the foregoing conditions shall operate as covenants running with the land, and a breach of any such covenants * * * may be enjoined, abated or remedied by said grantor * * * or by any such owner * * *."

Defendants admitted in their answer that their residence did not comply with the restrictions, but denied that it was constructed in violation of them. They alleged further: (1) that plaintiffs' claims for injunctive relief were barred by laches on the part of plaintiffs, in that, when the action was commenced the house was substantially completed; (2) that plaintiff Pauli Hoffman constructed a house and a wall on lot 4 which did not conform with the restrictions, and therefore the claims of plaintiffs for injunctive relief were barred; and (3) that plaintiff Virginia W. Morgan maintained for many years a hedge on lot 8 between the southeasterly corner of the residence on lot 8 and the curb, which did not conform with the restrictions, and therefore the claims of plaintiffs for injunctive relief were barred.

On July 22, 1941, defendants received a deed to lot 10 which recited that the lot was subject to restrictions of record. On August 1st, defendants received a policy of title insurance which stated the number of the book and page of the official records wherein the restrictions appeared. Stakes and lines placed on lot 10 by defendants on July 15th to indicate the foundation lines remained in position until August 10th, when excavation was commenced. Construction of the cement foundation, started September 3rd, was finished September 13th. Erection of the rough framework of the building, commenced September 15th, was completed September 27th.

Defendant Russel A. Veach and plaintiff Raymond R. Morgan will be referred to hereinafter as the defendant and Morgan, respectively.

About September 21st, when some of the rough framework of the walls had been erected, a brother of plaintiff Morgan, who lived across the street from lot 10, told defendant that the house was too close to the front property line. On September 21st, plaintiff Morgan, who owned lot 1 and lived on lot 8 owned by his wife Virginia W. Morgan, noticed for the first time that defendant was building in violation of the restrictions; and on September 22nd (according to his testimony), or on September 29th (according to defendant's testimony), he said to defendant by telephone that the house was too close to the line and defendant was violating the restrictions. Defendant replied that his builder had told him he could build anywhere on the lot and he (defendant) thought he would go ahead as planned. About September 29th, defendant went to Morgan's office and told him: that he had found the restrictions as to the set-back; that he did not know what he could do about it, since it would cost him more to relocate the house than he had expended at that time; and that he was going ahead with the building anyway. Morgan replied that if he did go ahead, he (Morgan) would have to do something about it and try to stop him legally. About October 1st, Morgan's attorney sent a letter to defendant, which reached him October 15th or 16th, stating that unless defendant complied with the restrictions, relief would be sought from the courts. Thereafter and during October, the rough plumbing, the fireplace, cabinets, paper and netting on the outside for stucco, and plaster board on the inside, were installed. This action was commenced on October 31, 1941. On November 1st, a temporary restraining order was served on defendants. At that time the house was ready for the outside stucco and the inside plaster. Within a week after the temporary restraining order was dissolved, defendant resumed work on the house, and, according to his statement, he proceeded to complete it "in a hurry" because materials were hard to get. The house was completed on December 24th. The cost of the house, not including the lot, was about $10,000.

The front property lines of the lots are 8 feet from the street curb, and there is no sidewalk. The garage on defendants' lot is "a part of the main residence," as required by the restrictions, and adjoins the house at the front on the south side. Defendants' house, instead of being at least 20 feet from the front property line, is the following distances from the front property line: the northerly corner of the house, 8.2 feet; the northeast corner of the garage, 13.65 feet; and the southeast corner of the garage, 21.7 feet. Defendants' house, instead of being 5 feet from the lot sidelines, is the following distances from the sidelines of lot 10: the north side, 3.8 feet; and the south side, 3.5 feet.

The trial court found that defendants' residence did not comply with said restrictions, particularly in that said building was placed less than 20 feet from the front property line of lot 10; that about September 21, 1941, plaintiffs caused defendants to be notified of the fact that defendants were constructing a building which did not conform with the set-back restrictions; that notwithstanding said fact and notice defendants continued with and completed the construction of said building in violation of said restrictions and covenants; that said violations by defendants caused damage to plaintiffs, and the beauty and symmetry of the plan of improvement of the tract was diminished; that there was no laches on the part of plaintiffs; that it was not true that the building constructed on lot 4 by plaintiff Hoffman, and the building constructed on lot 8 by plaintiff Virginia W. Morgan, did not conform with said restrictions.

The first contention of defendants is that the trial court abused its discretion in granting the injunction. They assert "that while the defendants' residence building was constructed in violation of the restrictions in that the residence was set too close to the front property line, such construction was the result of inadvertence and mistake upon the part of defendants." They state that the inadvertence and mistake occurred by reason of the following: that the real estate agent who sold the lot told them the curb was the front line of the lot, and they could build anywhere on the lot, except within 5 feet of the south line; that the deed received by defendant did not specifically set forth any restrictions; that the lot was on a steep hillside and there was no sidewalk or trees in the space of 8 feet between the curb and the front property line, dedicated to the city, to indicate the front line was not the curb; that the garage on the lot north of lot 10 (which was not in the tract involved) was closer to the curb than defendants' house; and that lot 9, to the south of defendants' lot was vacant, and the street between the Morgan house on lot 8, and defendants' lot 10 curved appreciably into the hill.

[1] The matters just referred to, standing alone, might indicate inadvertence and mistake, but there were other circumstances to be considered by the trial court. It is difficult to understand why defendant relied upon the agent for information regarding the restrictions when authoritative information was available, as indicated by references to the restrictions in the deed and policy of title insurance received by defendant before the building was commenced. Although he might have

acted inadvertently prior to the time he was notified by Morgan's brother and by Morgan that he was building too close to the line, thereafter he proceeded with knowledge that the restrictions required a set-back of not less than 20 feet and with knowledge that his building was considerably less than 20 feet from the line. At the time he was so notified, the expense of changing the location of the house would have been between $1,500 and $2,000. Defendant did not heed the notices, declared his intention on two occasions to proceed without complying with the set-back restrictions, and proceeded "in a hurry" to complete the house irrespective of said oral notices and a written demand by Morgan's attorney that he comply with the restrictions, and irrespective of pending litigation to prohibit him. Although defendant stated that he relied upon the agent for information as to the restrictions and the agent told him the building should not be within 5 feet of the south line, it is to be noted that defendant violated even that restriction and built the house 3½ feet from the south line. There was evidence that defendant intended in the first instance to build farther back on the lot but he changed his mind in order to have more space in the back yard. The construction in violation of the restrictions, at least after the foundation was in, was not the result of inadvertence or mistake.

Defendants assert further, as a part of their argument, that the court abused its discretion in granting the injunction, that, although the plaintiffs Morgan were in a position at all times to observe the proposed location of the house, a period of more than 2 months elapsed before defendant was advised the restrictions were being violated, that plaintiffs permitted defendant to continue the construction until the latter part of October, when the house was substantially completed, without bringing to his attention their determination to require compliance with the restrictions; and that while such failure of plaintiffs to act might not have constituted laches the elements of estoppel were present and the issuance of an injunction worked an inequitable burden on defendants. By reason of the hillside character of defendants' lot, the terraces thereon, and the curve of the street, it was difficult for persons who were not on defendants' lot and were not builders to determine, before the walls were started, whether the restrictions were being violated.

[2, 3] Plaintiffs were not required, at the risk of waiving a violation of restrictions by defendants, to scrutinize the activities of defendant to ascertain whether he was violating the restrictions. At a time, however, when Morgan could first determine with reasonable certainty, without being upon the lot, that the restrictions were being violated, that is when the walls were started, he notified defendant immediately that he objected to the violation. In response to defendant's statement that he would go ahead as planned, plaintiff Morgan stated he would try to stop him legally. The position of Morgan that he would insist upon compliance with the restrictions was placed before defendant definitely and promptly when he ascertained the facts. The claim of laches or estoppel cannot be sustained.

[4-6] An appropriate statement relative to defendants' assertion that an injunction would work an inequitable burden is in 28 Am.Jur. section 56, page 253 as follows: "In view of the drastic character of mandatory injunctions, the rule under consideration as to balancing the relative conveniences of the parties applies with special force to a prayer for such mandatory relief. Where, therefore, by innocent mistake or oversight, buildings erected * * * slightly encroach * * * and the damage to the owner of the buildings by their removal would be greatly disproportionate to the injury * * * the court may decline to order their removal * * *. But relief by way of a mandatory injunction will not be denied on the ground that the loss caused by it will be disproportionate to the good accomplished, where it appears that the defendant acted with a full knowledge of the complainant's rights and with an understanding of the consequences which might ensue * * *."

In a note in 57 A.L.R., 1st column, page 343, it was said: "Wilfulness on the part of the defendant in proceeding with the violation of the restriction after warning by the complainant, especially after suit is brought, is a ground for equitable relief by mandatory injunction greatly stressed by the courts. Thus, one who deliberately violates building restrictions placed upon his lot for the benefit of a district in a city cannot avoid a mandatory injunction so to build as to comply with the restrictions, on the theory that the loss caused by it will be disproportionate to the good accomplished." The case of Stewart v. Finkelstone, 1910, 206 Mass. 28, at page 38, 92 N.E. 37, at page 40, 28 L.R.A.,N.S., 634, 136 Am.St.Rep. 370, cited in support of that statement, stated: "It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would * * * impose on the defendant a loss disproportionate to the good it can accomplish * * *. This remedy * * * in cases proper for its exercise * * * ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant with full knowledge of the restrictions 'deliberately attempted' to override them, and thus deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts."

[7] Defendants assert also, under their point concerning abuse of discretion in granting the injunction, that plaintiffs did not prove any damages. In Walker v. Haslett, 1919, 44 Cal.App. 394, at page 398, 186 P. 622, at page 623, it was said: "When clearly expressed, covenants of this description will be strictly enforced, and a court of equity will decree an injunction, and this without any showing of actual damage or substantial injury. * * * He [owner] has the right to define the injury for himself, and also for his grantees of the remaining lots * * *. He, or any subsequent owner * * * may enforce the covenant when it is broken, and is not to be defeated by the opinion of any number of persons that the breach occasions no substantial injury." It was said in Joyce v. Krupp, 1927, 83 Cal.App. 391, at the bottom of page 398, 257 P. 124, at page 127: "Where equitable relief is sought, proof of actual or substantial injury is not essential, the establishment of a violation of a uniform building restriction being all that is necessary to entitle a complaining owner to relief * * *." "The propriety of affording equitable relief by injunction rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of each particular case." Diederichsen v. Sutch, 1941, 47 Cal.App.2d 646, 649, 118 P.2d 863, 865. The court did not abuse its discretion.

[8, 9] The second contention of defendants is that equitable relief should not be granted to one who has violated restrictions. They assert that plaintiff Virginia W. Morgan violated restrictions as to lot 8 in that she maintained a hedge about 7 feet in height on the south side of her house. A witness called by defendants testified to that effect. Morgan testified that there was a line of shrubs, but not a solid line, between the curb and the southeast corner of the house; that the shrubs were not on the Morgan property; that they were not a hedge; that he planted them on the adjoining lot 7, with the permission of the owner; and that he could remove them in 10 minutes. The court found that it was not true that the building on lot 8 did not conform with the restrictions. No finding was made concerning the hedge or shrubbery, but the finding that the building was not in violation of the restrictions should be regarded, in view of the judgment, as a general finding sufficient to include the item of landscaping. They also assert that plaintiff Hoffman violated the restrictions as to lot 4, in that a well which extended across the premises was 40 feet from the curb instead of being not less than 45 feet from the property line, as required by the restrictions. Morgan testified that the part of the premises referred to as a wall was landscape gardening to hold up flower beds. Defendants also contended that a corner of the Hoffman garage was 2 feet closer to the property line than was permitted by the restrictions. The garage adjoined the residence building, as required by the restrictions, and was a part of it. The court found that it was not true that the building on lot 4 did not conform with the restrictions. No special finding was made concerning the wall or the garage. There was no allegation in the answer referring specially to the garage. The general finding concerning the building included the garage and was sufficient, in view of the judgment, to include also a determination that the portion of the premises referred to as a wall or a part of a flower bed was not a violation.

[10] Furthermore, it was not alleged that any of the plaintiffs other than the owners of lots 10 and 4 violated the restrictions. Defendants did contend, however, that a hedge on lot 2 which the owner, Mrs. Schneider, said was 1 foot high, was a violation. Even assuming that some of

the plaintiffs had violated the restrictions, the other plaintiffs would not by reason thereof be prevented from obtaining injunctive relief, if they were otherwise entitled to it and had no knowledge that the restrictions had been violated by any person other than defendants. Alderson v. Cutting, 1912, 163 Cal. 503, 506, 126 P. 157, Ann.Cas.1914A, 1.

[11] The third contention of defendants is that damages cannot be awarded as an alternative when only injunctive relief was sought in the complaint. Their argument is that plaintiffs sought only injunctive relief in the complaint and did not establish any facts upon which the court could award damages. The complaint was labeled "Complaint for Injunction," did not include a prayer for damages, but did allege that said violations by defendants caused great damage to plaintiffs, and included a prayer for general relief. "The subject-matter of an action and the issues involved are determinable from the facts pleaded, rather than from the title or prayer for relief." Standard Brands of California v. Bryce, 1934, 1 Cal.2d 718, 721, 37 P.2d 446, 447. The case was tried upon the theory that the amount of damages was involved. Plaintiffs and defendants called witnesses who testified concerning damages. The trial judge stated just before the case was submitted that he did not know how much he would allow as damages or whether he would make an alternative judgment. At the time the judge made that statement defendants did not indicate in any way that they considered the amount of damages was not involved. The amount of damages was an issue in the trial. At the beginning of the trial the parties requested the trial judge to view the property involved, and the judge stated he would do so after testimony had been received. At the close of the trial the judge stated that plaintiffs were entitled to a remedy, that he had not looked at the premises and had not indicated "how much he would allow"—whether a stated amount or "an alternative judgment to move the house back" or allow damages, and he would look at the property before he made up his mind. The record does not show that the judge did not view the property, and it will be assumed that he did view it. In the case of Rose v. State of California, 1942, 19 Cal.2d 713, at page 733, 123 P.2d 505, at page 517, which was a condemnation case in which the judge determined the amount of damages, it was stated: "That the trial judge is not bound by the opinion of the witnesses on market value is well settled. * * * Furthermore, in the instant case the trial judge visited the premises, and the information so obtained 'is independent evidence to be taken into consideration by the court in determining the issues of the case.'"

[12, 13] Defendants also argue that the court in awarding $1,000 damages found that plaintiffs' injury was compensable, and therefore they had an adequate remedy at law and injunctive relief should have been denied. It can be argued with equal force that the fact that injunctive relief was granted was a finding that the injury was not compensable. An alternative judgment was rendered in the case of Carey v. Bowie, 1933, 130 Cal.App. 400, 19 P.2d 1032, which required defendants to remove a part of their dwelling, in order to comply with building restrictions, to a point not less than 4 feet from the property line, or to pay $1,000 damages. On appeal by defendants the judgment was affirmed. The alternative form of the judgment, however, was not discussed in the opinion. The attorney for defendants herein correctly states that it does not appear from the opinion therein that alternative relief was not prayed for. The transcript in the cited case is not available, but the respondent's brief therein stated, "Plaintiff prayed for a mandatory injunction compelling the removal of the offending addition, for damages in the sum of One Thousand Dollars ($1,000), and for general relief." It therefore appears that alternative relief was not prayed for in the complaint in the cited case in which an alternative judgment was rendered. It is true that was not a case wherein injunctive relief only was sought, but it is also true that alternative relief was not sought therein. The awarding of damages in the present case, however, did not indicate that the injunction should not have been granted. The circumstances in the case at bar were such that the court was required to grant the mandatory injunction. The defendant deliberately proceeded, after notices and protests, to construct his building in violation of the restrictions with full knowledge that he was violating them and in total disregard of the notices and protests of the owners of other lots. The encroachment by defendants within the restricted distance from the property line was not slight, but was great. At one place defendants' building extended about 12 feet into the restricted area. The

evidence shows that the expense of moving the house after the foundation was in would have been between $1,500 and $2,000. Of course, after the house was completed, the expense of moving it would be considerably more. The mandatory injunction having been required by the evidence, and having been granted, the alternative part of the judgment whereby defendants were granted the privilege of paying $1,000 damages in lieu of complying with the restrictions, was therefore a ruling very much in favor of defendants. The position of defendants is, therefore, that they are objecting to a part of the judgment which, under the circumstances, is favorable to them. The plaintiffs have not appealed from that portion of the judgment. It is not necessary, however, to decide herein either of the questions as to the propriety of an alternative judgment for damages or as to the sufficiency of the evidence to support the award of damages. The judgment of injunction was supported by the findings and the evidence, and it was not necessary, as above shown, that any specific amount of damage be proved as a basis for the injunction. The alternative part of the judgment which permits the defendants to evade the injunction by paying $1,000 was not based upon a finding of damages in that amount, for there was no such finding. The absence of such a finding is a sufficient answer to defendants' contention that the award of damages shows a case where plaintiffs can be adequately compensated in damages and hence no injunction should be granted. The alternative, allowing payment of $1,000, apparently was an act of grace toward the defendants, and was based upon nothing appearing in the findings. If it was an error, it was in favor of defendants. The evidence clearly shows, and defendants concede, that it would cost them much more than $1,000 to comply with the injunction. The alternative allowing the payment of damages being in defendants' favor, they cannot complain of it on this appeal. 2 Cal.Jur. 841; Irvine v. MacGregor, 1928, 203 Cal. 583, 586, 265 P. 218.

[14] Defendants also contend that they have been deprived of a jury trial upon the issue of damages because the complaint did not include an issue as to damages, and there was no issue upon which they could base a request for a jury. As above stated, the case was tried upon the theory that the issue of damages was involved. Also as above shown, if injunctive relief was the only issue (as defendants contend), proof of actual or substantial injury was not essential. Joyce v. Krupp, supra. Defendants did not suggest at any time when the matter of damages was being presented by plaintiffs and themselves that defendants desired a jury trial. Furthermore, when the judge stated at the close of the case that he might allow damages, no indication was made by defendants that they desired a trial by jury if damages were to be allowed. Under such circumstances defendants' contention that they were deprived of a jury trial cannot be sustained.

The judgment is affirmed.

SHINN, Acting P. J., and SHAW, J. pro tem., concur.

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59 Cal.App.2d 833

ROSE v. PETERS et al.

Civ. 12437.

District Court of Appeal, First District, Division 2, California.

July 26, 1943.

1. Easement 🔑53

Ordinarily the owner of an easement is required to keep it in repair, but the parties may alter their legal obligation by contract.

2. Easements 🔑12(1), 53

An easement may be created by an executed oral agreement and the owner of the servient tenement may by agreement obligate himself to join in keeping the easement in repair.

3. Easements 🔑53

Where the right to the operation of irrigation ditch across plaintiff's land under an easement was conceded, an agreement, under which plaintiff fenced both sides of the ditch and defendants improved and maintained ditch, could not be repudiated by plaintiff by bringing an action to enjoin the use of the ditch.

4. Easement 🔑36(1)

Where road was in open and uninterrupted use for more than fifty years in connection with operation of an irrigation ditch, the presumption arose that the use was under a claim of right and adverse, and it was not necessary that the use thereof be defended upon theory that road was a way of necessity.

◆

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Jose S. Rose against Lena Peters and others to enjoin the use of an irrigation ditch running across plaintiff's land, and for damages wherein defendant filed cross complaint for declaratory relief seeking a determination of the rights and duties of the respective parties in relation to the ditch. From a judgment declaring defendant's rights to the use of the ditch for irrigation purposes and requiring plaintiff to protect the banks from the ditch giving defendant an easement in the roadway, plaintiffs appeal.

Affirmed.

Herbert E. Paul, of Modesto, for appellant.

Whitehurst & Logan, of Patterson, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued in equity to enjoin the use of an irrigation ditch running across his land, and for damages for the use of the ditch. Defendants filed a cross-complaint for declaratory relief seeking a determination of the rights and duties of the respective parties in relation to the ditch. The defendants had judgment declaring that they were entitled to use the ditch for irrigation purposes, to pass over and through plaintiff's land to maintain the ditch and, for that purpose, to use a certain roadway running through plaintiff's land. It was also declared that defendants were bound to maintain the ditch in reasonable condition to prevent injury to plaintiff's land, and that the latter was bound to maintain fences on either side of the ditch to prevent injury to the banks from his cattle and livestock. The plaintiff appeals from the judgment on the cross-complaint. He attacks the portions of the judgment requiring him to protect the banks of the ditch and giving defendants an easement in the roadway.

The ditch was constructed in the early 70's and had been used continuously by defendants, or their predecessors in interest, ever since. During all this time the defendants, or their predecessors, had used the road, or lane, as a means of egress to clean, maintain, and control the flow of water during the irrigating period. The common ownership in the properties terminated about 1907 and the defendants, either directly or through their predecessors, continued to use the ditch and the road until 1936 when the plaintiff complained that injury was being suffered. A settlement of differences was then made wherein plaintiff agreed to fence both sides of the ditch and the defendants agreed to improve and maintain it. The agreement was carried out until the year 1940, when plaintiff commenced this action.

[1-3] The first point raised by appellant, relating to the portion of the judgment requiring him to maintain the fences and protect the sides of the ditch, is controlled by the executed oral agreement of the parties made in 1936. The position of respondents is unanswerable. The easement for the operation of the ditch is conceded. The agreement relating to its maintenance called for mutual obligations and those of the respondents have been fully performed. We may take it as settled that ordinarily the owner of an easement is required to keep it in repair, but it is a monotonous truism that the parties may alter their legal obligations by contract. Hence, since an easement may be created by an executed oral agreement (Flickinger v. Shaw, 87 Cal. 126, 25 P. 268, 11 L.R.A. 134, 22 Am.St.Rep. 234; 9 Cal.Jur. p. 949) there is nothing unreasonable in the rule that the owner of the servient tenement may by agreement obligate himself to join in keeping the easement in repair. 17 Am. Jur. p. 1005. This was what was done here. The contract carried mutual considerations; the appellant accepted all the benefits; has made no effort to rescind the contract; and has shown no grounds in this proceeding supporting his repudiation of it. The case of Durfee v. Garvey, 78 Cal. 546, 21 P. 302, upon which appellant puts his whole case, is not in point. There the court merely followed the accepted rule that the owner of an easement had the duty to maintain and repair it. The question of the rights of the parties under a special covenant to maintain and repair was not involved.

[4] The second point raised by the appellant does not require extended comment. He argues that respondents' right to use

the road in maintaining and repairing the ditch can be defended only upon the theory that the road is a way of necessity. He follows this with the argument that other means are equally available. But respondents do not rely upon this theory. Their claim to the use of the road rests squarely upon prescription. The evidence shows that the road was in open and uninterrupted use for more than fifty years. From this the presumption arises that the use was under a claim of right and adverse. Fleming v. Howard, 150 Cal. 28, 30, 87 P. 908; Wells v. Dias, 57 Cal.App. 670, 672, 207 P. 913; 28 C.J.S., Easements, § 6, p. 641; 17 Am.Jur. p. 967.

The judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem. concur.

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60 Cal.App.2d 1

GOSNELL v. WEBB

Civ. 14028.

District Court of Appeal, Second District,
Division 3, California.
July 27, 1943.

1. Divorce 🔑245(1)

Provision of interlocutory divorce decree directing husband to pay $200 per month to wife was a provision for "alimony" and was not a term of a "property settlement" given judicial approval, and therefore the decree was one within jurisdiction of court to modify. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony" and "Property Settlement".

2. Divorce 🔑255

Where recitals of divorce decree were inconsistent with any claim that agreement of parties approved by decree settled amount of alimony beyond court's jurisdiction to modify it, in proceeding for order of modification, the decree could not be collaterally attacked by evidence that it was not what it appeared to be, or that it was not in accordance with agreement of parties.

3. Appeal and error 🔑854(1)

Ordinarily, an order will be affirmed if any ground exists which supports it, irrespective of reason advanced by trial court, but such rule does not apply where it appears that the trial court has declined to pass on the merits of a motion.

4. Divorce 🔑286

Where trial court improperly determined that it was without jurisdiction to modify alimony provision of interlocutory divorce decree, the order could not be affirmed on theory that the movant was estopped from seeking modification of the decree.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action for divorce by Bertie Gosnell against Ira Gosnell, wherein the defendant filed a motion for reduction of alimony, and wherein Arthur C. Webb, as executor of the estate of Ira Gosnell, deceased, was substituted as party defendant in lieu of Ira Gosnell. From an order denying the motion, the substituted defendant appeals.

Reversed.

B. Russell Priess, of Los Angeles, for appellant.

Rupert B. Turnbull, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The appeal before us is from the following order: "Motion by defendant for reduction of alimony awarded in Interlocutory Decree of Divorce, heretofore submitted June 22, 1942, the Court now finds that the Interlocutory Decree of Divorce granted by this Court June 17, 1940 was made by the Court after stipulation of parties as to various issues involved, made in open court and prior to completion of the taking of testimony at the trial; that said interlocutory decree did in truth and in fact reflect a compromise of all of the marital and property rights of the parties and embodied therein the ultimate result of what amounted to a property settlement agreement between the parties; that because thereof this court is without jurisdiction to modify or alter this decree.

and it is therefor[e] ordered that the motion by defendant to modify the interlocutory decree of divorce with respect to award of alimony and for reduction thereof, now be and hereby is denied." We are of the opinion that the trial court had jurisdiction to modify the interlocutory decree, (adopted by reference in the Final Judgment of Divorce) and that it erred in declining to consider defendant's motion on its merits.

We are interested in the following excerpts from the introductory recitals found in the interlocutory decree itself and in paragraph 2 of the decree: "Thereupon it was stipulated that the plaintiff might amend her prayer for relief to ask for other and additional relief, to wit, divorce.

"It was further stipulated that the matters of permanent alimony for plaintiff, attorneys' fees and costs should be submitted to the Court without further testimony or other proceedings.

"Thereupon the Court said: 'Let the records show nevertheless that it has been submitted before the trial has been fully completed. Both sides still have other testimony that could have been produced. They are waiving that for the purpose of compromise,' to which all the counsel, in the presence of their respective clients assented; whereupon the Court took the cause under submission, and the Court having duly considered the law and the evidence and being dully [sic] advised in the premises, and findings of fact and conclusions of law having been expressly waived by both parties; and

"It being further stipulated and agreed by the respective counsel, in the presence of the plaintiff and defendant, in open court, that the court enter its judgment awarding to the plaintiff herein such sum or sums as alimony to be paid to the plaintiff by the defendant as may be determined by the court.

"* * * Now, Therefore * * * 2. It is further ordered, adjudged and decreed that the defendant be, and he is hereby directed to pay to the plaintiff as alimony, the sum of Two Hundred ($200.00) Dollars per month, commencing June 10, 1940, and continuing thereafter until the death or remarriage of the plaintiff."

[1] No possible construction consonant with reason can be placed upon this decree other than that its provision directing that the defendant pay $200 per month to the plaintiff is a provision for alimony; it is not a term of a property settlement given judicial approval. Unless it be permitted to prove that the decree has a meaning different from that appearing on its face, the decree must be given the effect of one providing for alimony, and hence one within the jurisdiction of the court to modify. Civil Code, § 139; Ross v. Ross, 1934, 1 Cal.2d 368, 369, 35 P.2d 316; Leupe v. Leupe, Cal.Sup.1942, 130 P.2d 697.

[2] The plaintiff contended, in her attempt to show cause why the provision respecting alimony should not be modified:

"I. That the order for payment of $200.00 per month for alimony now sought to be modified by the defendant Ira Gosnell, was an order made by the trial court only after the parties plaintiff and defendant and their respective counsel, had in open court stipulated that they desired to compromise the question involved with respect to property, property rights and alimony, and that the said judgment of the trial court, which is now a final judgment, expressly provided that the said judgment with respect to alimony was made in effect, as a compromise, and that the said Bertie M. Gosnell had additional proof with respect to the property and property rights of defendant, which she could have produced at said trial, and which evidence was not produced because of the compromise and promise of the defendant and the agreement on the part of the defendant that the property rights of the parties could be forever fixed, and that the same were fixed by said decree, and by the order for payment of $200.00 per month alimony.

"II. That the said judgment and decree was made as a result of all property settlement had by stipulation, and this court has no jurisdiction and should not vacate and set aside the said judgment." Even were it true that the parties had agreed upon the amount to be allowed as alimony, so long as it was provided for in the decree as alimony and not as an approval of a contractual settlement, the decree would remain subject to modification. Ross v. Ross, supra, 1 Cal.2d 368, and cases cited, page 369, 35 P.2d 316. But, we have already seen, the decree recites that the matter of permanent alimony was "submitted to the court" which was to enter judgment awarding such sums as alimony "as may be determined by the court." These recitals are inconsistent with any claim that the agreement of the parties settled the amount of alimony beyond the court's jurisdiction to modify it. It is not permitted, in this proceeding for an order of modification, collaterally to attack the decree by evidence that it is not what it appears to be, or that it is not in accordance with the agreement of the parties. Nielson v. Emerson, 1931, 119 Cal.App. 214, 218, 6 P.2d 281, and cases cited.

[3, 4] It may be that what the plaintiff was striving to show was that the defendant was estopped to move for a modification of the decree. Whether or not the showing made was sufficient to warrant a denial of the motion we need not consider, for that was not the basis upon which the court acted. While usually an order will be affirmed if any ground exists which supports it, irrespective of the reason advanced by the trial court, (Bealmear v. So. Cal. Edison Co., Cal.Sup.1943, 139 P.2d 20) this is not so where it appears that the trial court has declined to pass upon the merits of a motion. Liles v. Superior Court, 1937, 19 Cal.App.2d 506, 507, 65 P.2d 920; Smith v. Superior Court, 1937, 21 Cal.App.2d 160, 163, 69 P.2d 176; and see People v. Jones, 1927, 87 Cal.App. 482, 496, 262 P. 361; Laumann v. Conner, 1936, 12 Cal. App.2d 631, 55 P.2d 1225; and People v. McEntyre, 1938, 32 Cal.App.Supp.2d 752, 761, 84 P.2d 560. To hold that because the trial court denied defendant's motion he therefore considered it on its merits, because his proper course on the theory that he had no jurisdiction to grant it would have been to take no action whatever, would be to let the form control the substance. We do not interpret Lincoln v. Superior Court, Cal.Sup.1943, 139 P.2d 13, as requiring such an unfortunate result. The defendant may not have merited having the alimony order modified, but he did have the right to have his motion weighed to see if it did have merit, and the trial court plainly, and erroneously, never came to that question, because it first of all decided that the interlocutory decree was not what it appeared to be, but was something else.

The order denying defendant's motion is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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59 Cal.App.2d 752

LEENDERS v. CALIFORNIA HAWAIIAN SUGAR REFINING CORPORATION, Limited.

Civ. 12333.

District Court of Appeal, First District, Division 2, California.

July 23, 1943.

Rehearing Denied Aug. 21, 1943.

Hearing Denied Sept. 20, 1943.

1. Wharves 🔑21

A stevedore, employed by shipping company, an independent contractor, to deliver goods to wharf of defendant, was as to defendant an "invitee" to whom defendant was under duty to use ordinary care to furnish him a safe place in which to work.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Negligence 🔑32(3)

Duty of owner to keep premises safe for use by an invitee does not extend to keeping premises safe for uses outside purpose and scope of invitation for which property was not designed, and which could not reasonably have been anticipated except where owner was present and actively co-operating with invitee in particular use of premises involved in injury to invitee.

3. Wharves 🔑21

Where steamship company was invited by owner of warehouse to use particular bay of warehouse for unloading part of its cargo with knowledge by owner that in so doing landing cable must scrape face plank on edge of roof of warehouse as each load was drawn inward to table by stevedores, owner had duty to use ordinary care to see that face plank was secure and strong enough to withstand such usage.

4. Trial 🔑142

In solution of question of fact, jury was entitled if its judgment so dictated to draw every reasonable inference favorable to plaintiff's case from evidence presented.

5. Wharves 🔑21

Evidence as to conduct of owner of warehouse authorized finding that stevedore employed by steamship company and unloading ship at particular bay of warehouse, when injured by falling face plank attached to edge of roof of warehouse and against which plank ship's unloading chain scraped, was an "invitee" in that particular bay of warehouse, so as to make owner negligent in allowing a rotten plank to be subjected to such use, notwithstanding that there were other bays where unloading chain would not have touched face plank.

6. Evidence ⚷75

Failure of party to produce evidence presumptively in his power to produce will support inference that such evidence if produced would be unfavorable to his case.

7. Wharves ⚷21

Where face board on edge of roof of warehouse appeared sturdy to observation of foreman of stevedores unloading ship, and evidence authorized finding of an invitation by warehouse owner to use warehouse unloading bay in such a manner that landing cables came in contact with face board, which actually was rotten, negligence of steamship company was at most concurrent and was not a bar to a recovery by injured stevedore against warehouse owner.

8. Wharves ⚷21

Where evidence disclosed that rotten face board attached to edge of warehouse roof withstood scraping of unloading chain for several hours before breaking loose and injuring plaintiff stevedore, court could not hold as a matter of law that a sound face board two inches thick fastened by heavy iron bolts would not withstand scraping of such chain so as to excuse warehouse owner's negligence in not replacing rotten face board.

9. Appeal and error ⚷989

Where jury resolved evidence against defendant, District Court of Appeal could not reweigh it, but was limited to a determination of sufficiency of evidence to support verdict.

10. Appeal and error ⚷928(4)

Under rule requiring appellant to present a record on appeal which will support his claims of error, where record failed to disclose at whose request instructions were given it was presumed in support of judgment that instructions complained of were given at appellant's request.

11. Damages ⚷168(2)

Fact that plaintiff had been physically impaired so as to increase probability of future infection in an eye was competent to be considered by jury in determining extent of plaintiff's present and permanent injury.

12. Damages ⚷168(2), 185(3)

Testimony that injury to plaintiff's eye would result in abnormal accumulation of bacteria, and that, in event of eye being scratched, presence of bacteria might cause infection or ulcer which could result in loss of eyeball, would not support an award of damages on theory that such infection with attendant results was reasonably certain to occur, but could competently be considered in determining actual impairment of eye as permanently decreasing resistance to infection.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfield, Judge.

Action by William Leenders against California Hawaiian Sugar Refining Corporation, Limited, for injuries sustained when face board on roof of warehouse owned by defendant swung down and struck plaintiff while plaintiff was helping unload ship into warehouse. Judgment for plaintiff, and defendant appeals.

Affirmed.

Myrick & Deering & Scott, and James Walter Scott, all of San Francisco, for appellant.

John A. Foley, Jack Flinn, and Leo H. Shapiro, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

Plaintiff recovered judgment for personal injuries, after a jury trial. On appeal defendant's principal claim is that the evidence is not sufficient to support the verdict and judgment. There is little conflict in the evidence since defendant produced only two witnesses, a medical witness whose testimony was limited to evidence of the extent and character of plaintiff's injuries, and a maker of maps and diagrams whose testimony was concerned exclusively with a description of the premises where plaintiff's injuries were incurred.

From the evidence introduced by the plaintiff it appears that on July 7, 1941, the S.S. Malama was engaged in unloading a cargo of sugar at the "Bankers Warehouse" owned and operated by defendant at Crockett, California. Plaintiff was working as a stevedore employed by the steamship company in this work of unloading. The Bankers Warehouse is a wooden structure over 50 years old which for several years had not been used by defendant for unloading or storing sugar. It consists of a pier or wharf at least 550 feet long covered by a sloping roof open on the water side and supported by posts set approximately fourteen feet apart. Between the outer edge of these posts and the edge of the wharf along the water there is a strip of wharf about three feet wide which is not covered by the roof.

In unloading a cargo it is the practice of the stevedores to set up a table consisting of planks placed upon wooden horses. This table, where, as here, the cargo is being discharged onto a roofed-over pier, is set as close to the waters edge as possible to avoid contact between the cable which delivers the cargo to the pier and the edge of the roof. On the day in question the ship was moored so that its number three hatch was opposite an opening or bay, between two of the uprights supporting the roof, which was obstructed by a mooring bitt consisting of wooden piles extending above the surface of the wharf and set back some distance from its edge. This bitt interfered with the setting of the landing table toward the water side of the wharf so that the table extended only about one foot outside of the edge of the roof. Along the roof's edge above this bay there was a face board consisting of a wooden plank 2 inches thick and 10 inches wide fastened to the structure by iron bolts about ½ inch in diameter. In unloading the cargo it was brought from the ship's hold in a sling at the end of a steel cable operated by a power driven winch. Each load weighed about 1,600 pounds. The loads were lowered to a point slightly above the edge of the table without touching the roof or face board and then it was necessary for two stevedores standing on the table to draw the load manually under the roof so that it could be deposited on the table. In doing this the cable was drawn against and scraped along the face board.

The face board was observed by the foreman of the stevedores to have old scratches or gouges on its surface, apparently made by the scraping of unloading cables against it at some earlier time. The sugar was delivered by the stevedores from the table to trucks and the trucks were then taken by employees of defendant who hauled the sugar away and stacked it. The work of unloading at this particular bay commenced at 8 A.M. on July 7, 1941. About 10 A.M. that morning two carpenters or millwrights came to the bay and the work of unloading was halted while they nailed up a diagonal cross piece, between one of the uprights and the beam supporting the edge of the roof, which had become loosened. About 3:30 P.M. as a load was being delivered to the table one end of the face plank tore loose from its bolts and swung down striking plaintiff on the face and head. This end of the face plank "was rotten. Lots of rotten pieces. When it hit Mr. Leenders there was a few rotten pieces left on the table there from the plank * * *. This end was rotten (indicating), around the bolt it was rotten. * * * The end that fell down was rotten."

Defendant's evidence showed that there were approximately seventeen bays where there were not bitts to interfere with setting a table so that the landing cable would not come in contact with the edge of the roof.

[1] Plaintiff, being employed by an independent contractor to deliver goods to the wharf of defendant, was as to the defendant an invitee on its premises, (Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724; Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 108 P.2d 738; Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 16 P.2d 807) to whom the defendant was under a duty to use ordinary care to furnish him a safe place in which to work.

Defendant does not dispute this as a general principle of law, but seeks to take this case out of the general rule on a number of grounds.

[2, 3] The principal ground urged by defendant to take the case out of the general rule is thus stated in defendant's opening brief: "While there is a duty to keep the premises safe for all uses by an invitee which are within the scope of the invitation, the owner is not bound

to keep them safe for uses outside the purpose and scope of the invitation for which the property was not designed, and which could not reasonably have been anticipated."

In support of this statement defendant cites: Fanjoy v. Seales, 29 Cal. 243; Baddeley v. Shea, 114 Cal. 1, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56; Kalis v. Shattuck, 69 Cal. 593, 11 P. 346; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; Gribben v. Yellow Aster etc., Co., 142 Cal. 248, 75 P. 839; Slyter v. Clinton Const. Co., 107 Cal.App. 348, 290 P. 643; Fountain v. Willard-Slater Co., 172 Cal. 129, 155 P. 630; Scott v. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55; and a number of cases from other jurisdictions. It will serve no useful purpose to discuss the facts of these several cases. It will be sufficient to concede that they all, on a variety of facts, support the rule set out in the sentence quoted from defendant's opening brief, but in none of them does it appear, as here, that the owner of the premises was present and actively cooperating with the invitee in the particular use of the premises involved in the injury to the plaintiff. The basic question presented by this argument of defendant is whether on the evidence in this case the jury was bound as a matter of law to find that the use of the premises made by plaintiff's employer was, to requote a portion of the above quoted language, "for uses outside the purpose and scope of the invitation * * * and which could not reasonably have been anticipated." To put the matter affirmatively, if the evidence will support a finding that the steamship company was invited by the defendant to use this particular bay for unloading of part of its cargo with knowledge on the defendant's part that in so doing the landing cable must scrape the face plank as each load was drawn inward to the table by the stevedores, then defendant would be under a legal duty to use ordinary care to see that the face plank was secure and strong enough to withstand such usage.

[4-6] In the solution of this question of fact the jury was entitled, if its judgment so dictated, to draw every reasonable inference favorable to plaintiff's case from the evidence presented. It was also entitled to find, if the evidence warranted, that an invitation was implied by the defendant's conduct. 19 Cal.Jur. 619. The jury in this respect had the following pertinent facts before it: the face plank bore old scars indicating that other ships had in the past been unloaded at this bay; the employees of defendant were continuously receiving the sugar from the stevedores as it was unloaded at this bay; and at 10 A.M. two carpenters or millwrights made repairs to the structure of this bay at a time when it was actually in use for unloading. From these facts the inference could reasonably be drawn that the use of this particular bay was at least at the implied, if not at the express, invitation of defendant. The further fact probably did not escape the attention of the jury that defendant, which had it in its power to produce evidence, if it existed, to rebut this reasonable inference, chose rather to rest on the supposed weakness of plaintiff's case and produced no witness from among its own officials or employees in authority at the Bankers Warehouse at the time of the accident or present when it occurred. The failure of a party to produce evidence presumptively in his power to produce will support the inference that such evidence if produced would be unfavorable to his case. Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172; Perry v. Paladini, Inc., 89 Cal.App. 275, 281, 264 P. 580; II Wigmore on Evidence, 3d Ed., sec. 285, p. 162 and sec. 289, p. 171.

The jury was entitled to find as reasonable inferences from the evidence produced that defendant expressly or impliedly invited the steamship company to unload at this particular bay; that defendant knew that the cable must scrape the face board; and that it was negligent in allowing a rotten board to be subjected to this use.

[7] Defendant's claim that the negligence of the steamship company was the sole proximate cause of the fall of the face board is based upon cases of which Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231, is typical. In that case a crane was accidentally brought into contact with a high tension wire over forty-five feet in the air by a plaintiff who knew the position of the wire and its dangerous voltage. Here the face board before its fall appeared sturdy to the observation of the foreman of the stevedores, and the jury was entitled to find an invitation by defendant to use it in the manner in which it was actually used. The cases are not at all parallel; and even were the steamship

company also negligent it would still present a case of concurrent negligence which would be no bar to a recovery by the steamship company's employee. Strong v. Chronicle Pub. Co., 34 Cal.App.2d 335, 340, 93 P.2d 649; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630.

[8] Defendant argues with much vigor that the continual "pounding" of the cable with its heavy load was such that even a sound face board could not have withstood it. This is an argument on a question of fact which might well be, and probably was, made to the jury. It is supported by no direct testimony in the record. We are in no position to hold as a matter of law that a sound face board 2 inches thick fastened to the structure by heavy iron bolts could not withstand the scraping of a chain against it which supported a load that could be handled manually by two men, particularly in the face of evidence that a rotten board withstood it for a period of several hours.

[9] The fact that there were at least seventeen bays where the cargo could have been unloaded without the cable coming in contact with the shed was only one element to be considered by the jury in determining what inferences were to be reasonably drawn from the evidence. The jury having resolved the evidence against defendant, we may not reweigh it. Our function is limited to a determination of its sufficiency to support the verdict.

[10] Defendant is in no position to urge error in any of the instructions given by the court. The burden is on an appellant to present a record on appeal which will support his claims of error. Defendant has presented a transcript which fails to show at whose request any of the instructions were given and it must be presumed in support of the judgment that the instructions complained of were given at defendant's request. 2 Cal.Jur. 870.

[11, 12] A medical witness for plaintiff, after testifying that the tear duct of one of plaintiff's eyes had been so injured that it did not carry off the water from his eye, testified that such a condition would result in an abnormal accumulation of bacteria in the eye and that in the event of the eye being scratched in the future the presence of these germs might cause an infection or an ulcer which could impair the patient to a great extent or even result in the loss of the eyeball. This is attacked as speculative. Defendant in this attack overlooks the distinction between the general competency of evidence and its sufficiency to support a particular finding. The fact that plaintiff had been physically impaired so as to increase the probability of future infection in the eye was a proper matter to be considered by the jury in determining the extent of his present and permanent injury. The jury could not properly award him damages on such evidence on the theory that such infection with its attendant results was reasonably certain to occur. It could take into consideration the actual impairment of his eye which permanently decreased his resistance to infection with all the results that might be attendant thereon. The size of the verdict does not indicate that the jury awarded damages on the theory that it regarded the future impairment of plaintiff's eyesight or the loss of his eyeball as reasonably certain. The distinction between the competency of such evidence and its probative effect is elaborately discussed in Bauman v. San Francisco, 42 Cal.App.2d 144, 163 et seq., 108 P.2d 989; Cordiner v. Los Angeles Traction Co., 5 Cal.App. 400, 91 P. 436; and II Wigmore on Evidence, 3d Ed., sec. 663, pp. 776-7.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

59 Cal.App.2d 666

PRUITT et al. v. KROVITZ et al. (two cases).

HANSEN v. SAME et al. (two cases).

No. 12332.

District Court of Appeal, First District, Division 1, California.

July 13, 1943.

Hearing Denied Sept. 8, 1943.

1. Automobiles 🔑245(50)

In action for injuries arising out of automobile collision, where evidence was conflicting on several essential factors, question of proximate cause was for jury.

2. Automobiles 🔑244(35, 37)

Evidence authorized finding that after plaintiff's automobile had entered obstructed intersection governed by fifteen mile per hour speed limit defendant drove into intersection and attempted to cross at speed of forty or more miles per hour and that such conduct was proximate cause of collision. Vehicle Code § 511(a) (4), St.1941, p. 2716.

3. Automobiles 🔑245(80)

Testimony that plaintiff before entering obstructed intersection looked for cross traffic, then entered at lawful speed, and thereafter discovered defendant's rapid approach and accelerated to get out of the way precluded contention that plaintiff was guilty of negligence as a matter of law for driving into intersection blindly without looking for approaching traffic. Vehicle Code § 511(a) (4), St.1941, p. 2716.

4. Automobiles 🔑244(43)

Testimony that plaintiff before entering obstructed intersection looked for cross traffic, then entered at fifteen miles per hour, and thereafter discovered defendant's rapid approach and accelerated to twenty miles per hour to get out of way supported jury's implied finding that plaintiff was not negligent and that he was not driving at an unlawful speed. Vehicle Code § 511 (a) (4), St.1941, p. 2716.

5. Automobiles 🔑243(7)

The admission or rejection of evidence as to rate of speed of vehicle before a collision occurs is in sound discretion of trial court.

6. Automobiles 🔑243(7)

Admission of testimony that defendant's automobile, one block before reaching obstructed intersection where collision occurred, was traveling at fifty miles per hour was not an abuse of discretion on theory that testimony was too remote. Vehicle Code § 511(a) (4), St.1941, p. 2716.

7. Automobiles 🔑245(44)

Weight to be given testimony concerning speed of defendant's automobile when it crossed intersection one block before it arrived at point of collision was for jury.

8. Negligence 🔑93(1)

Negligence of driver of an automobile cannot be imputed to passenger therein, in absence of evidence showing that passenger exercised some control over driver or that he possessed power to direct manner in which automobile should be operated.

9. Appeal and error 🔑1064(1)

Where evidence established that decedent was guest in automobile and neither exercised control nor possessed power or right to direct manner of operation, error in failing to include in instruction on circumstances causing negligence of driver to be imputed to passenger, the circumstance of passenger having right or power to direct manner of operation, was harmless.

10. Negligence 🔑93(1)

Mere fact that guest in automobile who was visiting home of driver intended to and did do some shopping while accompanying driver to grocery store did not make trip a "joint enterprise" so as to make any negligence of driver resulting in collision imputable to decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Enterprise".

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Evelyn Pruitt and others against Edward Krovitz and others to recover for death of plaintiff's husband in an automobile collision and action by Ed Hansen against Edward Krovitz and others to recover for injuries sustained in the same collision, which cases were consolidated for trial. Judgments for plaintiffs, and defendant Harry R. Krovitz appeals.

Affirmed.

F. E. Hoffmann, of San Mateo, for appellant.

Wayne R. Millington, of Redwood City, for respondents.

KNIGHT, Justice.

An automobile driven by Harry Krovitz collided with one driven by Ed Hansen, as a result of which the drivers of both cars were injured, and Joseph Pruitt, who was riding with Hansen, suffered a basal skull fracture and other injuries from the effects of which he died two days later. Alleging that the accident was proximately caused by the negligent operation of the Krovitz car, Pruitt's widow brought an action against him to recover damages on account of the death of her husband, and Hansen sued separately to collect damages for the personal injuries he sustained. The actions were consolidated for trial, and a jury returned verdicts in favor of the plaintiff in each action. Krovitz appealed from the judgments entered on said verdicts, and the appeals are presented in one record.

[1] Appellant makes no claim that the evidence is insufficient to establish negligence on his part, but contends that Hansen was guilty of negligence as a matter of law, and that therefore the trial court committed error in denying appellant's motions for nonsuit and a new trial. There is no merit in the contention. The record discloses a typical fact case, the evidence being conflicting on several essential factors, and the question of proximate cause being one for the determination of the jury.

[2] The accident happened in the city of San Mateo on the evening of March 22, 1941, between dusk and dark, at the intersection of Grand and Seventh Streets, which cross each other at right angles. The parties stipulated that it was an "obstructed intersection," within the meaning of the Vehicle Code definition thereof, section 511(a) (4), St.1941, p. 2716, and that consequently 15 miles an hour was the speed limit across the intersection. Hansen was driving a two-door Ford coach northerly along Grant Street, and appellant was driving a Buick sedan westerly along Seventh Street. Pruitt was riding on the front seat with Hansen, and Mrs. Hansen and Mrs. Pruitt occupied the rear seat. They had just driven from the Hansen home, a few blocks away, to a nearby store to purchase some groceries, and were on their way back to the Hansen home when the accident occurred. Appellant was a resident of Massachusetts; at the time of trial he was in Rhode Island, and his testimony was produced by way of deposition. On the evening of the accident he was accompanied by a friend named Ernest Fachadio. They had been at the Bay Meadows Race Track and were on their way to the Owl Cafe in San Mateo. The Hansen car entered the intersection first; its lights were on, and it had reached a point beyond the center of the intersection when it was struck on the right side by appellant's car and hurled a considerable distance beyond the point of impact. The weather was clear, the streets were dry, and the evidence introduced in behalf of respondents is amply sufficient to establish that appellant entered and attempted to cross the intersection at a speed of forty or more miles an hour, and that such was the proximate cause of collision.

[3, 4] In support of his point that Hansen was guilty of negligence as a matter of law appellant contends that Hansen drove into the intersection "blindly"—without looking for approaching traffic. The record shows otherwise. Hansen testified positively that upon reaching the intersection and before attempting to cross it he looked to the right and to the left and saw no approaching vehicles; that after he "got a little way into the intersection" he again looked to the right and saw appellant's car approaching at a high rate of speed—about 40 miles an hour; that it was then about 30 feet east of the intersection; that he, Hansen, accelerated the speed of his car in an effort to get out of the way, but was unable to avoid being struck. Nor does the record support appellant's further contention that Hansen was operating his car at an unlawful rate of speed and greater than was prudent with regard to the particular intersection. Hansen was the only witness who testified regarding the speed of his car. In substance he stated that he approached the Seventh Street crossing at a speed of about 20 miles an hour; that as he reached the intersection he slowed down to 15 miles an hour; that he looked to the right and to the left and saw no cars; that when part way across the intersection he looked again and saw appellant's car travelling toward him at about 40 miles an hour; that he attempted to get out of the way of it by accelerating the speed of his car to 20 or 25 miles an hour, and that he was travelling at that speed when appellant's car struck him. On cross-examination counsel for appellant sought to impeach the witness by calling

his attention to excerpts of testimony given by Hansen at the trial of some justice's court action growing out of the collision. However, the explanation given by Hansen of those portions of his previous testimony was evidently satisfactory to the jury, for it resolved whatever conflict there may have been therein in his favor; therefore, since the testimony given by Hansen at the present trial amply supports the jury's implied finding that he was not driving his car at an unlawful speed, the conclusion so reached by the jury is binding on appeal

In any event the state of the evidence is such that the question of the proximate cause of the collision is one of pure fact for the determination of the jury, and there is an abundance of evidence to support its implied finding that the proximate cause thereof was the unlawful speed and reckless manner appellant was driving his car. In addition to the testimony given by Hansen that immediately preceding the collision appellant was travelling 40 miles an hour, another witness named Patti testified that as appellant crossed the intersection a block easterly from the one where the collision took place he was travelling about 50 miles an hour. Furthermore the location and condition of both cars following the collision fully supports the inference that appellant's car struck the coach while appellant was travelling at a high rate of speed. In this connection appellant himself testified that following the impact his car continued on and came to a stop "over" a fire hydrant on the northwest corner of the intersection; that the hydrant was broken off; that the left side of his car "was all bent in" and three windows were broken; that the "hydrant had knocked the motor at an angle bending the frame of the car," and the "hood flew off." He claimed he was travelling not more than 25 miles an hour, but the evidence above narrated clearly negatives such claim.

[5-7] Appellant contends that the testimony given by the witness Patti was erroneously admitted in that it was "too remote." As said, however, in Ackel v. American Creamery Co., 12 Cal.App.2d 672, 55 P.2d 1195, the law is well established in this state that the admission or rejection of evidence as to the rate of speed a vehicle is travelling before a collision occurs rests in the sound discretion of the trial court. The question rests so largely within its discretion that no fast or positive rule can be laid down governing the matter, for which reason the ruling of the trial court as to the admission or rejection of this sort of evidence will not be disturbed except upon a showing of abuse of discretion. Ritchey v. Watson, 204 Cal. 387, 268 P. 345; Traynor v. McGilvray, 54 Cal.App. 31, 200 P. 1056; Wagy v. Brave, 133 Cal. App. 413, 24 P.2d 209. Here no abuse of discretion is shown. The question of the weight that was to be given to the testimony was properly submitted to the determination of the jury.

[8-10] The trial court fully instructed the jury that the negligence of Hansen, if any, proximately contributing to the collision, barred recovery as to him; and with respect to the cause of action based on the death of Pruitt, it was instructed that if it found that Pruitt was riding with Hansen as his passenger or guest the negligence of Hansen if any could not be imputed to Pruitt; that negligence if any on the part of Hansen could not be imputed to Pruitt "in the absence of proof that he exercised control, supervision and direction as to the manner in which the automobile was being operated." Appellant contends that the portion of the instruction above quoted does not correctly state the law; that the test is not whether one exercises such control, supervision and direction, but rather whether he has the right so to do. The general rule governing in such cases as restated in Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529, 530, is as follows: "The negligence of the driver of a machine, however, cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. Bryant v. Pacific Electric R. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric R. Co., 178 Cal. 630, 174 P. 319." However, in the present case, whatever deviation there may have been in the statement of the rule could not possibly have operated to appellant's prejudice, for the evidence affirmatively shows, without conflict and beyond any question of doubt, that Pruitt's status in riding with Hansen was that of a guest, and that he neither exercised control over the driving of the Hansen car nor possessed the power or the right to supervise or direct the manner in which it should be operated. In addition to the facts already set forth, the

record in this respect shows that Mrs. Hansen and Mrs. Pruitt are sisters; that the Pruitts lived in South San Francisco, and on this particular afternoon were visiting Mrs. Hansen at the Hansen home; that when Hansen returned home from his work he took his car to drive to the grocery store to make some purchases, and that the Pruitts and Mrs. Hansen accompanied him. The mere fact that the Pruitts intended to and did do some shopping also while accompanying Hansen to the grocery store could in no sense bring the case within the "joint enterprise" doctrine suggested by appellant.

The judgment in each action is affirmed.

PETERS, P. J., and WARD, J., concur.

HISE, Building and Loan Commissioner, v. McCOLGAN, Franchise Tax Commissioner.

Civ. 14078.

District Court of Appeal, Second District, Division 2, California.

June 28, 1943.

Hearing Granted Aug. 26, 1943.

1. Taxation ⚷124½

The operations of the building and loan commissioner in liquidating a building and loan association are not subject to tax imposed by the Bank and Corporation Franchise Tax Act, since the action of the commissioner is taken as a public officer performing his statutory duty, and is not taken pursuant to the franchise of the corporation to do business as a building and loan association. Gen.Laws 1937, Act 986, § 13.11; Act 8488, § 4(1).

2. Appeal and error ⚷882(3)

District Court of Appeal would not consider a theory of a case which was different from the theory urged in the trial court, and which was presented for the first time on appeal.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Harley Hise, as Building and Loan Commissioner of the State of California, in the liquidation of Marine Building & Loan Association, against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover a franchise tax paid under protest. Judgment for plaintiff, and defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for appellant.

George S. Dennison, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a franchise tax paid under protest, defendant appeals.

The stipulated facts are:

The Marine Building & Loan Association was duly incorporated and licensed to do business as a building and loan association in the State of California. In 1933, the California State Building & Loan Commissioner, deeming the Marine Building & Loan Association to be in an unsafe financial condition, took over the association and proceeded to liquidate its property, business, and assets.

Defendant, as Franchise Tax Commissioner of the State of California, assessed a franchise tax against the aforesaid building and loan association for the year 1938, in the sum of $250.55. The tax plus interest was paid under protest.

It is necessary for us to determine two questions, which will be stated and answered hereunder seriatim.

First: Are the operations of the State Building and Loan Commissioner in liquidating a building and loan association within the purview of section 4(1), of the Bank and Corporation Franchise Tax Act of California (Act 8488, 2 Deering's General Laws of California 1937, page 3852)?

[1] This question must be answered in the negative. The Building and Loan Commissioner of California derives his power entirely from the provisions of the Building and Loan Association Act. (Act 986, 1 Deering's General Laws of California 1937, page 538.) This act creates

the office of Building and Loan Commissioner and, among other things, provides that if it shall appear to the commissioner that any building and loan association is in an unsafe condition or conducting its business in an unsafe or injurious manner such as to render its further proceedings hazardous to the public or to any or all of its investors, the commissioner may forthwith demand and take possession of the property, business, and assets of such association and retain such possession until such association shall, with the consent of the commissioner, resume business or until its affairs be liquidated. (Act 986, section 13.11, 1 Deering's General Laws of California 1937, page 599.)

It is under the foregoing provisions of the Building and Loan Association Act that plaintiff assumed control of the Marine Building and Loan Association. It is stipulated that he retained possession thereof until the affairs of the association were liquidated.

The tax authorized under section 4(1), of the Bank and Corporation Franchise Tax Act, supra, is a tax levied upon financial corporations actively engaged in doing business for the privilege of exercising their corporate franchises within this state.

When the Building and Loan Commissioner exercises the authority conferred upon him by the provisions of the Building and Loan Association Act, supra, to take possession of the property, business, and assets of a building and loan association, the building and loan association's franchise to do business is thereby suspended. (Cf. Mercantile Trust Co. v. Miller, 166 Cal. 563, 569, 137 P. 913. This case was one where the superintendent of banks, under the authority of the California Bank Act, took over the liquidation of a bank and our Supreme Court held that by so doing the bank's franchise to do business was suspended. The Bank Act contained provisions substantially similar to those of section 13.11 of the Building and Loan Association Act, supra.)

It is evident that whatever action plaintiff as Building and Loan Commissioner took in liquidating the affairs of the Marine Building and Loan Association was taken as a public officer performing his statutory duty (Richardson v. Superior Court, 138 Cal.App. 389, 392, 32 P.2d 405) and such action was not taken pursuant to the franchise of the corporation to do business as a building and loan association, since such franchise was suspended by the very act of plaintiff in taking over the affairs of the association.

It follows that defendant improperly levied a tax under the provisions of section 4(1) of the Bank and Corporation Franchise Tax Act of California, supra, and that plaintiff, having paid the same under protest, was entitled to a judgment for the amount thereof.

People v. Richardson, 37 Cal.App.2d 275, 99 P.2d 366, cited and relied on by defendant, is factually distinguishable from the instant case. In People v. Richardson the court pointed out that the superintendent of banks had appointed a *conservator* for the bank of San Pedro under the provisions of section 135b et seq. of the Bank Act (Statute 1933, page 319, Deering's General Laws, Act 652) and had not taken over the affairs of the bank in the capacity of a *liquidator,* pursuant to the provisions of section 136 et seq., of the Bank Act, supra. The court stressed the fact that the bank had engaged in business through the conservator, thus making it liable for payment of the franchise tax.

In the case before us the Building and Loan Commissioner took over the affairs of the Marine Building & Loan Association as a *liquidator,* and after the take over he alone conducted the affairs of the association until it was liquidated. Hence it is evident that due to the factual difference in the cases, People v. Richardson, supra, is not here in point.

Second: Even though the Franchise Tax Act was not applicable in the present case, was plaintiff's recovery barred because he had not paid either a) an income tax as trustee of the assets of the Marine Building and Loan Association, or b) a corporation income tax for said association?

[2] This question will not be considered by us for the reason that the law is established in this state that an appellate court will not consider a theory of a case different from that urged in the trial court, and which theory is presented for the first time on appeal. (Title Insurance & Trust Company v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935, and cases therein cited.)

[3] Applying the foregoing rule to the facts of the present case, defendant did not plead by way of counterclaim the right to collect from plaintiff an income or corporation tax. Neither did he in any other

way present nor urge to the trial court the defense which he is now pressing in this court. The soundness of the rule here applied is well illustrated by this case, for the reason that we have no record before us from which we could determine the amount of income or corporation tax due defendant from plaintiff. As far as the record before us discloses plaintiff does not owe defendant any tax.

For the foregoing reasons the judgment is affirmed.

W. J. WOOD, J., concur.

MOORE, P. J. dissents.

60 Cal.App.2d 13

BLACKWELL et al. v. FERRARI et al.

Civ. No. 6857.

District Court of Appeal, Third District, California.

July 27, 1943.

Rehearing Denied Aug. 25, 1943.

1. Appeal and error ⇨1010(1)

Where there is present in record substantial evidence in support of findings of trial court, it is beyond province of District Court of Appeal to disturb judgment on appeal.

2. Appeal and error ⇨717

Where opinion of trial court was not a part of record on appeal, it could not be considered for any purpose, even if it was incorporated in bill of exceptions.

3. Vendor and purchaser ⇨44

In purchaser's suit for rescission of written agreement to purchase land for vendor's alleged misrepresentations that land would pasture 15 to 20 horses, that land would support from 20 to 25 dairy cows, and that springs on property would supply sufficient water, evidence adequately supported judgment denying rescission.

4. Appeal and error ⇨1011(1)

Findings of trial court will not be disturbed on appeal where evidence regarding issues framed by pleadings is in sharp conflict.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Suit by Les Blackwell and another against Emil A. Ferrari and others for rescission of a written agreement for the purchase of certain realty wherein the defendants filed a cross-complaint. From a judgment denying rescission, plaintiffs appeal.

Affirmed.

Robt. H. Schwab, of Sacramento, for appellants.

J. M. Inman, of Sacramento, for respondents.

THOMPSON, Justice.

This suit was instituted by plaintiffs seeking rescission of a written agreement for the purchase of certain real property. The complaint alleges that defendants falsely and fraudulently misrepresented material conditions in regard to the real property in question which induced the plaintiffs to enter into the agreement. An answer and a cross-complaint were filed, in which cross-complaint rescission of the contract to sell the real property was also asked.

The trial court announced its opinion that the rescission of the written agreement should be granted, upon the theory that defendants' pleadings constituted a consent to rescission. Upon motion of the defendants, the court vacated the submission and permitted them to withdraw their cross-complaint and to stand upon their answer. The matter was then resubmitted upon the issues raised by the complaint and the answer which denied the fraudulent misrepresentations charged in the complaint. Findings were adopted favorable to the defendants. Judgment was rendered accordingly, denying rescission.

The findings determine that defendants did not make any of the misrepresentations alleged in the complaint. The only issue for determination is the one of alleged fraud which was denied by the answer. In other words, is there substantial evidence to support the findings and judgment?

Lester T. Blackwell, one of the plaintiffs, testified that he became acquainted with Emil Ferrari, about March 1, 1940, and that he made arrangements through Mr. Nunneley, a real estate man, for the three men to drive to Ferrari's ranch so that Blackwell might view the property. The ranch is located near Diamond Springs in El Dorado County. He also testified that he was the owner of a riding stable and about fifty-two head of horses; that Mr. Nunneley knew he was looking for a ranch that would pasture fifteen or sixteen mares a year and Nunneley told him that the Ferrari ranch would serve that purpose. Mr. Blackwell said that he told Nunneley and Ferrari he did not know anything about farming and would have to rely on their judgment as to whether the ranch would serve his purpose of pasturing and watering his horses; that he told Nunneley and Ferrari he was not interested in the ranch for dairying purposes but that Mr. Bette, a friend of his, was interested in a dairy ranch, and they might all get together on a deal; that Ferrari told him the meadow located on the ranch would take care of twenty to twenty-five head of dairy cows and the pasture would graze fifteen or sixteen head of horses; that Ferrari also stated he got two cuttings of hay a year, which was enough to feed the cows in the winter time; that there was ample water for all the stock Blackwell might wish to place on the ranch; and that Ferrari stated the springs on the ranch "were never known to go dry."

A week or two prior to May 6, 1940, on which date the agreement for the purchase of the ranch property was executed, Messrs. Blackwell, Nunneley, Ferrari, Maier and Mr. Maier's son met in Sacramento for the purpose of discussing the proposed purchase. Mr. Maier was interested in placing dairy cows on the ranch, and he and Blackwell subsequently entered into an agreement for the mutual benefit of one another which required that the ranch be cared for by Maier. In regard to this meeting in Sacramento, Mr. Blackwell testified that Maier thought the ranch was all right and that there was plenty of water and feed; that they (Blackwell and Maier) discussed the manner in which they would start the operation of the ranch, and that he (Blackwell) repeated to Ferrari that he did not know anything about farming or the dairy business and that he was relying on Ferrari's word in regard to the conditions existing on the ranch; that he told Maier he did not want him to quit his job unless he was sure he could make money on the ranch, and that all he wanted was a place for his horses with plenty of grass and water and somebody to take care of them; that Mr. Ferrari assured them there was plenty of water on that ranch for the stock.

Mr. Blackwell took possession of the property soon after May 6, 1940, and Mr. Maier and his son promptly moved to the ranch to take over its care. Blackwell testified as to subsequent events and conditions: That the barn and the house on the ranch were in poor condition; that the barn required a new roof; that the pasture required fencing; that it was necessary to install watering troughs for both the pasture and the meadow; that the spring had been cleaned out, ditched and rocked but that the water failed to come down in sufficient quantity to fill the trough.

George Maier, who was called on behalf of plaintiffs, testified, in substance, that Ferrari told him there was pleanty of water on the property and sufficient feed on the ranch for the stock; that he could mow the meadow twice a year; that it would support fifteen or sixteen head of cattle; that the pasture would support ten to fifteen head of horses. Maier testified that the second crop of hay did not grow high enough to cut.

Marvin Maier, the son of George Maier, testified to the same effect as his father, stating that when they moved onto the property in the summer time the springs went dry.

Mr. Nunneley, testifying for plaintiffs, stated that the conversation regarding the spring was for the most part general. However, it was to the effect that there was plenty of water on the property; that Ferrari told Blackwell that, so far as he knew, the spring had never gone dry; and that when he had operated the dairy in the past he had from twelve to sixteen cows pastured in the meadow.

The defendant, Emil A. Ferrari, testified that he was born on the ranch; that he had not represented to Blackwell that the pasture would support fifteen to twenty horses; that he did not state to him that the meadow would support twenty to twenty-five dairy cows; that he did state to Blackwell and Nunneley, in regard to the spring on the ranch, that he had received sufficient water therefrom to supply the cattle and for irrigation of a small garden; that the spring had never gone dry while he was on the ranch, and that he had never represented to Blackwell that there was more than one spring on the property.

Ferrari testified that his only representations to Mr. Blackwell in regard to the productivity or conditions of the ranch related to the time when he operated the ranch and that the representations made were so limited; that, in regard to the number of cows which could be supported on the property, he told Blackwell he was grazing twelve to sixteen head of cows when he left the ranch, and that no mention was made of the number of horses which the ranch would support.

A number of witnesses residing in the vicinity of the Ferrari property testified in behalf of the defendants, to the effect that the Ferrari ranch had always been considered good property for the production of garden truck and to support stock. These witnesses, with the exception of two, testified to the productivity of the ranch during the time it was operated by Ferrari some ten or twelve years previous to the time of the commencement of suit. Joseph Ahart and Claude West, however, testified to conditions existing on the ranch at the time of the trial. Claude West, whose testimony substantially corroborated the evidence given by Joseph Ahart, was living upon the property and operated the ranch at the time of the trial. He stated that he had twenty head of cattle on the ranch, fourteen of which were milk cows. He said he had been on the property three months, and that he was milking ten or eleven cows, and that he had three head of horses on the place; that he was getting plenty of water from the two wells by means of the pumping plants. He asserted that he had cut one crop of hay and could have cut a second, but that he turned the stock in there to graze.

In support of their right to rescission, the appellants rely most strongly on the following three alleged misrepresentations: That the land would pasture fifteen to twenty horses; that the land would support from twenty to twenty-five dairy cows; that the spring on the property would supply enough water all the year round for the stock or for necessary irrigation. The complaint alleges that as a result of such misrepresentations appellants were damaged by the loss of three cows valued at $109 each which died because of a lack of hay and from eating poisoned weeds growing on the premises; by depreciation in value of fourteen cows as a result of a lack of nourishment in the hay; by failure of cows to produce milk on account of said lack of nourishment; by the death of newborn calves resulting from a lack of nourishment; and for expenditures made by appellants in repairing the buildings and constructing necessary water troughs.

The findings of the trial court specifically conclude that defendants did not represent that the pasture on the land would support fifteen to twenty head of horses or that the pasture would support from twenty to twenty-five dairy cows; that defendants did not represent that the spring on the property would produce enough water the year round to supply the stock or to irrigate the land.

[1] Conceding that the authorities cited by appellants support the conclusion that "actionable fraud" would have been disclosed by proof of the truth of the allegations of the complaint, it is nevertheless the opinion of this court that appellants have failed to prove by a preponderance of the evidence that the respondents made any of the material misrepresentations alleged in the complaint. The record discloses a decided conflict in the evidence in that regard. As stated by appellants, the issue before the trial court was one of fact, and if there is present in the record substantial evidence in support of the findings of the trial court, it is beyond the province of this court to disturb the judgment on appeal.

[2] The fact that the opinion of the trial court indicates a doubt as to whether the complaint made out a proper case of fraud regardless of the denials of the allegations contained therein is of no moment in the determination of the issues which are presented on this appeal. The opinion of the trial court is not a part of the record on appeal, and it may therefore not be considered for any purpose whatever, even if it is incorporated in a bill of exceptions. Cavagnaro v. Delmas, 29 Cal. App.2d 352, 84 P.2d 274; Goldner v. Spencer, 163 Cal. 317, 125 P. 347; DeCou v. Howell, 190 Cal. 741, 214 P. 444; 2 Cal. Jur. 488, § 235, and p. 688, § 394.

The testimony of defendant Emil Ferrari, which has been sufficiently set forth, is in direct conflict with the testimony of plaintiff Blackwell so far as it relates to the material issues contained in the complaint. Ferrari specifically denied that he had represented to Mr. Blackwell that the pasture on the ranch would support fifteen to twenty horses, or that the meadow would supply twenty to twenty-five dairy cows. The testimony of Ferrari in regard to the spring is also in direct conflict with the allegation that Ferrari represented that the spring would supply sufficient water all the year round for the stock or for irrigation. Ferrari's testimony in this regard was that Blackwell was told there was sufficient water in the spring for the cattle and for a small garden.

The testimony of plaintiffs' witness, George Maier, fails to support the allegations of the complaint. He testified in regard to the water in the springs, as follows:

"A. I asked Mr. Ferrari then, I says, 'Mr. Ferrari, do not the springs go dry?' and he says, 'No', and so I let it go on by until I lived on the place. * * *.

"Q. He just said, 'There is plenty of water'? A. I just asked him if the spring went dry; he said, no, there is plenty of water there."

The foregoing testimony does not support appellants' claim that Ferrari represented that the spring would supply water for the stock or for irrigation all year round. In regard to the alleged misrepresentations on the part of Ferrari in connection with the number of horses and dairy cows which could be pastured and supported upon the land, the following testimony of George Maier appears:

"Q. What did he say about the meadow, supporting how many cattle? A. He did say it would support fifteen or sixteen head of cattle. * * *.

"Q. Did he say anything about pasture? * * * A. That there was good pasture and water over there.

"Q. How many horses would it support? A. Support from ten to fifteen head of horses for awhile over there in the summer."

As disclosed, Maier's testimony fails to support the allegations of the complaint. He testified that Ferrari represented that the meadow would support fifteen or sixteen head of cattle and not twenty to twenty-five head as alleged in the complaint. He testified that Ferrari also represented that the land would pasture ten to fifteen head of horses, and not fifteen to twenty head as alleged in the complaint.

It will be observed that Maier does not testify that Ferrari said the land would pasture ten or fifteen horses the year round, but merely that it would support that number of horses "for awhile * * * in the summer."

It might be contended that the discrepancies set forth in the foregoing testimony are unimportant in determining the question as to whether the respondents by their action are not guilty of "actionable fraud", but as heretofore stated, the question before the trial court, in the final analysis, became one of fact, and in considering such discrepancies together with the testimony of defendant Ferrari, which was an absolute refutation of the alleged representations, we find that a definite conflict in the evidence bearing upon the material allegations of the complaint does exist. Ferrari's testimony relative to the spring on the ranch was to the effect that the spring had never gone dry during the time he occupied the property. Those representations in regard to the spring are supported, at least in part, by plaintiff Blackwell's own testimony. He testified: "He said that it never did go dry. It never would go dry." Such representations certainly are inconsistent with the claim of appellants that Ferrari represented that the spring would supply enough water all year round for the stock or irrigation. Although it does appear that during the summer, and after Blackwell had taken possession of the ranch, the spring had apparently gone dry, there is no evidence in the record that this spring had ever gone dry during the time that Ferrari occupied the property. Ferrari testified that the spring required regular "cleaning out" and possibly this work was not properly done after the appellants took possession of the property.

[3] We are of the opinion the findings and judgment are adequately supported by the evidence.

[4] It is an established rule of law that the findings of the trial court will not be disturbed on appeal where the evidence as to the issues framed by the pleadings is in sharp conflict. Segaloff v. Furman, 209 Cal. 301, 287 P. 92.

In regard to the evidence given by the various witnesses who testified in behalf of defendants, it may be said that, while such testimony was not direct evidence bearing upon the issue as to whether defendant Ferrari made the alleged misrepresentations, it was material to enable the trial court to determine the good faith of Ferrari at the time of the property transaction. There is no reason to disbelieve the testimony of Claude West, who was operating the ranch at the time of the trial. According to his testimony, the ranch was being supplied with plenty of water through the use of two pumping plants. The stock was in good condition, and the ranch in general was in conformity with the conditions represented by defendant Ferrari.

The judgment is affirmed.

ADAMS, P. J., and PEEK J., concur.

RISKIN v. TOWERS.

Civ. 13765.

District Court of Appeal, Second District, Division 3, California.

July 30, 1943.

Hearing Granted Sept. 27, 1943.

Judgment 🔑138(3)

Where judge in one department following a full hearing and upon conflicting evidence denied defendant's motion to quash personal service of summons on ground that no service had been made, and defendant's showing on second motion before judge in another department to vacate default on ground that he did not know he had been served until court so ruled in first motion was no stronger than that on first, denial of second motion was proper. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Frank G. Swain, Judges.

Action by David Riskin against Walter Towers, wherein a default judgment was taken against defendant. From the judgment and from an order denying motion to vacate and set aside default, defendant appeals.

Affirmed.

Glenn A. Lane, of Los Angeles, for appellant.

Sydney M. Williams, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

After the judge of one department, following a full hearing, and upon conflicting evidence, had denied defendant's motion to quash personal service of summons upon the alleged ground that no service had been made, the judge of another department denied defendant's motion under section 473 of the Code of Civil Procedure to vacate his default upon the ground that he did not know he had been served until the court so ruled on the first motion. Defendant appeals from the second order and from a default judgment against him for damages.

Defendant's showing on the second motion was no stronger than that on the first, and there was manifestly no abuse of discretion in the court's refusal to go contrary to the first ruling or to hold that, although defendant had been served, he did not know it.

The order and judgment are affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.

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SECOND SERIES

22 Cal.2d 535

FRIEDMAN et al. v. BERGIN et al.

L. A. 18633.

Supreme Court of California.

July 15, 1943.

1. Frauds, statute of 🔑44(1)

Contract for operation of concessions at race track to be performed over period of five years was within statute of frauds. Civ.Code, § 1624(1).

2. Frauds, statute of 🔑113(2)

Where memorandum of five-year contract for operation of concessions at race track, which was within statute of frauds, did not contain material terms of contract so that operation of concession involved practical construction, not of terms of memorandum, but of material terms not expressed within it, there could be no recovery for breach of such contract. Civ.Code, § 1624(1).

3. Frauds, statute of 🔑113(2)

Where memorandum of five-year contract for operation of concessions at race track did not mention plaintiffs' right to use stands built by defendants so that in action for breach of such right after three years of operation plaintiffs were compelled to rely on parol modification of contract, action was barred by statute of frauds. Civ.Code, § 1624(1).

4. Frauds, statute of 🔑131(1)

A parol promise performable over a five-year period is within statute of frauds whether or not it is a modification of another contract. Civ.Code, § 1624(1).

5. Frauds, statute of 🔑58(1)

A leasehold contract, like other contracts, must comply with statute of frauds. Civ.Code, § 1624(1).

6. Frauds, statute of 🔑158(3)

Contention that an insufficient description of premises leased may be aided by parol evidence does not apply to a concession contract performable over a five-year period, the only memorandum of which omitted essential elements of contract.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by William J. Friedman and another against Thomas M. Bergin and others for breach of contract. Judgment for plaintiffs, and defendants appeal.

Reversed.

For prior opinion, see 131 P.2d 13.

Mott & Grant, Kenneth E. Grant, and Harry C. Cogen, all of Los Angeles, for appellants.

Desser & Rau, of Los Angeles, for respondents.

TRAYNOR, Justice.

In a contract executed April 4, 1937, the Del Mar Turf Club granted defendant Thomas Bergin the right to dispense all food, liquors, soft drinks, cigars, cigarettes, and other commodities, and to operate a cafe for employees, at a race track at the San Diego County Fair Grounds, at Del Mar, California. On April 24, 1937, Bergin signed an instrument reading as follows: "Received of William J. Friedman and Alex Charles Goodman, the sum of two thousand dollars ($2,000) in consideration for the following concessions at the Del Mar Turf Club: Cigarettes, cigars, candy, checking, including all lavortories (sic.); for the term of five years commencing with the 1937 season and ending with the season for the year 1941. This agreement is to be followed by a formal contract on the same basis as that between the Del Mar Turf Club and the undersigned concessionaire." A formal contract was twice tendered plaintiffs Goodman and Friedman, but according to their testimony they rejected it because it contained no clauses covering their understanding that they were to receive an option to renew for five years, and that Bergin would return the $2,000 to plaintiffs if racing were discontinued during the term of the contract. Although no formal contract was executed, plaintiffs operated the concession at the track for three years, making a profit of $4,198.61. The greater part of plaintiffs' sales were made in stands built by Bergin in the grandstand, and operated by Bergin's employees. Plaintiffs' sole function in connection with these stands was to provide the goods that were sold there. Bergin accounted to plaintiffs each night for the sales of such goods, and paid the proceeds to plaintiffs, less 16⅔% of the candy sales, which he retained, and 3% of plaintiffs' total sales to cover the sales tax. Plaintiffs' sales in other parts of the track were made by girls who circulated through the crowd. Plaintiffs relied on Bergin to make all necessary arrangements for retail licenses, social security and unemployment insurance payments, industrial accident insurance, and sales tax.

During part of this period, Bergin acted through the Del Mar Caterers, to whom he had assigned his general concession from the Del Mar Turf Club. On April 24, 1940, the Del Mar Caterers assigned this concession to defendants Anderson and Van Steen, informing plaintiffs accordingly. Anderson and Van Steen were unwilling to continue the previous arrangement but offered to use their own employees and stands for the sale of plaintiffs' goods in return for 50% of plaintiffs' net profits. Plaintiffs acquiesced, and, through agents, commenced operating the concession. Anderson and Van Steen, however, not only refused to give nightly accountings but insisted that plaintiffs be responsible for their own licenses, social security and unemployment insurance payments, industrial accident insurance, and sales tax. After two or three days plaintiffs discontinued operations. Judgment was given in their favor in an action for breach of contract and defendants appeal. The defendant Anderson died during the pendency of the action and his executrix, Beulah Anderson, was substituted as defendant. After proceedings for new trial, the judgment was modified in certain particulars not here material. Subsequently, by stipulation of the parties, an order nunc pro tunc as of the date of entry of judgment was made striking from the judgment the name of defendant Del Mar Caterers, who by clerical error had been included therein.

[1] The contract that plaintiffs seek to enforce was to be performed over a period of five years and is within the statute of frauds. Civ.Code, § 1624(1). Therefore, only if the instrument executed on April 27th contains the material terms of the contract may plaintiffs recover. Fritz v. Mills, 170 Cal. 449, 150 P. 375; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; see 12 Cal.Jur. 901; Restatement, Contracts, § 207; 2 Williston on Contracts, 1936, p. 1618.

[2] The trial court found that the only agreement between plaintiffs and Bergin was that of April 24, 1937. That finding necessarily implies that the terms of the actual arrangement under which the concession was operated were agreed upon at that time and were intended to be a part of the contract then made. Although plaintiffs and Bergin may have agreed to these terms when they signed the memorandum, they did not include them therein. The memorandum does not state that plaintiffs were to have the right to sell their wares through Bergin's stands and Bergin's employees, that plaintiffs were to receive nightly accountings, or that Bergin was to pay plaintiffs' licenses, social security and unemployment insurance payments, industrial accident insurance and sales tax. There is no mention in its two sentences of Bergin's right to retain 16⅔% of plaintiffs' receipts from candy sales. The actual operation of the concession involved the practical construction, not of the terms of the memorandum, but of material terms not expressed within it. See Niles v. Hancock, 140 Cal. 157, 73 P. 840; Edgar Bros. Co. v. Schmeiser Mfg. Co., 33 Cal.App. 667, 166 P. 366; Wineburgh v. Gay, 27 Cal.App. 603, 150 P. 1003; Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832; Enlow v. Irwin, 80 Cal.App. 98, 251 P. 658; Santoro v. Mack, 108 Conn. 683, 145 A. 273; 2 Williston on Contracts, 1936, p. 1645.

No contention is made that the reference to the contract between Bergin and the Del Mar Turf Club was intended to amplify the memorandum through the incorporation of that contract. The contract contained a clause requiring Bergin to erect his own facilities. A like clause in a contract between Bergin and plaintiffs would have required plaintiffs to erect the facilities; yet the only breach found by the trial court was that plaintiffs were denied the use of stands erected by Bergin. The Del Mar Turf Club had the right to terminate Bergin's contract if a named officer of the club regarded his services as unsatisfactory. Bergin was required to post $5000 as bond for performance, to pay his own sales tax and to comply with all laws, presumably including Workmen's Compensation and Social Security Laws. Plaintiffs, however, relied upon Bergin to pay such costs as taxes, licenses, and workmen's compensation and social security insurance. They were never asked to post bond, and there is no indication that any belief that their services were unsatisfactory would be sufficient grounds to permit Bergin to terminate the contract. The reference to the Del Mar contract suggests only that it was to be a model in form for the formal contract to be executed, and affords no clue as to how far the parties proposed to copy the Del Mar contract.

[3, 4] Plaintiffs explain the absence from the memorandum of the terms of the arrangement under which they operated on the ground that those terms were the result of a parol modification of the contract. They testified that in July, at the opening of the 1937 racing season, Bergin told them that they could not erect their own stands, but must work through his. Plaintiffs testified that Bergin also told them that he would be responsible for such costs as taxes, licenses, and workmen's compensation and social security insurance. They therefore contend that the memorandum was a complete statement of the contract before its modification. Since the only breach found, however, was the denial of plaintiffs' right to use the stands erected by Bergin, plaintiffs must rely upon the modifications in order to recover. These modifications were not made in writing, and a parol promise, performable over a five-year period, is within the statute of frauds whether or not it is a modification of another contract. See Twohey v. Realty Syndicate Co., 4 Cal.2d 379, 49 P.2d 819; notes 118 A.L.R. 1511; 29 A.L.R. 1095; 17 A.L.R. 10; 9 Wigmore on Evidence, (1940) p. 177.

[5, 6] Plaintiffs also contend that a concession contract is like a lease, and rely on Beckett v. City of Paris Dry Goods Co., 14 Cal.2d 633, 96 P.2d 122, for the proposition that an insufficient description of the premises leased may be aided by parol evidence. Like other contracts, however, a leasehold contract must comply with the statute of frauds. Wineburgh v. Gay, supra; Enlow v. Irwin, supra; Rohan v. Proctor, 61 Cal. App. 447, 214 P. 986. The opinion in the Beckett case does not discuss the statute of frauds and shows that the court had before it a detailed written lease, involving no omissions comparable to those made in the writing on which plaintiff relies.

The judgment and the order modifying judgment after proceedings on motion for new trial are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

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22 Cal.2d 552

HALLETT v. SLAUGHTER et al.

L. A. 18369.

Supreme Court of California.

July 23, 1943.

Rehearing Denied Aug. 19, 1943.

1. Judgment ⇨461(3)

Where there was testimony by judgment debtor's attorney showing that answer and copy thereof to complaint in original action were handed to secretary with instructions for mailing, evidence supported finding that answer and copy thereof were mailed so as to permit setting aside of default judgment.

2. Appeal and error ⇨158(2)
Judgment ⇨153(5)

The enforced satisfaction of a judgment does not deprive the judgment debtor of the right to appeal or seek to have the judgment vacated or set aside.

3. Judgment ⇨147

Where judgment creditor obtained default judgment, stipulations as to payments out of salary held under levy of execution and claim of exemption did not constitute "ratification" of judgment so as to "estop" judgment debtor from seeking vacation of judgment, where stipulations were made for sole purpose of securing a prompt release to debtor of a portion of money. Code Civ.Proc. § 690.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Ratification".

4. Judgment 🔑437

Remissness of judgment debtor's attorney in failing to discover that answer was not filed did not amount to such "inexcusable neglect" as a matter of law as to foreclose right to maintain suit to set aside default judgment, especially where judgment debtor's delay in discovering entry of default was due in part to failure of judgment creditors to take earlier action to enforce their judgment. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Inexcusable Neglect".

5. Judgment 🔑435

Where default judgment was entered against judgment debtor because of debtor's belief that answer to complaint in original action had been filed, there was such "extrinsic accident" and "mistake of fact" as to furnish a ground for setting aside judgment in equity.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Accident" and "Mistake of Fact".

6. Judgment 🔑456(1)

Where default judgment was entered as result of judgment debtor's mistaken belief that answer was on file, suit to set aside judgment was commenced a few weeks after discovery of mistake, and diligently prosecuted, and judgment creditors did not suffer injury, judgment debtor was not barred from relief by "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Judgment 🔑145(4)

Where default judgment was entered through judgment debtor's mistake in action for medical services, proof established that judgment debtor had a meritorious defense supporting setting aside of default judgment.

8. Judgment 🔑145(4)

To show a meritorious defense supporting setting aside of default judgment, proof produced by judgment debtor in support of allegations need only show with reasonable certainty that a more favorable judgment would follow from a hearing on the merits.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Meyer B. Marion, Judge pro tem.

Suit in equity by Gladys Meyer Hallett against J. A. Slaughter and others to set aside and vacate a default judgment. From a decree for plaintiff, defendants appeal.

Affirmed.

For prior opinion, see 130 P.2d 156.

Herbert Gall and Edward Fitzpatrick, both of Los Angeles, for appellants.

David I. Lippert, of Los Angeles, for respondent.

SCHAUER, Justice.

Defendants appeal from a decree in equity setting aside and vacating a judgment by default secured against plaintiff in an action filed on April 17, 1940, in the Municipal Court of Los Angeles, and based on an assigned claim for medical services allegedly furnished by Dr. Walter B. Schwuchow (since deceased) to plaintiff and her son. In that action defendants herein, Slaughter and Trigg, as operators of a collection agency named The Doctors Business Bureau, were plaintiffs and plaintiff herein was a defendant. In the instant suit plaintiff herein was also awarded a money judgment against defendants for certain sums which defendants had collected from her by means of levies upon her salary, under the municipal court judgment; enforcement of the municipal court judgment was enjoined; and the municipal court was ordered to permit plaintiff to file her answer in that court within ten days after judgment in the present suit becomes final. Defendant Jennie I. Schwuchow was joined as the widow of Dr. Schwuchow and executrix of his estate. We have concluded that the judgment of the trial court should be affirmed.

It appears from the evidence and was found by the court that on May 23, 1940, plaintiff was served with a copy of the summons and complaint in the municipal court action; that she forthwith employed an attorney to represent her in such action, and her answer to the complaint therein, prepared by her attorney and verified by her, and accompanied by the requisite filing fee, was on May 24, 1940, deposited in the United States mail at Los Angeles, California, enclosed in an envelope with sufficient postage affixed, and directed to the clerk of the Municipal Court of Los Angeles; that on the same day a copy of the answer was mailed to the attorney for plaintiffs in the municipal court action (defendants herein); that neither the original nor the copy of the answer was received by the respective addressees or returned to this plaintiff's attorney, but both were lost; that plaintiff and her attorney believed the answer was on file. On June 4, 1940, the default of plaintiff herein was entered in the municipal court action, and on December 27, 1940, judgment by default was taken against her.

Early in January, 1941, execution was levied upon plaintiff's salary. This was the first knowledge received by either plaintiff or her attorney that her answer had not reached the clerk of the court and had not been filed, that her default had been entered, and that judgment had been taken against her. Plaintiff sought release of her salary by filing a claim of exemption under the provisions of section 690.11 of the Code of Civil Procedure, but before the claim was heard by the court plaintiff stipulated with the judgment creditors that they take half of the money under levy and that she receive the other half. Early in February, 1941, defendants levied upon plaintiff's salary a second time, and plaintiff stipulated that they take $50 of the amount held. On February 24, 1941, plaintiff filed this suit. A third salary levy was made in March, 1941; plaintiff again filed a claim of exemption; and after a hearing the court ordered that plaintiff was entitled to half the money and that defendants take the other half.

The trial court further found that plaintiff has a meritorious defense to the municipal court action but that, by the accidental loss of her answer and the mistaken belief on her part and on the part of her attorney that the answer was on file, she was prevented from setting up such defense; that the loss of the answer and the mistaken belief that it was on file were "not due to any fault or neglect" of plaintiff or of her attorney; that they had the right to rely on the United States Post Office to transmit the answer as directed; that plaintiff was diligent in bringing the present suit and was not guilty of laches; and that plaintiffs in the municipal court action (defendants herein) willfully and with the intent to lull this plaintiff into a false sense of security, refrained from proceeding in that action until plaintiff's rights under section 473 of the Code of Civil Procedure were barred by lapse of time, although "they knew that plaintiff's * * * salary payments were vulnerable to such proceedings."

Defendants' contentions are four:

1. That the evidence fails to support the finding that plaintiff's answer and the copy thereof were mailed (as set forth above).

2. That by her stipulation made for the purpose of securing the release of her salary held under levy of execution, and by her affidavit of exemption made following the March salary levy and after the present suit was filed, plaintiff ratified and confirmed the municipal court judgment and is now estopped to attack it.

3. That plaintiff is guilty of neglect, of laches, and of want of diligence, and therefore is not entitled to equitable relief.

4. That plaintiff failed to show that she has a meritorious defense and that a new trial would result in a judgment more favorable to her.

[1] As to defendants' first contention, the attorney employed by this plaintiff to defend her in the municipal court action testified that on May 24, 1940, he handed plaintiff's answer and a copy thereof, together with the filing fee, to his secretary, and instructed her to mail the original answer and the filing fee to the clerk of the municipal court and to mail the copy to opposing counsel. The secretary testified that she did not recall the matter, but that if the papers had been given her to mail, then she had mailed them, and that she knew "there was sufficient postage because we had a scale. I couldn't go wrong in that." This testimony supports the finding that the papers were mailed.

[2-3] Defendants' second contention is answered by the rule, well settled in California, that the enforced satisfaction of a judgment does not deprive the judgment debtor of the right to appeal or to seek to have the judgment vacated or set aside. See 14 Cal.Jur. 1018, sec. 84, and cases there cited: Engelken v. Justice Court, 1920, 50 Cal.App. 157, 159, 195 P. 265; and Hartke v. Abbott, 1930, 106 Cal.App. 388, 391-393, 289 P. 206. Plaintiff's stipulations went no further than to specify the amount which was to be paid each of the respective parties to the judgment from the money held under levy, and contain no suggestion of a compromise agreement, of an affirmance of the judgment, or of a waiver of the right

to attack it. They were made for the sole purpose of securing a prompt release to plaintiff of a portion of the money, and cannot now be held to defeat her right to maintain this suit. The same is true of plaintiff's affidavit claiming exemption of her salary held under the levy made in March; the claim of exemption and the subsequent court hearing thereon were involuntary steps forced upon plaintiff in the same manner as were the stipulations.

[4] Defendants' third point—that because of neglect, laches, and want of diligence plaintiff may not seek relief from equity—is met by the findings of the trial court to the contrary on each of these issues. Although some degree of negligence may be charged to the attorney employed by this plaintiff to defend her in the municipal court action in not sooner discovering that plaintiff's answer had not been filed, we are not prepared to say that his remissness in this regard amounts to such inexcusable neglect as a matter of law that plaintiff should be foreclosed of her right to maintain this suit. Moreover, plaintiff's delay in discovering the entry of her default was due in part at least to the apparently designed and deliberate failure of defendants to take earlier action to secure and enforce their judgment. We are in accord with the following views set forth in Soule v. Bacon, 1907, 150 Cal. 495, 497, 498, 89 P. 324, 325: "There are many cases holding that the party may have relief in equity from the consequences of his mistake of fact, although he was somewhat negligent in making the mistake, if his negligence in no way prejudiced the opposing party. [Citations.] * * * At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion."

[5] Plaintiff was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action. That such accident and mistake furnish a ground for equitable intervention under the circumstances of this case is clear. See Bidleman v. Kewen, 1852, 2 Cal. 248, 250; Bibend v. Kreutz, 1862, 20 Cal. 109, 110, 114; Brackett v. Banegas, 1897, 116 Cal. 278, 284, 48 P. 90, 58 Am. St.Rep. 164; Bacon v. Bacon, 1907, 150 Cal. 477, 481, 486, 491, 89 P. 317; Wattson v. Dillon, 1936, 6 Cal.2d 33, 40, 56 P. 2d 220; Olivera v. Grace, 1942, 19 Cal.2d 570, 578, 122 P.2d 564, 140 A.L.R. 1328; Boyle v. Boyle, 1929, 97 Cal.App. 703, 706, 276 P. 118; Jeffords v. Young, 1929, 98 Cal.App. 400, 404, 277 P. 163; Winn v. Torr, 1938, 27 Cal.App.2d 623, 627, 81 P.2d 457; Wilson v. Wilson, 1942, 55 Cal.App.2d 421, 426, 130 P.2d 782.

[6] This suit was commenced within a few weeks after plaintiff learned of the mistake and has been diligently prosecuted by her. In addition, defendants have not shown that they have suffered injury as a result of the delay before plaintiff knew of the mistake (a delay which, as mentioned above, was caused in part by defendants' own conduct), and therefore one element of laches is missing. See 10 Cal.Jur. 530, sec. 68, and cases there cited.

[7, 8] The fourth contention of defendants—that plaintiff failed to show a meritorious defense—is also without foundation. Among the facts alleged by plaintiff by way of defense to the municipal court action are: that a major portion of the account there sued upon was for services to her son, Eugene, at a time when he was a minor, rather than to herself, and that for such services her obligation to the doctor, if any, was as guardian of the estate of her son, rather than individually; that the charges for such services had been barred by the statute of limitations; that the doctor had released and discharged her from all liability prior to commencement of the municipal court action; that her obligation to the doctor, if any, had been discharged in bankruptcy; and that neither she nor her son had been acquainted with the doctor or under his care during certain months covered by the account. Proof of even a portion of these allegations would result in a judgment in the municipal court action which would be more favorable to this plaintiff than that which was entered by default. As stated in Olivera v. Grace, 1942, supra, 19 Cal.2d 570, 579, 122 P.2d 564, 569, 140 A.L.R. 1328, "The requirement that the complaint allege a meritorious case does not require an absolute guarantee of victory." The same observation may be made concerning the proof produced by plaintiff in support of her allegations; she need only show with reasonable certainty that she would emerge in a more favor-

able position. See 15 Cal.Jur. 29, sec. 128, and cases there cited. The trial court heard the testimony of plaintiff and concluded that she has a meritorious defense to the municipal court action and that "if the judgment therein is set aside it appears that a like judgment would not follow; that on the contrary it is reasonably certain that a judgment more favorable to this plaintiff would result." Such a showing is all that is required of plaintiff in order to secure equitable intervention and an opportunity for a full hearing on the merits. To require in this suit complete proof in establishment of her defenses would render idle the act of conducting a trial on the merits in the municipal court action.

The judgment is affirmed.

SHENK, CURTIS, and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent.

The present action is an independent suit in equity commenced after the expiration of the time for relief under section 473 of the Code of Civil Procedure. Title Ins. & Trust Co. v. King, etc., Co., 162 Cal. 44, 120 P. 1066; Hunt, Mirk & Co., Inc., v. Hesperides Mining Co., 200 Cal. 382, 253 P. 317; Knox v. Superior Court, 100 Cal.App. 452, 454, 280 P. 375. The remedy afforded by section 473 is akin to the common law power of courts to vacate their own judgments during the term they were rendered. Olivera v. Grace, 19 Cal.2d 570, 574, 122 P. 2d 564, 140 A.L.R. 1328. For the most part the cases cited by plaintiff granting relief for the loss or delay of a pleading in the mails arose under statutes different from those existing in this state and involved requests for such relief made in the same action shortly after the entry of the default. Chicago, etc., Co. v. Eastham, 26 Okl. 605, 110 P. 887, 30 L.R.A.,N.S., 740; Boyd v. Williams, 70 N.J.L. 185, 56 A. 135; Norman v. Iowa Central R. Co., 149 Iowa 246, 128 N. W. 349; Corning v. Tripp, 1 How.Prac., N. Y., 14; Loeb v. Schmith, 1 Mont. 87; Williams v. Richmond, etc., Co., 110 N.C. 466, 15 S.E. 97. It is not enough now for plaintiff to show that the judgment was taken against her through a "mistake, inadvertence, surprise or excusable neglect" that would have entitled her to relief under the provisions of section 473 had she made timely application therefor. Olivera v. Grace, supra. She must prove that because of extrinsic fraud or mistake she had no reasonable opportunity to present her defense (Olivera v. Grace, supra; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Neblett v. Pacific Mutual L. Ins. Co., 22 Cal. 393, 139 P.2d 934; Larrabee v. Tracy, 21 Cal.2d 645, 649, 134 P.2d 265; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; see Restatement, Judgments, secs. 118-126), and that she has not been negligent in failing to discover the fraud or mistake. Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220; Wilson v. Wilson, 55 Cal.App.2d 421, 427, 130 P.2d 782, and cases there cited.

The plaintiff has not shown that defendants are guilty of fraud. The trial court's finding that defendants, with intent to lull plaintiff into a false sense of security, wilfully refrained from undertaking any proceedings in the action until more than six months after the entry of default, is not a finding of fraud, for defendants owed plaintiff no duty to notify her of the entry or to inform her of her legal rights. Code of Civ.Proc., secs. 585, 1010, 1014; Bley v. Dessin, 31 Cal.App.2d 338, 343, 87 P.2d 889; Trustees of Amherst College v. Allen, 165 Mass. 178, 42 N.E. 570. Defendants did nothing to deceive plaintiff, nor were they in any way responsible for the loss of plaintiff's answer or for her belief that it had been filed. See Wattson v. Dillon, 6 Cal.2d 33, 42, 43, 56 P.2d 220. They had a clear legal right to delay the entry and enforcement of the judgment and their motive in doing so is immaterial. Plaintiff herself rejects fraud as the basis of her action by characterizing the action in her brief on appeal as one "to set aside a default judgment obtained * * * as a result of mistake and accident."

The mistake in the present case was the erroneous belief of plaintiff and her attorney in the earlier action that her answer was on file, prompted by the failure of the attorney to file an answer with the clerk of the court. Code of Civ.Proc. sec. 465. One who is remiss in presenting his case to the court, however, is not entitled to the extraordinary remedy of setting aside a final judgment. Wattson v. Dillon, supra; Wilson v. Wilson, supra; Borland v. Thornton, 12 Cal. 440; Quinn v. Wetherbee, 41 Cal. 247; Restatement, Judgments, secs, 1, 126. Admittedly the answer was never delivered to the clerk, but plaintiff contends that it was mailed and that she was not responsible for its accidental loss. Mailing, however, is not equivalent to filing. McDonald v.

Lee, 132 Cal. 252, 64 P. 250; Estes v. Chimes, 40 Cal.App.2d 41, 104 P.2d 74; see United States v. Lombardo, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897; Poynor v. Commissioner of Internal Revenue, 5 Cir., 81 F.2d 521, 522. "Filing a paper consists in presenting it at the proper office, and leaving it there, deposited with the papers in such office. * * * A paper in a case is said to be filed when it is delivered to the clerk and received by him, to be kept with the papers in the cause." Tregambo v. Comanche M. & M. Co., 57 Cal. 501, 506; see Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 395, 121 P.2d 829. It is the duty of a litigant to see that his pleading is in fact deposited in the clerk's office within the time contemplated by law. Tregambo v. Comanche M. & M. Co., supra; Boyd v. Desmond, 79 Cal. 250, 253, 21 P. 755; Hoyt v. Stark, 134 Cal. 178, 180, 181, 66 P. 223, 86 Am.St.Rep. 246; Fletcher v. Maginnis, 136 Cal. 362, 363, 68 P. 1015; W. J. White Co. v. Winton, 41 Cal.App. 693, 695, 183 P. 277. When he engages an attorney, the latter becomes his agent in prosecuting the suit and must on his behalf perform the duties that the law imposes upon a litigant, and the attorney's failure to do so is chargeable to his client. Wilson v. Wilson, supra; United States v. Duesdieker, 118 Cal.App. 723, 5 P.2d 916; Jeffords v. Young, 98 Cal.App. 400, 277 P. 163; see 14 Cal.Jur. 1042-1043; 34 C.J. 307-309; 1 Freeman on Judgments (5th Ed.), p. 495. Thus if an attorney fails to file an answer (Borland v. Thornton, supra), or fails to find and correct an error in the record on appeal (Quinn v. Wetherbee, supra), equity will deny the client's application to set aside the judgment. Cases such as Brackett v. Banegas, 116 Cal. 278, 48 P. 90, 58 Am.St.Rep. 164, and Winn v. Torr, 27 Cal.App.2d 623, 81 P.2d 457, were not suits in equity to set aside a final judgment but actions to foreclose a mortgage, and rest upon the principle that since a mortgagee is entitled to an effectual foreclosure he is not precluded from bringing a new action to foreclose his lien by an earlier suit that failed of that purpose.

Cases in which the court or its attachés (Sullivan v. Lumsden, 118 Cal. 664, 668, 669, 50 P. 777; Herd v. Tuohy, 133 Cal. 55, 62, 63, 65 P. 139), or the other party (Olivera v. Grace, supra; Boyle v. Boyle, 97 Cal.App. 703, 276 P. 118; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Soule v. Bacon, 150 Cal. 495, 89 P. 324; Bidleman v. Kewen, 2 Cal. 248; Bibend v. Kreutz, 20 Cal. 109; Antonsen v. Pacific Container Co., 48 Cal.App.2d 535, 538, 539, 120 P.2d 148) is responsible for the mistake are of no avail to plaintiff, for the mistake was solely that of plaintiff and her counsel. Equity will in certain cases relieve a complainant from an adverse judgment resulting from his own mistakes (see Jeffords v. Young, supra), but it will not relieve him if he fails to present his case with the diligence required of a litigant. Wilson v. Wilson, supra; Borland v. Thornton, supra; Wattson v. Dillon, supra; Quinn v. Wetherbee, supra. Defendant assumed the risk that her answer might not reach the clerk of the court when it was sent to him by mail. As time passed there was no acknowledgment of the copy sent to opposing counsel, or any other sign to indicate that either the answer or the copy had been received, but nothing was done to ascertain whether the answer had in fact been delivered to the clerk. After six months had elapsed following the entry of default, plaintiff's attorney had still made no inquiry as to the progress of the case or as to whether the answer had been filed, nor did he examine the records of the case on file in the office of the clerk. The attorney's office was only a few blocks from the courthouse and he could readily have checked the records in the clerk's office. Even a telephone inquiry would have disclosed the true status of the case. Plaintiff must be charged with his failure to ascertain whether the answer had been filed. Wattson v. Dillon, supra; Rudy v. Slotwinsky, 73 Cal.App. 459, 238 P. 783.

In my opinion the trial court erred in setting aside the judgment of the municipal court, and also erred in granting plaintiff judgment for the sums collected by the defendants. The judgment should therefore be reversed.

EDMONDS, J., concurred.

Rehearing denied; GIBSON, C. J., and EDMONDS, and TRAYNOR, JJ., dissenting.

22 Cal.2d 522

PEOPLE v. GILBERT et al.

Cr. 4458.

Supreme Court of California.
July 14, 1943.

As Modified July 29, 1943.

1. Criminal law 🔑680(1)

Refusal of trial court, during murder trial, to admit testimony not pertaining to defendant being tried and directing that such evidence be considered in subsequent proceeding to determine degree of the offense and punishment on pleas of guilty entered by codefendants, was not an abuse of discretion where defendants were accorded full opportunity to produce all the evidence they desired prior to fixing the degree of the crime. Pen.Code, §§ 189, 190.

2. Criminal law 🔑680(1)

The order of proof rests in the discretion of the trial court.

3. Criminal law 🔑980(2)

In proceeding to determine degree of offense and punishment after plea of guilty to murder, trial court's assertion that the evidence further showed the commission of kidnapping not charged in the information and court's action in propounding question to witnesses aimed at the determination of the question whether kidnapping had been committed was not an abuse of discretion. Pen.Code, §§ 189, 190, 209.

4. Criminal law 🔑980(2)

In determining the degree of an offense and the punishment to be imposed after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense.

5. Criminal law 🔑980(2)

A hearing for the determination of the degree of an offense and punishment therefor is not a "trial" in the technical sense, and is not governed by the same strict rules of procedure as a trial, but it is simply a statutory hearing by which the court examines witnesses to determine whether any facts exist to aggravate or mitigate the punishment.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

6. Criminal law 🔑980(2)

In proceeding to determine degree of offense and punishment to be imposed after plea of guilty to murder, that trial court, immediately after witnesses had testified and arguments were heard, read a written document setting forth his views as to guilt of defendant did not indicate that such decision was reached in disregard of defense evidence. Pen.Code, §§ 189, 190.

7. Homicide 🔑18(5), 29

Murder perpetrated in the commission of a robbery, or of an attempt to commit robbery, is "murder of the first degree" and all persons engaged therein whether or not they actually fired the fatal shot are equally answerable for all the natural consequences thereof. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder of the First Degree".

8. Homicide 🔑354

Evidence failed to establish that trial court abused its discretion in imposing the death penalty on a plea of guilty to murder committed in the course of a robbery. Pen. Code, §§ 189, 190.

9. Criminal law 🔑980(1)

Evidence failed to establish that trial judge allowed himself to be influenced by asserted newspaper publicity and public interest in another criminal trial in imposing death penalty on defendants' pleas of guilty to murder committed in the course of a robbery. Pen.Code, §§ 189, 190.

10. Criminal law 🔑1147

Where the evidence is not insufficient as a matter of law to support conclusion reached by trial court in determining degree of offense and punishment on defendants' plea of guilty to murder committed in the course of a robbery, Supreme Court could not modify the judgment. Pen.Code, §§ 189, 190; Const. art. 6, § 4.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; William R. McKay, Judge.

Lyle Cecil Gilbert and John Lovelace were convicted of murder in the first degree, and from judgments imposing death penalty appeals were automatically taken under Penal Code, § 1239.

Affirmed.

Rosalind Goodwin Bates, of Los Angeles, and Nathan O. Freedman and A. Wm. Christlieb, both of Hollywood, for appellants.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appealing defendants pleaded guilty to the crime of murder, committed during the commission of the crime of robbery. They do not dispute the facts which legally and admittedly constitute their crime murder in the first degree, but they appeal from judgments of death imposed by the trial court and contend that such court abused its discretion in several particulars hereinafter severally discussed. They seek to have the sentences modified to life imprisonment. The State challenges the power of this court, in view of its prior decisions, to consistently make such modifications. As we have concluded that the record discloses no abuse of discretion by the trial court, it is unnecessary to pass upon such last-mentioned law point.

An information (amended) containing four counts was filed by the District Attorney of Los Angeles County against the appellants and a codefendant, Max Gilbert. Count one charged all of the defendants jointly with the murder of Lee N. Bunch, a police officer. Count two charged them with robbery of H. N. Griffin, and counts three and four charged them with the attempted murder of Benjamin Bailuis and Charles Piercey, respectively. Prior convictions were also alleged against appellants. The codefendant, Max Gilbert, entered a plea of not guilty to all the charges. Each appellant entered a plea of guilty to the charge of murder in count one, and denied the prior convictions. It was thereupon stipulated that the evidence adduced at the preliminary hearing and at the trial of Max Gilbert could be considered by the court for the purpose of fixing the degree of the crime and the sentences to be imposed against appellants on the murder charge. It was further agreed that the prosecution and the defendants "may introduce additional evidence if they so desire." The pronouncing of judgment and sentence on appellants as to the murder charge was set for a future date, and the trial of Max Gilbert on his plea of not guilty proceeded. Ultimately he was adjudged to be guilty of murder of the first degree and was sentenced to life imprisonment. Upon the conclusion of the Max Gilbert trial, the trial court heard additional evidence addressed to the prior convictions charged against appellants and also as to the degree of the murder to which they had entered pleas of guilty. The court ruled that the murder was of the first degree and imposed the death penalty as against both appellants. It thereupon dismissed counts two, three, and four of the information. Appellants gave oral notice of appeal from the judgments imposing the death penalty.

Appellants, at the proceedings in the superior court up to and including the pronouncement of judgment, were both represented by the same counsel. In view of certain criticism by one of the appellants of the conduct of his case it is appropriate to observe that the conduct of the appellants' cases by their counsel, on the face of the record, appears to have been characterized by frank admissions of guilt, by the making of timesaving stipulations, and, withal, by determined (though unavailing) efforts to serve the appellants to the full extent on which the facts seem to admit of debatable conclusions. In such conduct, counsel appears to have displayed a commendable combination of zeal for the cause of appellants and appreciation of duty as an officer of the court. The debated conclusion in the superior court in each case was, shall the penalty be death or life imprisonment? As previously noted, the trial court sentenced each appellant to death and we are asked to modify the sentences to life imprisonment. We have concluded that the judgments must be sustained and that upon the showing made the sentences cannot be modified by us.

The record discloses that early in the morning of March 8, 1942, the codefendant Max Gilbert, who is a younger brother of appellant Lyle Gilbert, transported Orville Horgan (now deceased) and appellants Lyle Gilbert and John Lovelace, in an automobile belonging to Max Gilbert, to the Twin Palms Cafe in the city of Gardena, California. Max Gilbert remained in his automobile. The other three men, each of whom was armed with a deadly weapon, entered the building, in which a card room and restaurant were maintained. Lovelace went into the dining room where customers were seated at the lunch counter, and kept them "covered" while Horgan, who was armed with a sawed-off shotgun, entered the card room where several persons were seated playing cards. He ordered the occupants to put up their hands and line up with their faces to the wall. Lyle Gilbert proceeded to the rear of the building to search for the proprietor. A scuffle there ensued in which appellant Gilbert struck the proprietor on the head three or four times with his gun. With a gun at his back, the proprietor was forced to enter the card room where appellant Gilbert then took $317 from his person. While Horgan held the shotgun pointed at the men lined up, appellant Gilbert, at Horgan's direction, began to search them. The deceased, Lee N. Bunch, a policeman in plain clothes, was among those lined up. While facing the wall Bunch, living up to the highest traditions of the police force, reached for his gun, turned around and fired several times, succeeding, despite the disadvantage of his position, in wounding both Horgan and Lyle Gilbert. Horgan returned the fire and Bunch died almost immediately from shotgun wounds. Two of the other men who were lined up (Bailuis and Piercey, referred to in counts three and four of the information) also received shotgun wounds. Shortly after the gunfire between Horgan and Bunch (neither appellant fired any shot) appellants and Horgan ran from the building and were driven away by Max Gilbert, who had waited outside in his automobile. Horgan died from his wounds prior to the trial.

When apprehended, appellant Lovelace and Max Gilbert made statements to the police officers admitting the charges. Both accompanied the officers to the scene of the robbery and there related further details of what had taken place on the night Bunch was shot. Upon the trial of Max Gilbert he and the appellants took the witness stand and gave testimony which established the commission of the crime substantially as related above.

Appellants contend that the trial court was guilty of an abuse of discretion in that: (1) it refused to permit any evidence affecting appellants alone to be introduced at the trial of Max Gilbert; (2) it made remarks from the bench and asked questions pertaining to the crime of kidnaping, with which offense appellants were not formally charged; (3) at the time of judgment it read a prepared statement which appellants assert indicated a conclusion previously reached "without taking into any account the evidence offered in behalf of the defendants"; and (4) assertedly it allowed public clamor in connection with another pending criminal case to influence its judgment in this case.

[1, 2] As to the first contention, that during the trial of Max Gilbert the trial court improperly refused to admit certain evidence not affecting Max Gilbert and relating only to the appellants, the record shows that during that trial counsel for appellants stated there were one or two things which did not concern Max Gilbert and about which she desired to question appellant Lovelace at that point, for the consideration of the court in determining the degree of the crime as to the appellants. The trial judge then stated, "Well, I think we will take that up in subsequent proceedings." This ruling of the trial court was in accordance with the prior stipulation and, moreover, the order of the proof rests in the discretion of the trial court. Although assigning as an abuse of discretion the refusal to receive the evidence at that time, appellants do not contend that the court refused to accord them a full opportunity to produce all the evidence they desired prior to fixing the degree of the crime. The record affirmatively shows that following the Max Gilbert trial the court addressed itself to the hearing of additional evidence on the question of the degree of the homicide to which appellants had pleaded guilty. Several witnesses were called by the defense, after which the court inquired of appellants' counsel whether "That is all the evidence you have to offer?" Counsel replied, "Yes." In view of the stipulation above referred to and the fact that appellants were accorded opportunity to adduce such additional evidence as they desired, it does not appear that any prejudice resulted from the order in which the proof was admitted.

[3-5] Appellants next contend that the court abused its discretion in making the assertion, during the course of remarks made by it in connection with its ruling as to the degree of the crime and the punishment to be exacted, that the evidence showed the commission of an offense (kidnaping) not charged in the information. They further complain that during the hearing to determine the degree of the crime the trial judge propounded questions to the proprietor of the cafe and his wife which were aimed at the determination of the question whether the crime of kidnaping had been committed. Both witnesses previously had given testimony of like purport

in response to questions propounded by counsel during the trial of Max Gilbert. As to the court's reference in its remarks to the possible guilt of appellants of the crime of kidnaping we are of the opinion that appellants were not prejudiced thereby. In determining the degree of an offense and the punishment to be imposed, after a plea of guilty, it is the duty of the trial court to consider matters in aggravation as well as in mitigation of the offense. The legal significance of established facts may well constitute an element of which cognizance is taken in the exercise of judicial discretion. A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. As stated in People v. Williams, 14 Cal.2d 532, 536, 95 P.2d 456, 458 (quoting from People v. Popescue, 345 Ill. 142, 153, 158, 177 N.E. 739, 77 A.L.R. 1199) it is "simply a statutory hearing, by which the court examined witnesses to determine whether any facts existed to aggravate or mitigate the punishment," and "in considering evidence in aggravation or mitigation of the offense the court may consider many matters 'not admissible on the issue of guilt or innocence' * * *."

[6-8] It is next urged that immediately after the witnesses had testified at the hearing on the degree of the crime, and after argument had been made thereon, the trial judge read a written document in which he had set forth his views as to the guilt of appellants., Among other things contained therein was the statement that the evidence indicated that at the time of the commission of the robbery appellants had also committed the crime of kidnaping, as denounced by section 209 of the Penal Code (an offense with which defendants were not charged); that the evidence showed that they had committed murder in the first degree and, in the absence of a showing of extenuating circumstances, it was the view of the court that the death penalty should be imposed. Appellants urge that the very existence of such document indicated that the trial court had prejudged the issue in that the written document apparently had been prepared prior to the opening of the hearing on that morning and before appellants' witnesses had been heard, their testimony having been given during that morning preceding the reading of the document. Upon prompt accusation by counsel the trial judge denied that he had made up his mind what his decision would be before hearing the defense witnesses, stating, "I made up my mind as to what this sentence was to be when you [counsel] sat down [after final argument to the court] and I received the last bit of information upon which this judgment is predicated."

The record shows that prior to the day on which the document was read, the court had heard testimony (comprising some 2,000 pages of the 2,098-page transcript) which included all the testimony given at the Max Gilbert trial, in which the circumstances surrounding the commission of the robbery and the shooting of Bunch had been related in detail. Before reading the document the court also had heard all of the testimony adduced by appellants as to the degree of the crime. The fact that the trial judge had made advance preparation for his decision, as disclosed by the production and reading of the written statement, does not establish that he rendered his decision in disregard of the defense evidence. It is reasonable to infer that after hearing the defense evidence the trial court concluded that it in no way destroyed the effect of the testimony already heard by him, and indicating the murder to be of the first degree. It is not contended by appellants that the evidence as a whole points to the homicide as other than that of the first degree. It cannot be questioned that murder perpetrated in the commission of a robbery, or of an attempt to commit robbery, is murder of the first degree, Penal Code, § 189; see People v. Vaiz, 55 Cal.App.2d 714, 715, 131 P.2d 407, and that all persons engaged therein, whether or not they actually fired the fatal shot or delivered the lethal blow, are equally answerable for all the natural consequences thereof. People v. Martin, 12 Cal.2d 466, 472, 85 P.2d 880; People v. Perry, 195 Cal. 623, 638, 234 P. 890. It was the trial court's duty to determine which of the penalties provided by law should be imposed. Penal Code, § 190; People v. Paraskevopolis, 42 Cal.App. 325, 331, 183 P. 585. It does not appear, from a consideration of the evidence, that the trial court abused its discretion.

[9] The contention that the trial judge allowed himself to be influenced by asserted newspaper publicity and public interest in another criminal trial which was proceeding simultaneously with the instant case, is not supported by any reference to

the record indicating that he was so influenced. The statement in the written document, before referred to, that many recent crimes had been committed by gangsters in the immediate community, establishes nothing on which appellants can predicate a claim of error or abuse of discretion. It certainly does not require the conclusion that the trial court erred in determining that the admitted homicide was murder of the first degree, or that it abused its discretion in refusing to mitigate to life imprisonment the punishment fixed by law for that crime. Under the admitted facts the selection of either of the alternative penalties (Penal Code, § 190), was within the bounds of judicial discretion.

[10] As to the asserted mitigating circumstances attending the offenses of appellants, including the facts that appellant Gilbert, although armed at the time he was wounded by officer Bunch, did not return the fire, and that Lovelace was physically handicapped, youthful, and acting under the direction of the apparently more hardened and forceful Horgan, it is not under any advocated theory within our province to exercise original discretion in the premises. If we were to assume all that is urged by appellants with respect to our power of review, we could modify the judgments only if it appeared that the discretion of the trial court had been abused as a matter of law (see Cal. Const., art. VI, § 4). Whether we might on original consideration of the facts differ from the trial judge is therefore immaterial. The controlling point is that the evidence is not insufficient as a matter of law to support the conclusions reached by the trial court.

Examination of the record discloses that no substantial right of either appellant was prejudiced by any of the above-mentioned matters. Appellants admitted that Bunch was shot and killed by their confederate while they were perpetrating a robbery. We find nothing in the proceedings leading up to the imposition of the judgments and sentences that appears to require a reversal of such judgments or a modification of the sentences. It is therefore unnecessary in this case to consider the question as to whether the bounds of jurisdiction, and of discretion, in the imposition of sentence in such cases are identical, or as to whether this court may properly review the exercise of judicial discretion by the trial court in the premises.

The judgments are and each is affirmed.

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22 Cal.2d 494

PEOPLE v. WESTERN FRUIT GROWERS, Inc., et al.

L. A. 17734.

Supreme Court of California.

July 14, 1943.

1. Agriculture ⚷1

The purpose of Agricultural Adjustment Act is to provide a regulation of intrastate commerce which will be correlated with corresponding regulation of interstate commerce in same commodities. St.1937, p. 2515, § 19.

2. Constitutional law ⚷48

All presumptions and intendments are in favor of constitutionality of a statute, and all doubts must be resolved in favor of validity.

3. Statutes ⚷141(1)

The purpose of constitutional requirement that act revised or section amended shall be re-enacted and published is to eliminate uncertainty and difficulty of correctly reading original section as later changed. Const. art. 4, § 24.

4. Statutes ⚷130

The constitutional requirement that act revised or section amended shall be re-enacted and published should be reasonably construed to remedy evil which it was designed to remedy. Const. art. 4, § 24.

5. Statutes ⚷141(3)

In complying with constitutional requirement that act revised or section amended shall be re-enacted and published, Legislature may use an existing statute or a section of it as basis for changing existing law, and Legislature's determination will not be questioned by courts. Const. art. 4, § 24.

6. Statutes ⚷130

The words "revise" and "amend" within constitutional provision that an act revised or section amended shall be re-enacted and published at length as revised or amended are interchangeable, and revising or amending act is intended as a substitute for original statute or section, continuing in force that which is re-enacted and repealing what is omitted. Const. art. 4, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Amend" and "Revise".

7. Statutes 🔑141(3)

If Legislature changes a statute by method of section-by-section amendment, no constitutional violation occurs so long as each section is published and re-enacted at length, regardless of number of sections so changed. Const. art. 4, § 24.

8. Statutes 🔑141(3)

In view of recitation of Agricultural Products Marketing Act of 1937 that it amended the 1935 statute by amending enumerated sections, added a new section and repealed certain sections of the 1935 statute, and in view of fact that each section of 1937 act begins with declaration that a specified section of 1935 statute is amended, Legislature intended to use the section-by-section amendment procedure, and as Legislature published at length each section as amended, constitutional mandate was complied with. St.1935, pp. 1468, 1044, §§ 15a, 19; St.1937, p. 2515, § 19; Const. art. 4, § 24.

9. Agriculture 🔑1

The 1937 amendment of Agricultural Adjustment Act of 1935 continues in effect all licenses issued under 1935 Act prior to effective date of amendments but subjects such licenses as to any future amendments, or as to their manner of termination, to requirements of 1937 amendments. St.1937, p. 2515, § 19.

10. Statutes 🔑68, 77(1)

Under constitutional prohibition of special legislation, a law is "general" when it applies equally to all persons in a class founded upon some natural, intrinsic or constitutional distinction, and it is "special" if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in exercise of common right upon a class of persons arbitrarily selected from general body of those who stand in precisely the same relation to the subject of the law. Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law" and "Special Law".

11. Statutes 🔑77(1)

The constitutional prohibition of special legislation does not preclude reasonable legislative classification. Const. art. 4, § 25.

12. Statutes 🔑77(1)

The inequality which necessarily results to some degree in every selection of persons for regulation does not place classification within constitutional prohibition of special legislation, but prohibited discrimination must be arbitrary. Const. art. 4, § 25.

13. Constitutional law 🔑48

When legislative classification is questioned, if any state of facts can reasonably be conceived that would sustain it, such facts are presumed to exist, and burden of showing arbitrary action rests upon one who assails the classification.

14. Constitutional law 🔑50

The Legislature may adapt legislation to an existing situation.

15. Statutes 🔑76(6)

The amendment of Agricultural Adjustment Act of 1935 continuing licenses issued under 1935 act without subjecting licensees to new requirements under amendments is not unconstitutional as "special legislation" where a general law can be made applicable. St.1937, p. 2515, § 19; Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Legislation".

16. Statutes 🔑48

The 1937 amendment of Agricultural Adjustment Act of 1935 is not invalid as inconsistent, self-contradictory and unintelligible in providing that pre-existing licenses shall be subject to 1937 provisions for amendment and termination. St.1937, pp. 2509, 2515, §§ 11, 19.

17. Agriculture 🔑1

The amendment of Agricultural Adjustment Act of 1935 that "no amendment to a marketing order shall be effective until approved in the same manner as required by section 7 of this act for the original marketing order to which such amendment was proposed," must be reasonably construed in view of purpose to require procedure of changing a license or marketing order to conform to act as amended. St.1937, pp. 2508, 2515, §§ 8, 19.

18. Agriculture 🔑1

Under amended Agricultural Adjustment Act, amendment to a license issued prior to amendment of act must be approved in same manner as required for issuance of new licenses under amended act. St.1937, pp. 2508, 2515, §§ 8, 19.

19. Agriculture 🔑1

As used in 1937 amendment of Agricultural Adjustment Act of 1935, providing that licenses theretofore issued should be continued in effect "and deemed to be within the standards and provisions of these amendments" but subject to 1937 provisions for amendment and termination of marketing order, quoted words mean that primary objectives of 1935 and 1937 enactments were essentially the same. St. 1937, p. 2515, § 19.

20. Statutes 🔑220

A legislative determination that primary objectives of 1935 Agricultural Adjustment Act and 1937 amendments are essentially the same, although not binding upon courts will be given great weight. St.1937, p. 2515, § 19.

21. Agriculture 🔑1

The purpose of 1935 Agricultural Adjustment Act and the 1937 amendments is identical, namely, the assurance to agricultural producers of a reasonable standard of living through elimination of over-production and uneconomic and wasteful marketing methods, and unfair methods of competition. St.1935, p. 1032, § 1; St. 1937, pp. 2502, 2515, §§ 1, 20.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the People of the State of California against the Western Fruit Growers, Inc., to enjoin violations of the license regulating the handling of oranges and grapefruit in intrastate commerce issued pursuant to the Agricultural Adjustment Act of 1935, wherein the defendant filed a cross-complaint against W. B. Parker, as Director of Agriculture, etc., and others, seeking an injunction to restrain cross-defendants from enforcing the license against it. From orders denying plaintiff's and granting defendant's applications for a preliminary injunction, the plaintiff and cross-defendants appeal.

Reversed.

Prior opinion, 129 P.2d 53.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for appellants.

G. V. Weikert, of Los Angeles, for respondents.

EDMONDS, Justice.

The attorney general sued in the name of the People of the State to enjoin Western Fruit Growers, Inc., from shipping oranges in intrastate commerce in excess of allotments fixed by the Director of Agriculture under a license which, it is contended, is authorized by the California Agricultural Adjustment Act of 1935 as amended in 1937, Stats. 1937, ch. 910, p. 2501; Deering's Gen.Laws, 1937 Ed. Act 146, p. 75. By a cross-complaint in which the Director of Agriculture, certain of his departmental officers, and the members of the committees established by the license were named as defendants, Fruit Growers sought an injunction restraining the enforcement of the license pending the final determination of the suit. Upon a hearing, the application of the People was denied and that of Fruit Growers granted. The People's appeal is from that order.

[1] Under the terms of the statute which the Director of Agriculture is endeavoring to enforce, by means of licenses he may restrict, under specified conditions, the production, distribution, and marketing in intrastate commerce of the particular grades and quantities of California grown food products designated by him. The purpose of the act is to provide a regulation of intrastate commerce which will be correlated with the corresponding regulation of interstate commerce in the same commodities. Brock v. Superior Court, 9 Cal.2d 291, 293, 71 P.2d 209, 114 A.L.R. 127.

Acting under the authority of the 1935 legislation, the Director of Agriculture issued, effective January 14, 1936, License No. 2 regulating the marketing of oranges and grapefruit grown in this state. It provides that weekly during each varietal season of oranges, a Distribution Committee composed of shippers of oranges shall recommend to the Director of Agriculture the total amount of oranges, to be shipped in intrastate commerce during the following week. The Growers Advisory Committee, also established by the license, shall recommend to the director the proportion of the total weekly shipments to be shipped from each prorate district and determine the proportion of the particular variety of oranges controlled by each shipper. Upon these determinations, according to the license, the director shall fix the weekly allotments for each shipper.

In 1937, the Legislature passed an act "to amend" the 1935 legislation by amending 20 of the 26 sections, repealing four of them and adding a new one. Stats. 1937, p. 2501. By one of these amendments, the short title of the act was declared to be "The California Agricultural Products Marketing Act of 1937." Section 18 of the 1935 enactment was amended to read as follows: "Any marketing agreement or license, or both, and each and every provision thereof heretofore executed or issued by the Director of Agriculture are hereby continued in effect and deemed to be within the standards and provisions of these amendments, subject however to the provisions hereof for amendment and termination. The term 'license,' as it may appear elsewhere in this act, is deemed identical in meaning and application with the term 'marketing order' as defined and used in these amendments, and shall be so construed in reading this act." St.1937, p. 2515, § 19. After the 1937 statute became effective, the Director of Agriculture did not terminate License No. 2, but is still acting under it in restricting the amounts of oranges marketed in intrastate commerce, and the Growers Advisory Committee and the Distribution Committee have continued to make recommendations in accordance with its terms.

Since July 10, 1936, according to the complaint of the attorney general, License No. 2 has been continuously in effect, and under it, the Director of Agriculture has fixed, and continues to fix, weekly allotments of oranges which may be shipped within the state by those shippers who apply for them. Fruit Growers, the complaint continues, applied to the director and was given specified allotments. From December 17, 1939 to February 3, 1940, however, it wilfully and knowingly shipped over 1700 boxes in excess of its quota, and has threatened to make additional shipments in violation of the license and of the statute. Unless further violations are enjoined, its acts will cause irreparable damage in that pecuniary compensation cannot afford adequate relief, and enforcement of the provisions of the license and statute against other producers and handlers of oranges is inequitable if Fruit Growers does not comply with them. Upon these allegations, the court was asked to issue a permanent injunction and award the sum of $1,000 as a reasonable attorney's fee.

By answer, Fruit Growers admits the overshipments of oranges, but denies that they were made in violation of the statute or that there was or is a valid license or marketing order regulating the handling in intrastate commerce of oranges or grapefruit in this state. In the cross-complaint, it asserts that License No. 2 is invalid and void and it prays for a declaration to that effect. The court is also asked to issue a preliminary injunction restraining the director and the other cross-defendants from enforcing the license pending the final determination of the suit.

[2] The principle is universally recognized that all presumptions and intendments are in favor of the constitutionality of a statute and all doubts should be resolved in favor of its validity. Ray v. Parker, 15 Cal.2d 275, 280, 101 P.2d 665; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 636, 91 P.2d 577. In justifying the order of the superior court, however, Fruit Growers relies upon three points: (1) that the 1937 act is a revision of the 1935 statute and is consequently void because it was not reenacted and published at length as required by section 24 of article IV of the California Constitution; (2) that the 1937 act, if valid, repealed the 1935 act, and nullified License No. 2 which had then been issued; and (3) section 18 of the 1935 statute, as amended by section 19 of the new law, is not a valid saving clause and did not continue in effect License No. 2.

The attorney general takes issue with each of these contentions, and, in addition, asserts that Fruit Growers is estopped to deny the constitutionality of the 1937 act, or the validity of the license, because it has accepted the benefits of the prorate program. And, he continues, the respondent is barred from relief by its laches in waiting for more than four years from the time the program was put into effect before questioning the validity of the license and the statute under which it was issued, to the disadvantage of those who have conformed to its requirements. Finally, the attorney general contends, the respondent has failed to state facts in its cross-complaint sufficient to constitute a cause of action for injunctive relief, first, because it seeks an injunction to abrogate the exercise of official discretion placed in the director by the Legislature to determine whether licenses issued prior to the effective date of the 1937 act continued to effectuate the declared policy of that statute; and second, for the reason that it has failed to allege or show that irreparable injury is caused by the continued operation of License No. 2 so as to entitle it to the equitable relief of injunction.

Only sections 15a and 19 of the 1935 statute, St.1935, pp. 1468, 1044, were left unchanged by the 1937 legislation. Section 19 provides that "Chapter 1029, of the Statutes of 1933 [the original act], is hereby repealed." Section 15a requires the Director of Agriculture to deposit specified moneys received by him in the State treasury to the credit of the Department of Agriculture fund. All of the 20 sections amended by the 1937 act were reenacted and published at length as amended, but such a complete change as that contemplated by the 1937 act, says the respondent, constitutes a revision of the existing law and not an amendment of it. And because the Legislature did not reenact sections 15a and 19 in the 1937 statute, and did not publish the entire act as revised, the constitutional mandate has been ignored.

[3] The California Constitution declares: "No law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall be reenacted and published at length as revised or amended. * * *" Art. IV, sec. 24. In the absence of such a provision, legislative bodies commonly amended an act or a section of it by directing the insertion, omission or substitution of certain words, or by adding a provision, without setting out the entire context of the section as amended. Fletcher v. Prather, 102 Cal. 413, 418, 36 P. 658; and see notes in 55 L.R.A. 833, 855; 86 Am.St.Rep. 276-279. The objection to this method of amendment was the uncertainty and difficulty of correctly reading the original section as later changed.

[4] To avoid the mischief inherent in the mechanics of this legislative process, the People of California imposed certain requirements upon the Legislature, but the provision should be reasonably construed and limited in its application to the specific evil which it was designed to remedy. It is not to be technically measured, nor used as a weapon for striking down legislation which may not reasonably be said to have been enacted contrary to the specified method. Evans v. Superior Court, 215 Cal. 58, 62, 8 P.2d 467; Heron v. Riley, 209 Cal. 507, 510, 289 P. 160; McClure v. Riley, 198 Cal. 23, 26, 243 P. 429; Beach v. Von Detten, 139 Cal. 462, 465, 73 P. 187; Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 486, 116 P.2d 121.

[5] In complying with the People's mandate, the Legislature may use either an existing statute or a section of it as the basis for changing an existing law. The decision as to which unit shall be used is one to be made by the Legislature in its discretion. There are occasions when the public interest may best be served by the publication and reenactment of a statute as a whole; in considering other legislation, the publication and reenactment of the sections affected may be sufficient for all purposes. The determination of the Legislature will not be questioned by the courts, but when the unit to be used as the basis for the new legislation has been determined, the constitutional provision must be followed.

[6] Neither the purpose of the change nor the number of sections to be rewritten has any bearing upon the issue. While abstractly there may be differences in meaning between the words "revise" and "amend," they are interchangeable in the sense in which they are used in the constitution; in either case the revising or amending act is intended as a substitute for the original statute or section, continuing in force that which is reenacted and repealing what is omitted. Pierce v. County of Solano, 62 Cal.App. 465, 469, 217 P. 545.

[7] This problem was considered in Beach v. Von Detten, supra, 139 Cal. page 464, 73 P. page 188, where it was said: "Nor does it make any difference that 58 sections of the original act of 234 sections were thus amended. If 1 section could be amended in the way in which it was done in this case 58 could be so amended. There is no law that makes the amendment of 1 section of an act embracing 234 sections a 'revision.' If the amendment of 1 section is not a revision, neither is the amendment of 2 sections, nor of 58 sections. Of course, every amendment of any section is in one sense a revision of that section, but it is not a revision in the sense of the Constitution." Quite inconsistently, in its subsequent discussion, the court declared "that an act consisting of many sections might be changed in many respects, the

subjects treated of differently, the sections differently arranged and differently numbered, and yet retain one or more complete sections of the original act. In such case the act would be a revision." This statement was not, however, essential to the decision and it is contrary to the holding that if one section of a statute may be amended without setting forth the entire act, no reasonable construction requires publication of the former legislation in its entirety because other sections are amended at the same time. If, therefore, the Legislature elects to change a statute by the method of section-by-section amendment, no constitutional violation occurs so long as each section is published and reenacted at length, regardless of the number of sections so changed.

In applying these rules it is necessary to determine which unit, act or section, the Legislature intended to use and the solution of the problem may often be found in the language of the new enactment. Thus Justice McFarland, speaking for the court in Lewis v. Dunne, 134 Cal. 291, 66 P. 478, 479, 55 L.R.A. 833, 86 Am.St.Rep. 257, emphasized that the title of the act there under consideration commenced with the words "An act to revise * * *". The preamble of the statute declared that by a certain act a commission had been appointed "for the revision and reforming of the law," and recited that, "for the purpose of revising said Code, the people of the state * * * do enact as follows." The court concluded that the act was intended as a revision. See, also, the reference to the basis for the decision in Lewis v. Dunne, supra, in the concurring opinion of McFarland, J., in Beach v. Von Detten, supra. In Beach v. Von Detten, supra, the title of the new statute began with the words "An act to amend" the original act "by amending certain sections thereof, repealing certain other sections, and adding certain sections thereto. * * * It is therefore clear," said the court, "that the Legislature thought it was amending certain sections of the act * * *." Page 464 of 139 Cal., page 187 of 73 P. And in People v. Oates, 142 Cal. 12, 13, 75 P. 337, 338, the court said: "We do not think the act before us is anything more than what its title declares it to be, viz., 'An Act to amend' the sections named and 'to repeal' certain sections named and 'to add a new section' to the Penal Code. It is in no sense a revision of the entire code." But although the legislation considered in Evans v. Superior Court, supra, 215 Cal. pages 62, 65, 8 P.2d page 468, commenced with the words, "An act to revise," the court held it was a "new and original piece of legislation. Its terms are not revisory or amendatory of any former act. Consequently, the provision of the Constitution requiring that revised or amended law shall be 'published at length as revised or amended' does not apply, even though the provisions of the Probate Code may be inconsistent with existing statutes."

[8] The title of The California Agricultural Products Marketing Act of 1937 recites that it is, "An act to amend" the 1935 statute "by amending" enumerated sections, "to add a new section * * *, and to repeal" certain sections of the 1935 law. Each section of the 1937 act begins with the declaration that a specified section of the 1935 statute "is hereby amended to read as follows". According to that language, the Legislature unquestionably intended to use the section-by-section amendment procedure, and as it published at length the sections as amended, there was no violation of the constitutional mandate.

Turning to the issue concerning the validity of License No. 2, the attorney general does not question the respondent's contention that the requirements for the issuance of licenses under the 1935 act differ essentially from those contained in the 1937 amendments. And he admits that License No. 2 was not promulgated in accordance with the provisions of the 1937 act. But he takes the position that a license issued under the 1935 act which effectuated its declared policy might also carry out the purpose of the 1937 amendments. The Director of Agriculture made his investigations and findings concerning the policy which should be followed, says the attorney general, and as he determined that License No. 2, issued under the 1935 act, conforms to the aims of the 1937 amendments, the license is continued in effect by section 18 of the 1935 law as amended by section 19 of the 1937 statute, subject of course to the standards of operation set forth in the later legislation.

[9] Section 18, as amended, provides: "Any * * * license * * * and each and every provision thereof heretofore executed or issued by the Director of Agriculture are hereby continued in effect and deemed to be within the standards and provisions of these amendments, subject

however to the provisions hereof for amendment and termination. The term 'license,' * * * is deemed identical in meaning and application with the term 'marketing order' as defined and used in these amendments * * *." This section undoubtedly purports to continue in effect all licenses issued under the 1935 act prior to the effective date of the 1937 amendments but subjects them as to any future amendments, or as to their manner of termination, to the requirements of the 1937 provisions governing such action. Consequently, if section 18, as amended, is valid, License No. 2 is still in effect; the respondent is subject to its restrictions; and the 1937 provisions as to the issuance of marketing orders become immaterial.

The respondent claims that section 18 is invalid because in violation of the constitutional provision: "The Legislature shall not pass local or special laws in any of the following enumerated cases * * *: Giving effect to invalid deeds, wills, or other instruments * * * Legalizing, except as against the State, the unauthorized or invalid act of any officer * * * In all other cases where a general law can be made applicable." Art. IV, sec. 25. The saving clause is unconstitutional because, so the respondent reasons, it attempts to give effect to an invalid instrument. And the validity of the license is challenged upon the ground that it does not conform to the requirements and measure up to the standards fixed by the 1937 act, and also as an attempt to legalize the unauthorized acts of the appellants. The saving clause thus discriminates, the respondent continues, between the producers and handlers of oranges and grapefruit, and the producers and handlers of lemons, limes, tangerines, and other competing agricultural commodities not covered by licenses under the 1935 act. This is a situation where a general statute can be made applicable, says the respondent, the 1937 act being such a law if the saving clause is eliminated, consequently, section 18, as amended, is special legislation within the meaning of the constitutional prohibition.

The respondent relies upon the case of Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805, 810, as determinative of the question. That case was a proceeding in prohibition to compel the respondent court to dissolve a temporary injunction restraining the enforcement of License No. 2 in so far as it regulated the intrastate marketing of grapefruit. The injunctive order was secured upon a complaint which alleged that the license attempted to regulate two distinctly different industries in violation of the act, and that no valid federal agreement or license controlling interstate marketing by the same agricultural industry was in effect, as required by the statute when the license was issued. The court accordingly held that the plaintiffs were entitled to findings of fact upon these issues, and since the respondent court had jurisdiction to grant the temporary injunction, it would not be prohibited from determining them. The petitioners had argued that the writ should issue because any defects in the license had been cured and "validated" by the amendments of 1937. In so far, however, as the saving clause purported to validate licenses which were defective under the 1935 act, said the court, it was an unconstitutional special law "giving effect to invalid deeds, wills, or other instruments," or "legalizing * * * the unauthorized or invalid act of any officer."

Obviously the two subdivisions of section 25 of article IV considered in Brock v. Superior Court, supra, have no application to a valid instrument or to an authorized act of a state official, and that decision is not determinative of the present proceeding. For here no question is raised as to the validity of License No. 2 under the 1935 act, or as to any want of authority of the Director of Agriculture to promulgate it. The issue now presented is a narrow one, namely, whether the action of the Legislature in continuing a license which was validly issued to regulate the marketing of commodities in a particular agricultural industry, is unconstitutional special legislation because one to restrict the distribution of agricultural products not regulated under the 1935 legislation must be issued upon different conditions and requirements.

[10-11] In the leading case in this state on the question of the distinction between a general and special law, the court declared that a law is a general one when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction; on the other hand, it is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the sub-

ject of the law. City of Pasadena v. Stimson, 91 Cal. 238, 251, 252, 27 P. 604; and see Ray v. Parker, supra; Jersey Maid Milk Products Co., Inc., v. Brock, supra; Frank v. Maguire, 201 Cal. 414, 257 P. 515; Martin v. Superior Court, 194 Cal. 93, 227 P. 762; Reclamation Dist. No. 1500 v. Riley, 192 Cal. 147, 218 P. 762; In re Sumida, 177 Cal. 388, 170 P. 823; Ex parte Stoltenberg, 165 Cal. 789, 134 P. 971; Matter of Miller, 162 Cal. 687, 124 P. 427. Under this rule, it is apparent that the constitutional prohibition of special legislation does not preclude legislative classification but only requires that the classification be reasonable. In re Willing, 12 Cal.2d 591, 86 P.2d 663; Barker Bros., Inc., v. City of Los Angeles, 10 Cal.2d 603, 76 P.2d 97; In re Weisberg, 215 Cal. 624, 12 P.2d 446; Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 5 P. 2d 882; Watson v. Division of Motor Vehicles, 212 Cal. 279, 298 P. 481; Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235.

[12, 13] Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be "actually and palpably unreasonable and arbitrary", or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. Radice v. New York, 264 U.S. 292, 296, 44 S.Ct. 325, 327, 68 L. Ed. 690; Arkansas Natural Gas Co. v. Arkansas Railroad Comm., 261 U.S. 379, 384, 43 S.Ct. 387, 67 L.Ed. 705; In re Livingston, 10 Cal.2d 730, 740, 76 P.2d 1192; Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148; Los Angeles City School Dist. v. Griffin, 3 Cal.2d 651, 46 P. 2d 141; In re Weisberg, supra; Martin v. Superior Court, supra; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398; In re Cardinal, 170 Cal. 519, 526, 150 P. 348, L.R.A. 1915F, 850. When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification. In re Fuller, 15 Cal.2d 425, 437, 102 P.2d 321; McCreery v. McColgan, 17 Cal.2d 555, 562, 110 P.2d 1051, 133 A.L.R. 800; In re Livingston, supra; Sequoia Nat. Park Stages Co. v. Sequoia & General Grant Nat. Parks Co., 210 Cal. 156, 291 P. 208; Martin v. Superior Court, supra; In re Cardinal, supra; County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963; Pacific Gas & Elec. Co. v. Moore, 37 Cal.App.2d 91, 98 P.2d 819.

Growers and shippers of agricultural commodities who may be subject to the prorate program under the California Agricultural Products Marketing Act of 1937 are classified by that statute into two groups: (1) Those who were already operating a prorate program under a license issued under the statute of 1935; and (2) Those who had not yet instituted such a program. New and different requirements for the issuance of a license are imposed upon those in the second group, but no claim is made that the committees would operate any differently under a marketing order issued under the 1937 act than under a license issued prior to the effective date of that statute. Regardless of which act governed the issuance of a particular license or marketing order, any future action with reference to its operation, such as its amendment or termination, must comply with the provisions of the 1937 amendments. Under these circumstances, the only question for decision is whether the continuance of licenses issued upon different but valid conditions (see Brock v. Superior Court, supra) without subjecting those operating under such existing licenses to the new requirements for the issuing of licenses in the future under the 1937 amendments is unreasonable class legislation.

[14] The Legislature may, in adopting a policy, adapt legislation to an existing situation. It is upon this basis that the exemption of existing structures from zoning ordinances has been held valid (City of Aurora v. Burns, 319 Ill. 84, 149 N.E. 784; City of Norton v. Hutson, 142 Kan. 305, 46 P.2d 630), and regulations governing the construction and occupation of certain types of existing buildings different from those required for structures to be erected have been upheld. Ex parte Stoltenberg, supra. For the same reason, courts have sustained the grant of a preferred position to prior applicants for certificates of convenience and necessity to operate motor vehicles over a given route. Bradley v.

Public Utilities Commission of Ohio, 289 U.S. 92, 53 S.Ct. 577, 77 L.Ed. 1053, 85 A.L.R. 1131. Similarly, laws amending vocational and professional standards may provide for the continuance of licenses issued prior to the amendment. Ex parte Whitley, 144 Cal. 167, 171, 77 P. 879, 1 Ann.Cas. 13; Bohannon v. Board of Medical Examiners, 24 Cal.App. 215, 140 P. 1089; People v. Walsh, 346 Ill. 52, 178 N.E. 343; Gerard v. Smith, Tex.Civ.App., 52 S.W.2d 347. And this court has sustained the validity of an amendment to section 4463 of the Political Code by which the Legislature changed the requirements necessary for a newspaper to be one of general circulation, exempting from the new requirement existing newspapers of general publication as they were defined by the prior statute. In re Byers, 219 Cal. 446, 27 P.2d 641. Also, in Whittier, etc., Ass'n v. Agricultural Prorate Commission, 11 Cal.2d 470, 478, 80 P.2d 983, the 1935 amendments to the Agricultural Prorate Act of 1933, changing both the requirements for the formation of a district or zone under the act and the standards of future operation of the program fixed by the act, were held applicable to existing districts validly organized before amendment of the statute only in so far as the future operations of the districts were concerned. Such districts, said the court, were not affected by the changed requirements for the organization of new districts.

[15] In the present action, no contention is made that Fruit Growers, or any other handler of citrus fruits, would be subjected to any different regulation if the license or marketing order had been issued under the 1937 statute rather than the earlier one. Presumably the same types of committees would function under a license issued in accordance with either law and would allocate proration allotments in a similar manner. Undoubtedly the growers and shippers of oranges had adjusted their production and facilities to the program instituted under the 1935 act. Under these circumstances, the recognition of an existing system of regulation and the exception of it from new requirements affecting only the issuance of such licenses while subjecting all licenses to the same standards of future operation is not a palpably unreasonable classification.

[16] The respondent also challenges the validity of section 19 of the 1937 act, amending section 18 of the 1935 statute, upon the ground that it is "inconsistent, self-contradictory, and unintelligible" in providing that the pre-existing licenses shall be subject to the 1937 provisions for amendment and termination. Section 11 of the 1937 act amends section 10 of the 1935 statute to provide that, whenever the director believes an amendment to a marketing order is necessary, he shall call a hearing upon the amendment which shall be held in the same manner and upon the same notice as upon an original marketing order. In what manner and upon what notice is such a hearing to be held, asks the respondent, where, as in the case of the license under consideration, no hearing was held prior to its issuance as a marketing order under the 1937 act? But contrary to the fact assumed by the question, License No. 2 was not issued under the 1937 law. And the answer to the respondent's inquiry is found in the clear words of the provision: "in the same manner and upon the same notice as upon an original marketing agreement or marketing order." Since by section 18, as amended, the procedure of amending a license is required to conform as nearly as possible to the provisions in the 1937 statute, the manner and notice required for an amendment of a license is the same as that required for the issuance of a marketing order under the 1937 act.

Section 11 of the 1937 statute further provides: "In considering such amendment, the director shall take into consideration the evidence presented at the original hearing on the marketing agreement or marketing order to which such amendment is proposed and upon any prior amendment thereto." How, the respondent asks, could the director take into consideration the evidence presented at the original hearing on the present alleged marketing order when no such hearing was held, and no evidence was presented under the 1937 act? But nothing in the language of this provision limits the consideration of the director to evidence introduced at a hearing held in accordance with the 1937 law. In its cross-complaint, the respondent alleges that notice of hearing was given and a series of public hearings was held by the Director of Agriculture during 1935 and 1936 prior to the issuance of License No. 2. All that the new statute requires is that if the director desires to amend License No. 2, he must take into consideration the evidence presented at these hearings.

[17, 18] The respondent refers to the provision of section 11 that "No amendment to a marketing order shall be effective until approved in the same manner as required by section 7 of this act for the original marketing order to which such amendment was proposed." What approval would be required, it asks, to effectuate an amendment to the license here in question, which was never approved as a marketing order by any producer or handler in the first place, as required by section 7, as amended? The provision must be given a reasonable construction in view of the obvious purpose expressed in section 18, as amended in 1937, to require the procedure of changing a license or marketing order to conform to that statute as closely as possible. With this end in view, the only reasonable interpretation of the clause is that an amendment to a license must be approved in the same manner as required for the issuance of new licenses under the legislation now in force, thus effecting the equality and uniformity of future operation contemplated by the Legislature both as to licenses issued before and after the effective date of the 1937 amendments.

[19] One other clause of section 18, as amended, must be considered,—the provision that the licenses theretofore issued by the director are continued in effect "and deemed to be within the standards and provisions of these amendments" but subject to the 1937 provisions for the amending and termination of marketing order. The quoted language must be considered in its context. The Legislature certainly knew that the provisions of the two acts differed, as otherwise there would be no purpose in adding the proviso subjecting existing licenses to the new provisions for amendment and termination. As so construed, the quotation merely means that, in the opinion of the legislators, the primary objectives of the 1935 and the 1937 statutes are essentially the same.

[20, 21] Such a legislative determination, although not binding upon the court, will be given great weight. However, an examination of the provisions of both acts shows that their purpose is identical. Thus section 1 of the 1935 law declares that the widespread agricultural collapse and disorganization prevents the agricultural producers from earning a sufficient return to enable them to contribute their fair share to the support of "ordinary governmental and educational functions and unduly increasing tax burdens of others in the State for those purposes." The aim of the statute, the section continues, is to prevent "the unreasonable and unnecessary waste of agricultural wealth through disorderly, improper or uneconomic marketing or overproduction of agricultural commodities or the marketing of agricultural commodities in excess of reasonable market demands, but preserving to all producers thereof equality of opportunity in the available market." Section 1 of the 1937 act states that the "unreasonable waste and inefficient use of agricultural resources" occasioned by the marketing within the state of greater quantities of agricultural commodities than are reasonably necessary to supply the demand and the disorderly marketing of them is opposed to public interest. Such economic conditions imperil the ability of agricultural producers "to contribute * * * to the support of ordinary governmental and educational functions, thus tending to increase and increasing the tax burdens of other taxpayers for the same purposes," and all render it impossible for agricultural producers to be reasonably assured a reasonable standard of living. In the interest of public welfare, the section concludes, "the unreasonable waste and inefficient use of agricultural resources should be eliminated, while at the same time preserving to all agricultural producers an equality of opportunity."

Again, section 21 of the 1935 act, Stats. 1935, ch. 307, p. 1044, and section 4 of the 1935 amendments, Stats. 1935, ch. 416, pp. 1470, 1471, both provide: "The economic conditions of agricultural producers throughout the State are such as to require immediate relief if their purchasing power and taxpaying ability are to continue and their morale and standard of living are not to be undermined. Such relief can be afforded only by the orderly production and marketing of agricultural products and the coordination of State control of production and marketing with Federal control, each of which supplements the other and makes the same effective." Section 20 of the 1937 statute is practically identical in language, and reads: "The economic conditions of agricultural producers throughout the State are such as to require immediate relief, if their purchasing power and taxpaying ability are to continue and their morale and standard of living are not to be undermined. Such relief can be afforded only by the orderly production and marketing of agricultural products and the establishment of marketing agreements and marketing orders which assure stabilized and orderly distribution of agricultural products which can not otherwise be so marketed." Both the 1935 and 1937 acts also provide for the elimination of unfair methods of competition. From these provisions, it is apparent that the Legislature enacted both statutes for the same purpose: The assurance to agricultural producers of a reasonable standard of living through the elimination of overproduction and uneconomic and wasteful marketing methods and unfair methods of competition through the establishment of administrative committees equitably to apportion among the producers and handlers of agricultural commodities the amount of the commodity which may be marketed in order to more accurately equalize supply and demand for that commodity.

The order is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, J., did not participate herein.

22 Cal.2d 513

**AMERICAN FRUIT GROWERS, Inc., et al.
v. PARKER, Director of Agriculture,
et al.**

L. A. 17735.

Supreme Court of California.
July 14, 1943.

1. Constitutional law 🔑42

Orange growers and distributors could not challenge validity of license covering regulation of oranges and grapefruit, on ground that each constituted a distinct agricultural industry, where only oranges were restricted and could be regulated under license at time of challenge, on ground court will not pass upon validity of statute or order upon complaint of one not injured by its operation. St.1937, p. 2509, § 10.

**2. Appeal and error 🔑1108
Injunction 🔑4**

Relief by injunction operates in futuro, and right to it must be determined as of date of decision by an appellate court.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the American Fruit Growers, Inc., and others against W. B. Parker, as Director of Agriculture of the State of California, and others, to restrain the defendants from enforcing against plaintiff a license issued to regulate the handling of oranges and grapefruit in intrastate commerce. From an order granting a preliminary injunction, defendants appeal.

Reversed.

Prior opinion, 129 P.2d 46.

Earl Warren, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for appellants.

Tuttle & Tuttle, Edward E. Tuttle, and Edward W. Tuttle, all of Los Angeles, Fred B. Wood, of San Francisco, and Joseph W. Paulucci and Norman Meller, both of Sacramento, as amici curiæ on behalf of appellants.

G. V. Weikert, of Los Angeles, for respondents.

EDMONDS, Justice.

A number of corporations and cooperative marketing associations engaged in growing oranges and marketing them in intrastate commerce joined American Fruit Growers, Inc., as plaintiffs in this proceeding, which challenges the validity of the license considered in People v. Western Fruit Growers, Inc., Cal.Sup., 140 P.2d 13. The Director of Agriculture and persons connected with him in administering the statutes construed in that case are the defendants. Upon a hearing, the superior court issued a preliminary injunction restraining the enforcement of the regulations established by the license. The appeal is from that order.

The decision in the companion case has disposed of all but one of the questions which are presented in this proceeding. Here the growers and distributors who are the respondents make the additional claim that the license was invalid from its inception because it covered the regulation of both oranges and grapefruit. The production and marketing of each of these products, they assert, is a separate and distinct agricultural industry.

This point was also urged in Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805, which was a proceeding brought by the growers and handlers of desert grapefruit to enjoin the enforcement of the same license against them. The court then decided that the allegations of the complaint tendered an issue of fact as to whether the marketing of desert grapefruit is an agricultural trade or industry distinctly different from the distribution of other products, and, also, whether the producers of grapefruit were being discriminated against to the profit and advantage of the orange growers. The plaintiffs, said the court, were entitled to the findings of a trial court upon those issues and it therefore denied the petition of the Director of Agriculture for a writ of prohibition compelling the respondent Superior Court to dissolve a temporary injunction which it had issued enjoining the enforcement of the provisions of License No. 2 as to grapefruit.

That injunction is still in effect. No prorate bases for shippers of grapefruit in intrastate commerce have been fixed by the Growers Advisory Committee, no limitations of total weekly shipments of grapefruit have been recommended by the Distribution Committee, and no weekly allotments for grapefruit have been made by the Director of Agriculture under License No. 2. Also since the date of the notice of appeal in this proceeding, the Director of Agriculture, pursuant to the provisions of section 9, as amended by section 10 of the 1937 statute, St.1937, p. 2509, issued an order terminating all of the provisions of License No. 2 concerning the regulation of grapefruit.

[1, 2] Not only has no determination yet been made that the inclusion of these two agricultural products under the same license is a regulation of separate industries, but it appears that, in fact, only oranges have been restricted and now can be regulated under the license. And as a court will not pass upon the validity of a statute or order upon the complaint of one who will not be injured by its operation (Ashwander v. Tennessee V. A., 297 U.S. 288, 347, 348, 56 S.Ct. 466, 80 L.Ed. 688; United States v. Superior Court, 19 Cal.2d 189, 197, 198, 120 P.2d 26; In re Estate of Childs, 18 Cal.2d 237, 244, 115 P.2d 432, 136 A.L.R. 333; In re Willing, 12 Cal.2d 591, 596, 86 P.2d 663; In re Weisberg, 215 Cal. 624, 630, 12 P.2d 446), the respondents cannot now challenge the enforcement of the license upon the ground that it restricts the marketing of more than one agricultural product. Relief by injunction operates in futuro, and the right to it must be determined as of the date of decision by an appellate court. Tulare Irr. Dist. v. Lindsay-Strathmore Dist., 3 Cal.2d 489, 527, 528, 45 P.2d 972, 1014; Dr. Miles C. Co. v. Sontag C. Stores Co., 8 Cal.2d 178, 179, 64 P.2d 726; Diederichsen v. Sutch, 47 Cal.App.2d 646, 650, 651, 118 P.2d 863.

The order is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, J., did not participate herein.

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22 Cal.2d 569

PEOPLE v. LANIGAN et al.

Cr. 4487.

Supreme Court of California.

July 27, 1943.

1. Criminal law ⊂⇒641(1)

The Sixth Amendment providing that accused shall enjoy the right to have "assistance of counsel" for his defense in all criminal prosecutions applies only to criminal trials in federal courts, but same right is protected in states by state Constitution. Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Assistance of Counsel".

2. Criminal law ⊂⇒641(1)

Fidelity to client who first employed attorney to represent him in criminal prosecution would have foreclosed attorney from voluntarily representing client's co-defendant, and since voluntary employment in that behalf would have been improper, compulsory representation of client's co-defendant, over attorney's objection should not have been imposed. St.1939, p. 355, § 6068(e); Const.Cal. art. 1, § 13.

3. Criminal law ⚷641(1)

Defendants jointly indicted and tried together for robbery were entitled to have question as to whether each should testify in his own behalf, and other questions of such nature, considered by counsel, independently of interests of other defendant. St.1939, p. 355, § 6068(e); Const.Cal. art. 1, § 13.

4. Criminal law ⚷1166½(1)

Where at first trial, two defendants were represented by separate counsel, and one of defendants released his counsel after a mistrial, and although trial court instructed such defendant to prepare to go to trial some 30 days later with counsel, such defendant was without counsel, trial court's action in appointing other defendant's counsel to represent both defendants, over objection of both counsel and defendant who was without counsel, constituted prejudicial error. St.1939, p. 355, § 6068(e); Const. Cal. art. 1, § 13.

5. Criminal law ⚷959

Trial court's action in substituting an alternate juror after final submission of case pursuant to statute must be tested in light of evidence before it at time of the decision. Pen.Code, § 1089.

6. Jury ⚷149

Trial court did not err in substituting an alternate juror on second day after case had been submitted to jury, where one of jurors became ill, juror was examined by physician who reported to trial court that he could give no assurance as to when juror would recover, and trial judge with consent of both parties also questioned juror privately. Pen.Code, § 1089.

7. Criminal law ⚷576(2)

Where date for trial of two defendants who were jointly indicted on September 3, 1941, was set at November 27, 1941, upon both defendants expressly waiving statutory time for trial, and thereafter all parties appeared in court for purpose of securing a continuance, and it appeared that court's calendar was congested during December, a continuance to January 9, 1942, was not an abuse of discretion as depriving defendants of their constitutional right to a "speedy trial". Pen.Code, § 1382.

See Words and Phrases, Permanent Edition, for all other definitions of "Speedy Trial".

8. Criminal law ⚷576(2)

Where date for trial of two defendants who were jointly indicted on September 3, 1941, was set at November 27, 1941, upon both defendants expressly waiving statutory time for trial, and thereafter all parties appeared in court for purpose of securing a continuance, fact that at end of December and early in January each defendant obtained an order to take depositions out of state furnished justification for granting of continuance to January 9, 1942. Pen.Code, § 1382.

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In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

James Lanigan and another were convicted of robbery, and they appeal.

Reversed.

For prior opinion, see 133 P.2d 459.

Morris Lavine, Richard Cantillon, and John E. Glover, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and Fred N. Howser and John F. Dockweiler, Dist. Attys., and Jere J. Sullivan and Marcus R. Brandler, Deputy Dist. Attys., all of Los Angeles, for respondent.

SHENK, Justice.

The defendants, James Lanigan and Antony Giardano, were jointly indicted for the crime of robbery. On the first trial the jury disagreed, and the second resulted in verdicts of guilty as to both defendants. They appeal from the judgments of conviction and from an order denying their motions for a new trial. There is no contention that the evidence is insufficient to support the verdicts. The principal contentions of the defendants are that their right of counsel was infringed; that an alternate juror was improperly substituted by the trial court; and that their motions to dismiss the case should have been granted.

On June 18, 1941, at a few minutes before 3 p. m., the cashier of the Prudential Life Insurance Company in the company's office in Los Angeles prepared the cash receipts for deposit in the bank. She wrapped the money in two bundles and took them to the desk of Ruth Lewis, an 18 year old girl recently employed, and asked her to take them to the bank. The cashier then called K. E. Powers, assistant superintendent for the company, and asked him to accompany Miss Lewis. The company offices were on the second floor of the building. As Miss Lewis and Mr. Powers descended the stairs, a man wearing dark glasses and a hat, with a handkerchief held up to his face as if wiping his forehead, passed them going up stairs. Descending a few steps further, they were accosted by a man coming toward them with a shopping bag in one hand. He was also wearing dark glasses. He pointed a gun at them saying, "This is a stick up." Miss Lewis was ordered to put the money in the shopping bag. The man who had passed them on the stairs came down with a gun in his hand. Mr. Powers and Miss Lewis were ordered to return to the office and say nothing, but they immediately notified the cashier. No trace of the robbers could then be found.

On July 10, 1941, the defendants were arrested by state patrolmen at Collinsville, Illinois, while in the vicinity of a tavern near the Fairmount Race Track, about 12 miles from St. Louis, Missouri. Lanigan and Giardano were accompanied by a third man, Michaels, who was armed with an army pistol. Lanigan, the owner and driver of the car in which the three men were riding, had a revolver in his belt and another revolver was found in the front of the car. Also found in the car were a pair of Kansas state license plates and a pair of Illinois license plates. Giardano was unarmed. The defendants offered no resistance and were taken to the Collinsville police station. Photographs of the men were sent to Los Angeles and were identified by Miss Lewis and Mr. Powers as the men who had held them up. These photographs were again exhibited to Miss Lewis and Mr. Powers just before they saw the defendants in person in Illinois. Upon seeing Lanigan and Giardano they positively identified them as the men who had staged the holdup.

At the first trial Giardano was represented by Morris Lavine and Lanigan by Cantillon and Glover. On January 28, 1942, at the time the mistrial was declared, Mr. Cantillon explained to the court that he was about to begin on a trial that might last two months, and that with Lanigan's consent he and his associate had been released. The court reset the cases for trial on March 9, 1942, at 10 o'clock a. m., and instructed Lanigan to be prepared to proceed with counsel on that date.

At 9:30 a. m. on March 9, Giardano appeared with Mr. Lavine as his counsel. Lanigan was present without counsel. Mr. Glover also appeared and requested to make a statement in regard to Lanigan. He called the court's attention to the fact that "we" (meaning Mr. Cantillon and himself) "were released from the defense on the record. Now, I understand from Mr. and Mrs. Lanigan both that something Mr. Cantillon said to them indicated he would go through with the case; but Mr. Cantillon says that is not the case. Apparently the defendant has suffered some prejudice by that to this extent that I understand he has no counsel at all and will have to be represented by the Public Defender." The court replied that on January 28th the defendant Lanigan had been admonished to be ready for trial on March 9th either with Mr. Cantillon as his counsel or with other counsel. The court then asked Lanigan if he recalled the admonition. The reply was "Yes, but it puts we in a difficult position. I was advised that he [Cantillon] would be ready * * * I thought I was prepared to go to trial."

The following then occurred:

"The Court: Under those circumstances I don't see anything to do but to go to trial today.

"Defendant Lanigan: You wouldn't want me to go to trial without counsel, would you?

"The Court: I gave you every opportunity, Mr. Lanigan. I told you the case would go to trial and it has to go to trial."

The defendant then asked for a continuance until he could secure counsel. The district attorney opposed the request on the ground that witnesses were present from the East and that Mr. Lavine was present at the first trial as counsel for Giardano, intimating, it is assumed, that Mr. Lavine might then also represent the defendant Lanigan. The trial judge stated to Mr. Lavine that he thought there were no conflicting interests as between the defendants. Mr. Lavine replied that he felt that their interests might conflict. The record then discloses the following: "The Court will deny the motion for continuance and will appoint Mr. Lavine to represent the defendant Lanigan."

"Mr. Lavine: Let the record show that that is over the objection of myself and the defendant Lanigan. * * *

"The Court: The record will so show. We will proceed to trial at 10 o'clock."

At 10 o'clock the case was called and the following occurred:

"Mr. Lavine: The defendant Giardano is ready. As far as Mr. Lanigan is concerned, as previously stated, he objects to proceeding to trial at this time for the reasons heretofore stated. He is not prepared and that he was under the belief that his former counsel would again come into the case. He just learned this morning, he states, that he will not come into the case. Therefore he is not ready to proceed. On the further ground that the representation of Mr. Lanigan by the counsel for Mr. Giardano is opposed by Mr. Lanigan on the ground that there would be conflict of interests and the representation of Mr. Lanigan by counsel for Giardano is opposed on the same ground.

"The Court: In order to keep the record clear in this matter the motion for continuance made in propria persona by the defendant Lanigan having been denied the Court at this time asks the defendant Lanigan to elect between representing himself or having Mr. Lavine represent him.

"Defendant Lanigan: Well, can I consult Mr. Lavine?

"Mr. Lavine: Mr. Lavine objects to being consulted on that motion.

"The Court: All right, let the record show that Mr. Lavine objects to being consulted on the question of the Court. It is up to you, Mr. Lanigan.

"Mr. Lavine: On the ground that there will be a conflict in the interests and the two interests are separate and apart.

"The Court: I will request you to make the election at this time, Mr. Lanigan, either represent yourself in the matter or be represented by Mr. Lavine as an officer of the Court.

"Defendant Lanigan: If the Court please, if Mr. Lavine represents me it is with my objection. I cannot represent myself.

"The Court: I understand that you are objecting to the order of the Court requiring you to elect and whichever course you adopt will be over your objection.

"Defendant Lanigan: Yes.

"The Court: At the order of the Court.

"Defendant Lanigan: I am in the position where I have to have an attorney. In other words, I am between the devil and the deep blue sea.

"The Court: Having had some 30 days notice, however, of the fact that the case was going to trial on this date and that you would be required to have counsel at this time.

"Mr. Lanigan: As I stated before I did believe I had counsel and I am not ready to go to trial.

"The Court: That question has been disposed of. I am now asking you to elect as to whether you want to represent yourself or have Mr. Lavine represent you as an officer of the Court.

"Defendant Lanigan: I should like an opportunity to consult some counsel as to that.

"The Court: I am afraid we can't give you that opportunity. You have had 30 days in which to prepare for this and I will have to ask you to declare your choice at this time.

"Defendant Lanigan: I am in an awful spot. I don't know what to do. I can't defend myself.

"The Court: You don't feel capable of defending yourself?

"Defendant Lanigan: No. It has always been taught to me that every person in this country has a right to counsel.

"The Court: You are correct about that.

"Defendant Lanigan: This is an important matter in my life. Fortunately we have a higher court.

"The Court: Yes, that is right. That is why I want to keep the record straight in this matter so that if it goes to a higher court the higher court will know just what the proceedings were.

"Defendant Lanigan: I realize that. I am not qualified to answer your question. I can't defend myself and I don't care to have Mr. Lavine defend me.

"The Court: You don't want to represent yourself?

"Defendant Lanigan: No.

"The Court: In that circumstance the Court will appoint Mr. Lavine as an officer of the Court and the record will show it is over your protest and over the protest of Mr. Lavine."

The defendants contend that prejudicial error was committed in denying to Giardano the undivided assistance of his counsel and in forcing upon Lanigan an attorney whom he did not wish to have as his counsel. The defendants insist that the present case is strikingly similar to the case of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 464, 86 L.Ed. 680, decided January 19, 1942, by the United States Supreme Court, in which the facts were as follows: Glasser, an Assistant United States Attorney for the Northern District of Illinois, and Kretske, another Assistant District Attorney, and others were charged with conspiracy to defraud the United States in the prosecution of liquor cases. At the opening of trial, McDonnell, the counsel who had been appointed to represent Kretske, informed the court that Kretske did not wish to have him as his attorney. The court suggested that Stewart, Glasser's attorney, represent both defendants. Glasser objected. The court then informed McDonnell he would have to continue with the case until Kretske could get another lawyer. Kretske then told the court that Mr. Stewart had said that if the court wished to appoint him "I think we can accept the appointment." Stewart was appointed, and Glasser registered no further objections. On appeal Glasser charged as prejudicial the denial of his right to counsel of his own choosing and the undivided assistance of that counsel. The Supreme Court reversed the conviction as to Glasser on the ground that the Sixth Amendment had been violated. It was pointed out that the conflict of interests had made it necessary for Stewart to fail to object to certain testimony admissible as to Kretske but inadmissible as to Glasser. Furthermore the court stated: "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citing cases.] Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interest which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. * * *"

[1] Although the Sixth Amendment is applicable only to trials in Federal courts (Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595), the same right is protected in this state by article 1, section 13 of our Constitution providing that "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel."

In the Glasser case the co-defendant Kretske consented to the appointment of Glasser's counsel to represent him. Glasser objected and was in the same situation as the defendant Giardano in the present case. Unlike Kretske in that case, the co-defendant Lanigan in this case vigorously objected.

[2, 3] There are many reasons why the objections of Mr. Lavine and the defendants themselves should have been respected. Mr. Lavine had been employed by Giardano as his sole counsel. That employment carried with it a very definite professional obligation on the part of Mr. Lavine. The engagement required him to "maintain inviolate the confidence and at every peril to himself to preserve the secrets, of his client" (subd. (e) sec. 6068, State Bar Act, St.1939, p. 355). That admonition to lawyers is as old as the canons of professional ethics. Undivided loyalty to the cause of his client is essential to the personal integrity of counsel and to the maintenance of the high standards of the legal profession. Under the circumstances here presented, fidelity to the client who first employed him would have foreclosed Mr. Lavine from voluntarily representing the co-defendant. Since voluntary employment in that behalf would have been improper, compulsory representation should not have been imposed. Mr. Lavine was therefore well within his rights in objecting to his appointment as counsel for Lanigan and

Giardano was entitled to the undivided assistance of the counsel whom he had employed. As to the defendant Lanigan, he requested but was refused the right to consult counsel as to the important question whether he would be prejudiced by being represented by counsel for the other defendant. He was represented by order of court by counsel with whom he had no opportunity to confer. When the time came for the presentation of their defense Mr. Lavine was confronted with the delicate question whether to advise them to testify in their own behalf, for the failure of a defendant "to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury". Cal.Const., art. I, § 13, as amended in 1934. In criminal cases it frequently occurs that circumstances which make it advisable for one defendant to testify are not present when consideration is given to the question of offering another defendant as a witness. One may be vulnerable to impeaching questions and the other not. It might be highly desirable that the one not so vulnerable take the witness stand and the other not. If the former should do so and the other not, the circumstance might weigh heavily against the latter in the minds of the jury. A like prejudice might not occur if the defendants were represented by separate counsel. Each of the defendants was entitled to have questions of this nature considered and decided by counsel independently of the interests of the other. And counsel should not be hampered or embarrassed by being compelled to choose one course as against the other because of the action taken by the court.

[4] In Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 65, 77 L.Ed. 158, 84 A.L.R. 527, it was stated that "the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." So in the present case there was a failure to make an "effective appointment of counsel." It must therefore be concluded that the trial court erred prejudicially in forcing the defendant Giardano to share the attention and efforts of his counsel with the other defendant, and that the court likewise so erred in forcing the defendant Lanigan to be represented by counsel who did not wish to represent him, who objected to the order of the court appointing him and who did not feel that he could properly represent him. In such circumstances counsel was not in a position freely to decide what was most advantageous for the defense of one client without weighing against it the disadvantage that might result to the other.

[5, 6] There is no merit in the contention of the defendants that error was committed by the substitution of an alternate juror. On the second day after the case had been submitted to the jury one of the woman jurors became ill from an intestinal disturbance and continued to be in distress for several hours. She was examined by a physician who reported to the court that he could give no definite assurance as to when she would recover. With the consent of both parties the judge also questioned the juror privately and was told by her that her illness was due in some degree to the nervous strain of the deliberations. After careful inquiry as to her physical condition the court concluded that the juror was ill to the extent that she was unable to perform a juror's duties and that the alternate should be substituted in her place. The jury continued its deliberations on the following morning and at about three o'clock that afternoon reached a verdict finding the defendants guilty as charged.

All of the defendants' contentions in this connection are answered by statute law and the decisions. In People v. Ross, 85 Cal. 383, 24 P. 789, it was held that the discharge of the jury, on account of sickness of one of the jurors, over the defendant's objection, did not constitute jeopardy. That case was decided in 1890. In 1895 (Stats.1895, p. 279), in order to obviate a discharge of the jury in such cases, the Legislature enacted section 1089 of the Penal Code to provide for alternates in protracted trials, and the substitution of an alternate for a juror who might become ill before the submission of the case to the jury. The constitutionality of those provisions was sustained in People v. Peete, 54 Cal.App. 333, 202 P. 51, where it was held that the right to be tried by a jury of twelve was not thereby infringed. In 1933 (Stats.1933, p. 1342), the section was further amended to provide that "if at any time, whether before or after the final submission of the case to the jury," a juror was unable to perform his duty on account of illness he may be replaced by an alternate. The amendment was upheld in People v. Von Badenthal, 8 Cal.App.2d 404, 48 P.

2d 82, 84, where an alternate was substituted "after the jury had been deliberating for some time without arriving at a verdict." That case also answers the contention that the evidence was not sufficient to justify the discharge of the juror, because it was shown at a later time that in a few days she was back at her employment. It was pointed out that the "action of the court must be tested in the light of the evidence before it at the time of the decision", which, in this case, unquestionably warranted the court in discharging the juror. In the case of People v. Love, 21 Cal.App.2d 623, 70 P.2d 202, the contention was made and rejected that the provision for the substitution of a juror after submission of the case to the jury was unconstitutional.

[7, 8] It is contended by the defendants that the trial court should have granted the motion to dismiss the case on the ground that it was not brought to trial within the time prescribed by section 1382 of the Penal Code, and that they were denied their constitutional rights to a speedy trial.

The indictment was returned on September 3, 1941. On September 8 the defendant Lanigan pleaded not guilty and his trial was set for October 27. The defendant Giardano was apprehended later and was arraigned on September 26. He pleaded not guilty and his trial was set for October 31. On October 17, on motion of both defendants, their trial was continued to November 27, 1941, each defendant expressly waiving the statutory time for trial. On November 7, 1941, the cases were advanced on the calendar to that date at the request of the prosecution and the defendants for the purpose of fixing a date later than November 27. At that time the prosecution stated to the court that the defendants wished to take depositions in St. Louis, Missouri, and Reno, Nevada, and that the prosecution would bring witnesses from eastern points, some of whom were scheduled to appear as witnesses in the Federal Court on January 20, 1942, in a case in which the defendants were charged with transporting from one state to another the guns used in the commission of the robbery charged in the present case. When the court informed counsel that the calendar was filled for December both defendants stated that they would be ready on November 27, 1941, and objected to a continuance. The court then set the case for trial for January 9, 1942. Defendant Giardano obtained on December 27, 1941, an order for the issuance of a commission to take the depositions of witnesses residing in St. Louis, Missouri, and on January 5, 1942, obtained the issuance of a commission to take the depositions of additional witnesses residing in St. Louis. Early in January, 1942, defendant Lanigan obtained an order for the issuance of a commission to take the depositions of witnesses residing in Reno, Nevada. On January 9, 1942, when the case was called for trial defendant Lanigan asked that the case be continued until January 14, 1942, basing his motion upon the ground that his counsel was engaged in another trial and on the further ground that depositions which he was taking had not been filed with the court. This motion was granted.

It clearly appears from the record that at the time of their appearance in court on November 7, 1941, all parties were in favor of a continuance to a date later than November 27, 1941. The court's calendar was congested during the month of December and the continuance to January 9, 1942, was not an abuse of discretion. Murphy v. Superior Court, 53 Cal.App. 6, 200 P. 483. Before the end of December and early in January each defendant sought and obtained an order to take depositions out of the state. These facts furnished further justification for the continuance.

Other points are made by the defendants. They relate to matters of procedure which are not likely to recur on a retrial and therefore need not be discussed.

The judgments and the order denying the motion for a new trial are reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

60 Cal.App.2d 116

STEINBERGER v. STEINBERGER.

Civ. 12270.

District Court of Appeal, First District,
Division 1, California.
Aug. 5, 1943.

Rehearing Denied Sept. 4, 1943.
Hearing Denied Sept. 30, 1943.

1. Evidence 🔑384

Under parol evidence rule a party is prohibited from varying terms of a written instrument by oral testimony.

2. Trusts 🔑94

Where oral trust in favor of transferor of land or oral agreement to reconvey land to transferor are unenforceable under statute of frauds, and transferee refuses to perform trust or agreement, a "constructive trust" arises if transfer was procured by fraud, misrepresentation, duress, undue influence or mistake entitling transferor to restitution, if confidential relation existed or if transfer was made as security for an indebtedness of transferor. Civ.Code, §§ 852, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust".

3. Trusts 🔑103(1)

Where confidential relationship exists between parties to transfer of land upon an oral agreement to reconvey, breach of agreement by transferee or his administrator constitutes sufficient "fraud" to create a "constructive trust." Civ.Code, §§ 852, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

4. Trusts 🔑103(1)

Equity courts will prevent one person who is in a confidential relation with another from becoming unjustly enriched by reason of a breach of the trust. Civ.Code, § 2224.

5. Trusts 🔑103(1)

Where there is some sort of a status between grantor and grantee of land upon an oral agreement to reconvey, and confidence is imposed, a "constructive trust" will be imposed upon repudiation of oral promise to reconvey. Civ.Code, §§ 852, 2224.

6. Trusts 🔑102(2)

Where a friendly intimate relationship existed between nephew and uncle who had lived together in house on property in which each had a one-third interest, a "confidential relationship" existed, and, on refusal of uncle's administrator to reconvey to nephew his interest in property which he had conveyed to uncle upon uncle's oral promise to reconvey, a "constructive trust" arose in favor of nephew. Civ.Code, §§ 852, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relationship".

7. Trusts 🔑96

A constructive trust based on repudiation of oral promise to reconvey property does not arise until transferee repudiates the promise or dies.

8. Trusts 🔑374

Where a constructive trust is imposed court should require beneficiary of trust to do equity, and under such rule beneficiary will ordinarily be required to repay benefits received.

9. Trusts 🔑374

Where constructive trust in favor of nephew arose upon refusal of uncle's administrator to reconvey to nephew land conveyed by nephew to uncle under oral promise to reconvey, administrator was not entitled to a lien for nephew's share of expenditures in reducing mortgage on property and paying taxes, in absence of evidence as to amount of such share or evidence to rebut inference that such expenditures by uncle were intended as a gift.

10. Appeal and error 🔑1071(6)

There was no prejudicial error in failing to find on particular issue where only reasonable inference from the evidence would have been contrary to appellant's contention.

◆

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by Earle C. Steinberger against Albert I. Steinberger, administrator of the estate of William Edward Steinberger, deceased, to establish a trust in an undivided one-third interest in real property in San Francisco. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

A. B. Bianchi, of San Francisco, for appellant.

John B. Ehlen, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Earle C. Steinberger, brought this action against the administrator of the estate of William Edward Steinberger, who died intestate and who was the uncle of plaintiff, to establish a trust in an undivided one-third interest in real property in San Francisco. From a judgment for plaintiff the defendant administrator appeals.

The facts are as follows: In 1929, or prior thereto, Mary Louise Steinberger, grandmother of Earle and a relative of William Steinberger, deeded the property, then encumbered, to William, Earle and to Earle's brother. William was the uncle of Earle. Each of the grantees received an undivided one-third interest in the property. On September 12, 1930, Earle, at the request of William, executed a grant bargain and sale deed of his one-third interest to his uncle William. This deed was executed on the uncle's oral promise to reconvey upon the request of Earle. This promise was subsequently orally renewed and orally acknowledged. William died on February 8, 1940. Prior to that time there had been no request to reconvey. The administrator refused to recognize Earle's interest in the property. The present action was brought some time prior to June 10, 1941, the amended complaint having been filed on that date.

The court found that a confidential relationship existed between Earle and his uncle; that on the date of the deed Earle was about to leave San Francisco for Los Angeles for an indefinite period; that the uncle requested Earle to execute the deed in order to make it more convenient for William to take care of and manage the property; that the uncle promised that if Earle would execute the deed, he, the uncle, would take care of and manage the property for the benefit of Earle and of himself, and that he would reconvey Earle's one-third interest upon request; that in compliance with such request, and because the plaintiff reposed the utmost trust and confidence in his uncle, and because he believed and relied upon the promise to reconvey, Earle executed the deed in question; that the deed was executed without consideration; that from the date of the execution of the deed until the time of his death William continuously and on repeated occasions recognized that he was holding the one-third interest in trust for Earle; that William at no time repudiated the trust; that the defendant administrator has refused to reconvey upon demand of Earle.

On this appeal the administrator, while not denying that the evidence supports the finding of the oral agreement to reconvey and its subsequent acknowledgement, contends that all such evidence was inadmissible as being in violation of the parol evidence rule, and of the statute of frauds. He also contends that if a constructive trust arose it necessarily arose in 1930 when the deed was executed and the promise made, and for that reason plaintiff's claim is barred by the statute of limitations. It is also urged that he is entitled to a lien on the premises for sums advanced by his intestate. In his reply brief, and in briefs filed at the request of the court since oral argument, he urges that the finding of confidential relationship is unsupported by the evidence. None of these contentions is sound.

[1] The main problem involved centers around the application of the statute of frauds and the parol evidence rule to the facts here involved. Section 852 of the Civil Code provides that:

"No trust in relation to real property is valid unless created or declared:

"1. By a written instrument, subscribed by the trustee, * * * or,

"3. By operation of law."

Under the parol evidence rule a party is prohibited from varying the terms of a written instrument by oral testimony. In the instant case plaintiff deeded the property to William by a grant bargain and sale deed. It is obvious, therefore, that the express trust, resting in parol, is unenforceable as an express trust, and that the oral evidence of such trust does tend to vary the terms of the deed. But this is not an action to enforce the oral express trust. It is an action to enforce a constructive trust which it is claimed arose by operation of law upon the repudiation of the promise to reconvey.

The law generally is unsettled on the question as to whether or not equity will enforce a constructive trust in real property upon breach of an oral contract to reconvey. The English cases hold that the transferee may set up the statute of frauds against enforcement of the oral express trust, and that no penalty will attach to him for so doing, but, if he sets up the statute, he is duty bound to restore the property received on the faith of his oral promise. If the transferee will not voluntarily make restitution, equity will compel such restitution through the medium of a constructive trust. The theory is that the constructive trust will be imposed to prevent the unjust enrichment of the transferee. Some few American cases have reached the same result by holding that the transferee's repudiation of his oral promise to reconvey is a fraud upon the transferor, which gives rise to the constructive trust.

The so-called majority American rule is that the repudiation of an oral promise to reconvey does not give rise to a constructive trust. The theory is that equity must respect and enforce the statute of frauds, and that to enforce a constructive trust is a violation of the spirit, if not the letter, of the statute. For discussion of the two rules, with many cases cited, see 3 Bogert, Trusts and Trustees, p. 1585, § 495 et seq.; 1 Scott on Trusts, p. 246, § 44 et seq.; 1 Perry on Trusts and Trustees, 7th Ed., p. 295, § 181a et seq.

California has apparently aligned itself with the English and the so-called minority American view. In Taylor v. Morris, 163 Cal. 717, 127 P. 66, there was involved a similar problem to the one here presented. Without reference to the confidential relationship there existing, the court stated (page 722 of 163 Cal., page 68 of 127 P.): "The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary, and it should be sufficient to refer to such cases as Butler v. Hyland, 89 Cal. 575, 26 P. 1108; Hayne v. Hermann, 97 Cal. [259], 261, 32 P. 171; Odell v. Moss, 130 Cal. 352, 62 P. 555; Becker v. Schwerdtle, 141 Cal. [386], 391, 74 P. 1029; Fanning v. Green, 156 Cal. 279, 104 P. 308; Cooney v. Glynn, 157 Cal. [583], 589, 108 P. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430." In Gray v. Walker, 157 Cal. 381, 108 P. 278, however, a department of the Supreme Court expressly adopted the so-called majority view, citing such cases as Feeney v. Howard, 79 Cal. 525, 526, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162; Babcock v. Chase, 111 Cal. 351, 43 P. 1105; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543. See, also, Smith v. Mason, 122 Cal. 426, 55 P. 143, adopting the so-called majority American view. The more recent California cases have clearly followed the rule of Taylor v. Morris, supra, and have held that a constructive trust arises and will be enforced to compel restitution upon violation of the oral promise. O'Brien v. O'Brien, 50 Cal.App.2d 658, 123 P.2d 877; Robertson v. Summeril, 39 Cal.App.2d 62, 102 P.2d 347; People v. Ahern, 31 Cal.App.2d 655, 88 P.2d 787; McRae v. McRae, 67 Cal.App. 480, 227 P. 933; Airola v. Gorham, 56 Cal.App.2d 42, 133 P.2d 78.

This problem has been the source of much discussion by the various legal authorities in the field of trusts. It is the view of these authorities that the English view is sound and that the so-called American view is unsound. It is their view that one of the functions of a court of equity is to prevent unjust enrichment. Just as quasi contracts are used to prevent unjust enrichment in the field of contracts, so quasi or constructive trusts should be used to prevent unjust enrichment in the field of trusts. Neither the parol evidence rule nor the statute of frauds will prevent a grantor from showing that a deed absolute on its face was intended as a mortgage, and upon payment of the obligation the grantor can compel restitution. In that case, just as is so in the problem here involved, the express oral promise to reconvey is unenforceable, but the repudiation of that promise should compel the grantee to restore the grantor to the status quo. 3 Bogert, Trusts and Trustees, p. 1603, § 497; 1 Scott on Trusts, p. 246, § 44; James Barr Ames in 20 Harv.L.Rev. 549; George P. Costigan, Jr. in 12 Mich.L.Rev. 427 and 515; Chief Justice Harlan F. Stone in 6 Columb.L.Rev. 326; see notes 24 Cal.L.Rev. 609; 13 Cal.L.Rev. 174. These arguments seem unanswerable. It should be here noted that in notes attached to § 182 of the Restatement of the Law of Restitution, and § 44 of the Restatement of the Law of Trusts, it is noted that: "The Institute takes no position" on the question here under discussion. If California has adopted the so-called English view, which would seem to be indicated by the above authorities, it is apparent that upon repudiation by the administrator a constructive trust arose, and that the administrator was properly required to restore the property in question.

[2] Although the so-called majority American view is that no trust will arise upon a repudiation of the oral promise to reconvey, several important exceptions to that rule have been recognized. These exceptions are perhaps best stated in § 182 of the Restatement of the Law of Restitution and § 44 of the Restatement of the Law of Trusts, the two sections being substantially identical. Section 182 provides:

> "Where the owner of an interest in lands transfers it inter vivos to another upon an oral trust in favor of the transferor or upon an oral agreement to reconvey the land to the transferor, and the trust or agreement is unenforceable because of the Statute of Frauds, and the transferee refuses to perform the trust or agreement, he holds the interest upon a constructive trust for the transferor, if
>
> "(a) the transfer was procured by fraud, misrepresentation, duress, undue influence or mistake of such a character that the transferor is entitled to restitution, or
>
> "(b) the transferee at the time of the transfer was in a confidential relation to the transferor, or
>
> "(c) the transfer was made as security for an indebtedness of the transferor."

[3-5] These exceptions, and particularly the one relating to confidential relations, are recognized in nearly every American state (see cases collected 3 Bogert on Trusts and Trustees, p. 1594, § 496; 1 Scott on Trusts, p. 253, § 44.2), and have clearly been adopted in California. (See California Annotations to the Restatement of the Law of Trusts (§ 44) and to the Restatement of the Law of Restitution (§ 182.) It is well settled in this state that breach of the oral promise to reconvey by the transferee or his administrator when the transferee was in a confidential relationship with the transferor at the time of the transfer constitutes sufficient "fraud" to create the constructive trust. In Re Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588, the court defined the terms "confidential relation" as follows: "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." However, it is not clear from the cases whether the courts mean a confidential relationship in fact must exist, or whether it must also be a relationship based on status. See cases commented on 13 Cal.L.Rev. 174. The basis of the confidential relationship exception is that under § 2224 of the Civil Code the equity courts will prevent one person who is in a confidential relation with another from becoming unjustly enriched by reason of a breach of the trust. It would seem, therefore, that a confidential relation in fact should be the test. Under such a test relief would be afforded in practically every case where there is a breach of the oral promise to reconvey. Few cases will arise where one person will convey property to another by absolute deed, and where the grantor will be satisfied with the oral promise of the grantee to reconvey, unless the grantor, in fact, has trust and confidence in the integrity and fidelity of the grantee. The result is that under such a test the exception tends to swallow up the rule to which it is supposed to be an exception. That is exactly what has happened in this state. The cases are clear that where there is some sort of a status between the grantor and grantee, and confidence is imposed, a constructive trust will be imposed upon repudiation of the oral promise to reconvey. Thus actual trust and confidence, plus the relationship of parent and child, is sufficient (Robertson v. Summeril, 39 Cal.App.2d 62, 102 P.2d 347; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Nordholt v. Nordholt, 87 Cal. 552, 26 P. 599, 22 Am.St.Rep. 268; Mead v. Mead, 41 Cal.App. 280, 182 P. 761), as is that of husband and wife (Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450; Kohn v. Kempner, 59 Cal.App. 621, 211 P. 805; Smith v. Lombard, 201 Cal. 518, 258 P. 55; Taylor v. Bunnell, 77 Cal.App. 525, 247 P. 240; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Jones v. Jones, 140 Cal. 587, 74 P. 143; Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189), even where the relationship is meretricious Cole v. Manning, 79 Cal.App. 55, 248 P. 1065. The trust has also been imposed where actual trust and confidence existed and the grantor and grantee were brother and brother (O'Brien v. O'Brien, 50 Cal.App.2d 658, 123 P.2d 877; Logan v. Ryan, 68 Cal.App. 448, 229 P. 993; Cummings v. Cummings, 55 Cal.App. 433, 203 P. 452), or were brother and sister (Tench v. McMeekan, 17 Cal.App. 14, 118 P. 476), or where attorney and client (Broder v. Conklin, 77 Cal. 330, 19 P. 513; Id., 121 Cal. 282, 53 P. 699),

or principal and agent (Kimball v. Tripp, 136 Cal. 631, 69 P. 428) or client and business advisor (Sanguinetti v. Rossen, 12 Cal. App. 623, 107 P. 560). Coming closer to the relationship here involved, it has been held that actual trust and confidence, plus the relationship of aunt and niece, will be sufficient to raise the constructive trust (Butler v. Hyland, 89 Cal. 575, 26 P. 1108) as is the relationship of uncle and niece and adopted daughter (Alaniz v. Casenave, 91 Cal. 41, 27 P. 521) and where the grantor and grantee were aunt and nephew by marriage (People v. Ahern, 31 Cal.App.2d 655, 88 P.2d 787). Trusts have also been imposed where the grantor and grantee were an engaged couple (McRae v. McRae, 67 Cal.App. 480, 227 P. 933), and where the grantor and grantee had "relations of great confidence" and were later married (Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750; Id., 37 Cal.App. 263, 173 P. 1011) and where they were brothers-in-law. Anderson v. Broadwell, 119 Cal.App. 130, 6 P.2d 260. In Barr v. O'Donnell, 76 Cal. 469, 18 P. 429, 9 Am.St. Rep. 242, it was held that where one cotenant deeds to another cotenant and the latter breaches his oral promise to reconvey, no trust arises, but in that case it was not contended that the relationship between cotenants was confidential. In Stewart v. Shearman, 22 Cal.App.2d 198, 70 P.2d 702, however, it was held that cotenants stand in a confidential relationship to one another.

[6] In the instant case the trial court found that Earle and his uncle William stood in a confidential relationship to each other. This finding is amply supported. There is not only the evidence of the status of uncle and nephew, and of cotenants, but there is ample evidence to show that a confidential relationship in fact existed. The respondent testified that he had trust and confidence in his uncle. The evidence shows that Earle and William lived in the house on the property here involved from the time of Earle's birth; that the uncle gave Earle money when he needed it, and that Earle reciprocated; that the uncle frequently expressed solicitude for his nephew Earle; that the uncle frequently stated he was keeping and holding the home for the boys. The evidence shows a friendly intimate relationship existed between Earle and his uncle. From this evidence it is apparent that the finding of confidential relationship is amply supported. It follows that whether California follows the English rule or the limited American rule, in the instant case a constructive trust arose upon the death of William and upon the repudiation of the trust by his administrator.

[7] But little need be said about the defense of the statute of limitations. The cases are clear that the constructive trust does not arise until the transferee repudiates the oral promise to reconvey or dies. Norton v. Bassett, 154 Cal. 411, 97 P. 894, 129 Am.St.Rep. 162; Barritt v. Barritt, 132 Cal.App. 538, 23 P.2d 54; Easton v. Geller, 116 Cal.App. 577, 3 P.2d 74; Jones v. Jones, 140 Cal. 587, 74 P. 143; Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450.

[8-10] The last contention of appellant is that he is entitled to a lien for sums advanced by his intestate. The evidence shows that when the deed was executed to William there was a mortgage on the property for $3,000; that in 1929 the mortgage was renewed by the three donees; that in 1934 the mortgage was renewed by William for $2,000; that in 1939 the mortgage was renewed by William for $1,741.90. It is the theory of appellant that William reduced the mortgage by approximately $1,300, and paid the taxes on the property during the period he was in possession, and that, equitably, he is entitled to a lien on the property for Earle's proportion of these expenses. There can be no doubt that where a constructive trust is imposed the court should require the beneficiary of the trust to do equity. This rule would normally require Earle to repay the benefits he had received from the conveyance. The evidence shows, however, that William requested the conveyance, and that he promised if Earle would so convey that he, William, intended to and would pay the expenses connected with the property, including payments on the mortgage. The evidence also shows that after the conveyance was made William occupied the premises as his home, and paid Earle nothing for this privilege. It was also shown that there was a second mortgage on the premises in the sum of $750, and that Earle paid $350 of this indebtedness, although he owned but a one-third interest in the property. At the close of respondent's case his counsel informed the court that Earle was willing to do equity by paying the portion of the expenses lawfully chargeable to him. The appellant offered no evidence on this issue at all. He made

no attempt to show the amount of the taxes, or the value to his intestate of the use of the premises. No evidence was offered to rebut the reasonable inference that all expenditures by the intestate, so far as respondent's one-third interest was concerned, were intended as a gift. The trial court made no findings on this issue. But, had such a finding been made, inasmuch as the evidence is uncontradicted, the trial court would have had to find a gift was intended, that being the only reasonable inference from the evidence. Under such circumstances, it was not prejudicial error to fail to find on the issue.

The judgment is affirmed.

KNIGHT and WARD, JJ., concur.

VALENCIA v. SHELL OIL CO. et al.

Civ. 6736.

District Court of Appeal, Third District, California.

July 29, 1943.

Hearing Granted Sept. 23, 1943.

1. Damages 🔑62(1)

A person injured by wrongful act of another must exercise reasonable care to avoid loss or minimize the resulting damages.

2. Damages 🔑62(3)

One whose property is threatened with injury by reason of tort or breach of contract by another must exercise reasonable care to protect property against such loss, and if he fails to do so, he cannot charge the other for loss due to his own neglect.

3. Damages 🔑62(1)

One injured by wrongful act of another is not required to make extraordinary expenditures requiring a disproportionate outlay in endeavoring to guard against consequences of wrongdoer's act, and lack of funds to meet the situation presented may excuse efforts to lessen injury.

4. Appeal and error 🔑931(4)

In view of evidence as to truck owner's assets and absence of evidence of any effort to raise money to pay repair bill, it could not be assumed in support of judgment for loss of use of truck that owner was unable to pay repair bill and obtain truck, in absence of finding to that effect.

5. Damages 🔑62(3)

When truck owner was definitely advised that parties responsible for damage thereto would not pay repair bill of approximately $200 it was his duty to minimize damage by paying repair bill if he was able to do so, though parties responsible for damage had promised to pay for repairs.

6. Contracts 🔑28(3)

In action for loss of use of truck due to refusal of party responsible for damage thereto to pay repair bill, conflicting evidence sustained trial court's finding that party responsible for damage had promised to pay for repairs.

7. Appeal and error 🔑959(3)
Pleading 🔑236(5)

Trial court has discretionary power to permit pleadings to be amended to conform to proof at any stage of trial and even after submission, and such discretion will not be interfered with on appeal except in case of its manifest abuse. Code Civ.Proc. § 470.

8. Pleading 🔑237(3), 253

Where action was tried on theory of loss of business and profits resulting from damage to truck and tort feasor's refusal to pay for repairs, trial court did not abuse its discretion in permitting plaintiff, after submission, to amend complaint so as to conform to proofs and warrant recovery for loss of use of the truck, or in denying defendant's subsequent motion to set aside submission and allow defendant to file amended answer and introduce further evidence upon issues presented by amendments. Code Civ.Proc. § 470.

9. Appeal and error 🔑1201(3)

Where plaintiff after submission of case tried on theory of loss of business and profits was permitted to amend complaint so as to conform to proofs and warrant recovery for loss of use of truck and judgment was reversed and cause remanded for a new trial, trial court may in its discretion permit defendant to amend answer and introduce further evidence upon issues presented by amendments. Code Civ.Proc. § 470.

Appeal from Superior Court, Siskiyou County; Albert F. Ross, Judge.

Action by J. R. Valencia against Shell Oil Company and another to recover for loss of use of plaintiff's truck. Judgment for plaintiff, and defendants appeal.

Judgment reversed and a new trial ordered in accordance with opinion.

J. T. Blalock and A. P. Black, both of San Francisco, for appellant.

Oliver J. Carter and Daniel S. Carlton, both of Redding, and J. Everett Barr, of Yreka, for respondent.

PER CURIAM.

On September 27, 1935, as the truck of respondent was being driven on the Pacific Highway between Dunsmuir and Weed in Siskiyou County, it was, without fault of the driver for respondent, hit by a Shellaine tank which fell from a truck driven by an employee of appellant Shell Oil Company. As a result of the accident respondent's truck was damaged so badly that it could not be continued in use until it was repaired, and it was taken to a garage in Weed and repaired at a cost of $222.30. There is some conflict in the record as to who authorized the repairs to be made but we believe it may fairly be inferred from the evidence that appellant Shell Oil Company, shortly after the accident, through its representatives, promised and agreed to pay for the repairs to respondent's truck and also to pay for the hire of a truck to be used by respondent while the damaged truck was being repaired.

The repairs to respondent's truck were completed on October 22, 1935, and Vincent Ferrari, the garage owner, sent the bill for the repairs to appellant oil company and notified respondent that the repairs were completed. The Pacific Indemnity Company, appellant's insurance carrier, on December 3, 1935, wrote a letter to Ferrari, refusing to pay the repair bill unless a release in full were given by respondent. Respondent refused to execute such a release and demanded that appellant pay him $800 for asserted damages to his business. This appellant refused to do, and the truck of respondent remained in the garage of Ferrari.

On January 17, 1936, respondent filed his complaint in which he alleged that he was damaged $1,500 for loss of sales, $10,000 loss on contracts, $222.30 for repair of truck, and $155 for hire of another truck. After issue joined the case went to trial, and on the day the trial commenced, March 18, 1937, appellant paid the amount of the repair bill. On April 30, 1940, more than three years after the trial, the trial court filed its memorandum of decision to the effect that respondent was entitled to judgment for the rental value of the truck from September, 1935, to March, 1937, a period of eighteen months, at $250 per month. Respondent then asked and was granted leave to file an amendment to the complaint to conform to proof, and thereupon filed an amendment which alleged: "that immediately after the damage to plaintiff's said truck said defendant, Shell Oil Company of California, promised said plaintiff that it would, at its cost and expense, repair plaintiff's truck and furnish to plaintiff a truck to be used by plaintiff in his said business while plaintiff's truck was being repaired; and pursuant to said promise said defendant placed plaintiff's truck in a garage at Weed, California, with instructions to the owner of said garage to repair plaintiff's truck; that said defendant, Shell Oil Company of California, in violation of its said promise, wrongfully failed to furnish a truck to plaintiff to use in his business except for a period of three days; that the repairs on plaintiff's said truck were completed on the 22nd day of October, 1935, and the reasonable and actual cost thereof was the sum of $222.30, but said defendant, Shell Oil Company of California, wrongfully refused to pay for said repairs unless and until said plaintiff would execute and deliver to said defendant Shell Oil Company of California a written release unconditionally releasing said defendant Shell Oil Company of California from any and all liability to plaintiff for damages caused by defendants' negligence and carelessness, and that plaintiff refused to execute said release, and said defendant, Shell Oil Company of California, wrongfully failed and refused to pay said repair bill, and the owner of said garage which repaired plaintiff's truck refused to deliver possession thereof to plaintiff until the repair bill was paid; that said defendant, Shell Oil Company of California, failed and refused to pay said repair bill until the date of the trial of this action, to-wit, the 18th day of March, 1937, but by that time said garage owner had made a charge for storage of plaintiff's truck and refused to deliver possession thereof to plaintiff before said storage bill was paid; and plaintiff did not receive possession of his said truck until after the 18th day of March, 1937; that plaintiff was by reason of the negligence and carelessness of said defendants, Shell Oil Company of California, and Harvey L. Foster, and the wrongful failure of said defendant Shell Oil Company of California to pay said repair bill deprived of the use of his said truck for a period of seventeen months and nineteen days, that is, from the 27th day of September, 1935, to the 18th day of March, 1937; that the reasonable rental value and reasonable value of the use of plaintiff's said truck during said time was the sum of $250.00 per month, or a total sum of $4,416.67; that plaintiff was unable during said period of time to obtain for hire a truck to use in his said business in the place and stead of his said General Motors Company truck; that by reason of the premises plaintiff has been damaged in the sum of $4,416.67."

Findings of fact following the language of the complaint as amended were filed, but before judgment was entered appellant moved to set aside the submission and that it be permitted to plead to the subject matter set forth in the amendment and offer proof with reference thereto. This motion was denied by the court, and judgment was thereupon entered in favor of respondent for the sum of $4,416.67, and this appeal is from said judgment.

[1] Appellant makes a vigorous attack upon the judgment. Its first contention is that it was error to award damages to respondent which he could have prevented with reasonable care and at small expense. It argues that respondent could have taken his truck out of the repair shop on October 22, 1935, the date the repairs were completed, by the payment of the comparatively small repair bill of $222.30, and that respondent could not permit the truck to remain in the repair shop for seventeen months thereafter and recover for the loss of use thereof for that period. Appellant cites numerous authorities enunciating the well established rule that it is the duty of a person injured by the wrongful act of another to exercise reasonable care to avoid loss or minimize the resulting damages.

[2] In 8 Cal.Jur. 782, it is stated: "It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort, to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented. In cases of contract, the duty is mutual."

In 15 American Jurisprudence 426, the rule is stated as follows: "He cannot recover for that which he might reasonably have avoided. When it is practicable to minimize the loss and injury by a reasonable outlay of money, it is incumbent upon the party injured to make such outlay, which he may recover as a part of his damages in the action for the breach of the contract."

In Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, at page 697, 242 P. 709, at page 711, the court said: "It is a recognized rule of law that, in a case where injury or damage to a plaintiff's property is threatened as the result of a tort or breach of contract by another, the duty rests upon the plaintiff to use reasonable care and diligence to protect his property against such threatened loss or injury, and, if he fails to do so, he will not be permitted to charge the defendant for that portion of his loss or injury which was due to plaintiff's own neglect in this behalf. This rule has been repeatedly recognized and applied in this state, as well as elsewhere." Citing Mabb v. Stewart, 147 Cal. 413, 81 P. 1073, and Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 P. 454.

In Schultz v. Town of Lakeport, 5 Cal. 2d 377, at pages 383, 384, 54 P.2d 1110, at page 1113, 55 P.2d 485, 108 A.L.R. 1168, it is said: "On the other hand, it is undoubtedly a settled proposition that the plaintiff may not recover damages which have accrued by reason of his failure to do everything reasonable in his power to reduce the injuries which would otherwise ensue by a discontinuance of the service. In Holly v. City of Neodesha, supra [88 Kan. 102, 127 P. 616], the dispute arose over the imposition of a $6 or $15 yearly rate for furnishing water to the plaintiff, a difference between the parties of but $9, and the question of the installation of a meter. The plaintiff sought damages of

$7,490 and was awarded the sum of $4,550. The case was reversed on the holding of the court that reasonable diligence under the facts required the plaintiff to secure water from the city at once by paying the excess claimed and thereafter suing for the overpayment, and that the plaintiff was entitled therefore to recover only the amount he would have been obliged to pay in securing a reconnection of the service and the amount of damages, if any, probable to the time water could again have been turned on." Citing Mabb v. Stewart, supra; Henrici v. South Feather Land, etc., Co., 177 Cal. 442, 170 P. 1135; Severini v. Sutter-Butte Canal Co., 59 Cal.App. 154, 210 P. 49; and Sargent v. North End Water Co., 190 Cal. 512, 213 P. 33. Also see 25 C.J.S., Damages, § 33, pp. 499–501, and 8 R.C.L. 442

[3] Respondent says, however, that the rule cited in the foregoing is not applicable here; that "the facts do not show that plaintiff by the use of reasonable care could have avoided the consequences of defendants' wrongful refusal to pay the repair bill or that he was able to pay the sum of $222.30 at the time the repairs were completed * * *." He argues that the duty to minimize damages by the payment of money does not run to a person who has not sufficient funds to make the payment required, and cites 25 C.J.S., Damages, § 33, p. 502, where it is stated: "The person injured is not required, however, to make extraordinary expenditures requiring a disproportionate outlay in endeavoring to guard against the consequences of the wrongdoer's act. So plaintiff's lack of funds to meet the situation presented may excuse efforts to lessen the injury." Also 15 Am.Jur. 425, to the effect that "It appears that a want of sufficient funds will excuse an absence of effort to lessen damages." However, it appears from the testimony of respondent that he was the owner and operator of a service station in Weed which had cost him $5,000 to build and against which there was an indebtedness of only $500; that there were two or three payments of $71.48 each still remaining unpaid upon the truck which had been purchased new by him in 1933 and upon which he had installed a tank costing $300 and a meter costing $145, and that he had a credit rating of $600 with the Mileage Gasoline Company in 1935 for the payment on the truck and trailer if he wanted to use it. He did testify, however, as follows:

"Well, when my truck was wrecked, I couldn't make any payments on the truck. I was meeting all the obligations as far as I could, as soon as the truck was wrecked, they turned around and they tied up the truck and my car and my bank account, which left me, well, penniless."

[4, 5] But there is no finding by the trial court that plaintiff was unable to pay the repair bill, and we are cited to no evidence in the record that respondent made any effort to raise the $222.30 to pay same; and in view of his own testimony as to his assets we cannot assume on this appeal that he was not, at any time after the repairs were completed, able to pay the bill and get his truck. While respondent may have been justified in relying upon appellant Shell Oil Company's asserted promise to pay the repair bill up to the time that he was definitely advised that it would not pay it unless respondent gave a release, yet when he was so advised, it was his duty to minimize his damage by paying the repair bill, if he was able to do so.

[6] Appellant next contends that the evidence does not substantiate respondent's claim that it agreed either with respondent or with the garageman to pay for the repair of respondent's truck. As hereinbefore stated, there is some conflict in the record as to who authorized the repairs to be made, but the trial court found that appellant Shell Oil Company did, and there is evidence to sustain said finding.

But, as we view the matter, even though appellant's agents did acknowledge that the damage was due to appellant's negligence and did agree to pay the repair bill, this did not justify respondent in refusing to pay the repair bill and take possession of his truck as soon as he learned that appellant would not pay the bill without the execution of a complete release by respondent. In our opinion respondent could not thereafter continue to permit his truck to remain in the garageman's possession by failure to pay the repair bill of $222.30 and recover from appellant for loss of use of the truck for the subsequent period if he could, with reasonable effort, have raised the money to pay said bill; and as we have already pointed out, the record does not show that he made any effort to do this, and there is no finding that he was financially unable to do so. It was the duty of respondent to use reasonable care to minimize the damages arising from the accident, whether appellant's failure to pay the repair bill was due to a breach of duty arising out of tort or out of contract.

It appears from the record that on the day the trial commenced, which was nearly eighteen months after the accident, appellant paid the repair bill, and that the trial court awarded respondent judgment for loss of use of the truck from the date of the accident to the date the bill was paid. We believe that, in the absence of a finding that plaintiff was unable to pay the repair bill, the judgment was erroneous, and that respondent was not entitled to recover for loss of use of the truck after the time that he was definitely and finally informed that appellant would not pay the repair bill, except, perhaps, for a reasonable time thereafter within which to raise the money to pay said bill, if he could, with reasonable effort, have done so.

Appellant's third contention is that the trial court erred in denying appellant's motion to set aside the submission of the case and to allow appellant to file an amended answer to the amendments to the complaint which the trial court permitted respondent to file, and for permission to introduce further evidence upon the issues presented by said amendments. The original complaint alleged the damage to respondent's truck by appellant's truck and that respondent was damaged in loss of sales to the general public in the sum of $1,500, and in the further sum of $10,000 because he was rendered unable to fulfill his station contracts, and in the further sum of $155 for hire of another truck, and prayed for total damages in the sum of $11,655. As hereinbefore stated, after the trial court filed its memorandum of decision, which was three years after the trial, respondent was granted permission to file the amendment to the complaint hereinbefore set forth. Appellants moved to set aside the submission of the cause and that they be permitted to plead to the subject matter set forth in the amendment and offer proof with reference thereto, which motion was denied.

[7] The theory upon which the trial court permitted the amendment was in order to conform to proof. As is stated in Burrows v. Burrows, 18 Cal.App.2d 275, at page 279, 63 P.2d 1135, at page 1136: "Under the provisions of section 470 of the Code of Civil Procedure, the trial court is invested with discretionary power to permit and even to order the pleadings of the parties to be amended at any stage of the trial of the cause, and even after its submission, so as to make such pleadings conform to the proofs; and it has been uniformly held that this discretion will not be interfered with upon appeal except in cases of its manifest abuse. Graham v. Stewart, 68 Cal. 374, 9 P. 555; Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560; Andrus v. Smith, 133 Cal. 78, 65 P. 320; Stohlman v. Martin, 28 Cal.App. 338, 152 P. 319."

[8] We cannot say that the trial court abused its discretion either in permitting the amendment or in denying appellant's motion; but in view of the fact that the amendment changed the theory upon which the action was tried, we believe that the trial court might well have granted the motion to set aside the submission and have permitted appellant to plead to said amendment and offer further proof. The amendment and the judgment were for loss of use of the truck and the case was tried upon the theory of loss of business and profits. Counsel for respondent at the trial stated: "This is an action for damages to recover for loss of profits that plaintiff suffered as the result of his inability to continue his gasoline distributing business." And counsel stated further: "Well, it is true in this action he is not suing for loss of the truck; he is suing for loss of business." No testimony whatever was introduced upon the question of the value of the loss of use of respondent's truck. The court in its memorandum of decision stated he could not say that respondent's business "was destroyed to the extent to justify compensation" but that respondent's compensation should be the value of the loss of use of the truck. The motion to amend to conform to proof was thereupon made and granted, the motion to set aside the submission was denied, and judgment entered in accordance with the amendment.

[9] In view of the fact that the judgment must be reversed and a new trial ordered, the trial court may, in the exercise of its discretion, see fit to permit appellant to file an amended answer to the complaint as amended, so that any defenses which appellant may have to same may be passed upon in the new trial.

The judgment is reversed and a new trial ordered in accordance with the views herein expressed.

59 Cal.App.2d 719

BECKWITH v. BUGBEE.

Civ. 12410.

District Court of Appeal, First District, Division 1, California.

July 20, 1943.

Hearing Denied Sept. 15, 1943.

1. Appeal and error ⚿994(3)

The credibility of witnesses, the accuracy of their recollection, etc., are for trial court.

2. Evidence ⚿594

Evidence tending to establish an issuable fact may not be arbitrarily disregarded, but if other evidence warrants a contrary conclusion, failure to directly contradict it is unimportant.

3. Trusts ⚿89(1)

In action by bankruptcy trustee against administrator of bankrupt's former guardian to impress a trust upon realty as belonging to bankrupt, evidence warranted judgment for administrator on ground that guardian did not use guardianship funds in purchasing the realty, and that there had been a settlement between guardian and bankrupt many years before bankrupt's indebtedness was incurred.

4. Limitation of actions ⚿39(11)

An action by bankruptcy trustee against administrator of bankrupt's former guardian to impress a trust on realty purchased by guardian was barred by four-year statute of limitations where there had been a settlement between guardian and bankrupt many years before bankrupt's indebtedness was incurred. Code Civ.Proc. § 343.

5. Guardian and ward ⚿73

An action against guardian's administrator for accounting on theory that subsequent to ward's attaining majority funds were held in trust for ward stated no cause of action where proceedings showed expenditures for benefit of ward greatly in excess of amount of trust fund.

6. Guardian and ward ⚿61

If there was no direct repudiation by guardian of a trusteeship with regard to ward's funds, ward's continued acquiescence worked an "estoppel" as regards right of ward's bankruptcy trustee to maintain action for accounting against guardian's administrator.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

7. Bankruptcy ⚿145(1)

Unless bankruptcy trustee proved fraud, he was in no better position to maintain an action against administrator of bankrupt's former guardian than the bankrupt.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Frank W. Beckwith, as trustee in bankruptcy of Gladys L. Lyons against Robert A. Bugbee, administrator of the estate of Cordelia F. Bugbee, deceased, to impress a trust upon certain real property alleged to belong to the bankrupt and in the hands of the defendant, and for an accounting. From a judgment for defendant, plaintiff appeals.

Affirmed.

Fletcher A. Cutler, of San Francisco, for appellant.

Hill & Hill, of Eureka, for respondent.

WARD, Justice.

This action by plaintiff, as trustee in bankruptcy of Gladys L. Lyons (formerly Gladys L. Rothe, a minor), was brought for the purpose of impressing a trust upon certain real property alleged to belong to said minor, and in the hands of defendant Robert A. Bugbee, administrator of the estate of his wife, the minor's mother and guardian, and for an accounting.

The facts of the case are as follows: Upon the death of her husband Cordelia F. Rothe (who subsequently married defendant) was, on September 30, 1901, appointed guardian of the estate of their daughter Gladys, then about two years of age. The estate consisted of one-half the property of the deceased husband and father, the other half being distributed to his wife. Shortly thereafter Mrs. Rothe and her child left the state of Oregon, where her husband's estate had been probated, and wherein she had been declared the guardian of their child, and moved to the home of her parents in California, where she purchased the piece of farm property in dispute. There is testimony that the purchase was made by the child's guardian as an investment for her from funds belonging to her. The particular witnesses who gave evidence in support of this contention are the principal creditors in the bankruptcy proceedings and include plaintiff herein, trustee. It does not actually appear that the mother did not make the purchase from her own funds for herself, or with funds belonging to her and her daughter.

The records fail to show that the mother ever filed an account of her administration as guardian in the state of Oregon, or that she had ever been discharged as such. There is testimony, however, that when Gladys attained the age of eighteen, she and her mother reached a settlement of the guardianship matter in the county in which it was pending; the cash bond was returned to the guardian, and mother and daughter sold real property in Oregon which was owned by them jointly, divided the proceeds and apparently considered the guardianship terminated.

There is evidence that a close bond of affection existed between mother and daughter; that the daughter lived at the home of her mother and step-father until she was twenty-nine years of age without paying anything for room and board; that at different times the mother gave the daughter sums of money for travel, clothes, etc., and advanced to her and her husband money with which to go into business.

The complaint herein specifically demanded judgment that the record title to the property be decreed to Cordelia F. Bugbee, deceased, in trust for her daughter Gladys L. Lyons, the true and lawful owner; that the administrator of the Cordelia F. Bugbee estate be directed to execute a deed to plaintiff as the trustee in bankruptcy of Gladys L. Lyons; that the property be sold for the benefit of the creditors of the bankrupt; that the administrator account for the profits derived from the property from the time of its purchase; that judgment be entered for the sum of $4,273.91, the amount distributed to the minor on the settlement of her father's estate, with interest from the date of the appointment of her mother as guardian.

The court found that Cordelia F. Bugbee was at the time of her death the record owner of the property; that she had not purchased it for the minor with funds belonging to the latter, and was not holding it in trust; that Gladys L. Lyons had not, with knowledge of her interest in the property, and with an intent to conceal the same from her creditors, omitted to include the same in her schedule in bankruptcy. The court further found that the action is barred by the provisions of section 343 of the Code of Civil Procedure.

[1, 2] The specific question involved in the first cause of action is based upon an allegation in the complaint that the farm property referred to was purchased with guardianship funds. The paragraph containing this allegation was found "not true" and "not sustained by the evidence." There is some evidence from which an inference might be drawn that the purchase in whole or in part was so made; also, as stated, that decedent, at about the time of the purchase said that she was buying the property for the child. It is appellant's position that this testimony is credible, probable, uncontradicted and unimpeached, and, therefore, must be accepted as proof of the above mentioned allegation of the complaint. See concurring opinion in Stewart v. Silva, 192 Cal. 405, 221 P. 191. The credibility of witnesses, the accuracy of their recollection, etc., are matters for the trial court to decide. Evidence tending to establish an issuable fact may not be arbitrarily disregarded (Stewart v. Silva, supra, 192 Cal. page 411, 221 P. 191), but in the event other evidence warrants a contrary conclusion, the failure to directly contradict it is unimportant. 27 Cal.Jur. 184; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Market Street Ry. Co. v. George, 116 Cal. App. 572, 3 P.2d 41.

[3] In the present case the trial court was called upon to decide not only the matter of the credibility of those appearing as witnesses, but the truthfulness of the statement claimed to have been made to them by decedent that the purchase was made from funds belonging to the minor. It was not entirely the credibility and the recollection of the witnesses over a long period of years that was passed upon, but whether in fact the decedent used the whole or part of the guardianship funds in the purchase of the property.

As against the claim of appellant trustee, the following facts appear: He and his wife, the witnesses to the alleged statement, are the principal creditors of the bankrupt; the time that elapsed between the making of such alleged statement and the trial of the cause was some thirty-seven years; that decedent had money of her own with which to buy the property; that decedent never informed her daughter that guardianship funds were used for the purpose; that the bankrupt did not list the property as an asset in the bankruptcy proceeding; that for thirty-five years the daughter made no claim to an interest in the property, although approximately half of that period elapsed after she attained her majority; that the guardianship bond was refunded to the guardian; that thereafter the mother and daughter sold certain property in Oregon and divided the proceeds; that during the many years the daughter lived with the mother she was supported, educated and received numerous sums of money from her for traveling and other expenses, the amount aggregating a sum greatly in excess of that received by her from her father's estate, and that after the daughter's marriage the mother borrowed money to assist her and her husband in conducting a hotel business. There is no evidence to support appellant's contention that if there was forgiveness on the part of the daughter of an indebtedness of the mother such forgiveness constituted a fraud on the creditors of the bankrupt, and there is no renunciation of a legacy such as would bring the case within the holding of Estate of Kalt, 16 Cal.2d 807, 108 P.2d 401, 133 A.L.R. 1424.

[4] In brief, there is no evidence which would compel the trial court to determine that the funds of the minor had been used in the purchase of the property. The evidence supports the claim of respondent that there had been a settlement between the guardian and ward many years before the indebtedness of the bankrupt to plaintiff or to his wife was incurred. Under the circumstances, the invocation of Code of Civil Procedure, § 343 to the first cause of action was proper.

[5] What has been said herein disposes of any contention that subsequent to the ward attaining her majority any funds were held in trust for her by her mother, and therefore the second and third causes of action lack foundation. The present proceeding shows expenditures for the benefit of the daughter, as evidenced by checks, etc., greatly in excess of the amount of the trust fund. An order directing a further accounting would merely result in delay in settling the estate of decedent without possibility of benefit to plaintiff.

[6, 7] If there was no direct legal repudiation by decedent of a trusteeship, the continued acquiescence of the daughter worked an estoppel. Unless the appellant trustee in bankruptcy proved fraud—which does not appear, he is in no better position to maintain the action than the daughter. There is evidence showing repudiation, as the court impliedly found, and acquiescence in such repudiation many years before the present action was brought.

Some inconsistencies appear in the findings as to certain allegations of the complaint being true or untrue, the effect of which was to find certain conceded facts to be false, but there is no doubt of the correctness of the finding that plaintiff failed to establish that the property in question had been purchased with guardianship funds, and this is the main question in the case.

We agree, under all the circumstances of the case, that the action was barred by the statute of limitations under the provisions of Code of Civil Procedure, § 343.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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60 Cal.App.2d 83

LEPLAT v. WILES et al.

Civ. 12449.

District Court of Appeal, First District, Division 1, California.

Aug. 2, 1943.

1. Appeal and error 🔑**339(2), 345(1)**

Under statute an appeal from order denying motion for judgment notwithstanding the verdict must be taken within 60 days from entry of order, and such time is not extended by implication until after determination of a motion for new trial. Code Civ.Proc. §§ 629, 939, 963, subd. 2.

2. Appeal and error 🔑**76(1)**

Absolute finality of a judgment or order is not an indispensable requirement of appealability. Code Civ.Proc. §§ 629, 939, 963, subd. 2.

3. Constitutional law ⚷70(1)

Whether an order or a judgment is appealable and in what stage of the proceedings the order or judgment becomes appealable are matters of legislative determination.

◆

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Henrietta Leplat against Raley Wiles and others for injuries sustained by plaintiff when struck by defendant's automobile. From an order denying plaintiff's motion for judgment notwithstanding verdict as against the defendant named, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

Philander B. Beadle and Samuel Vartan, both of San Francisco, for plaintiff and appellant Henrietta Leplat.

John J. Taheny, of San Francisco, for defendant and respondent Raley Wiles.

PETERS, Presiding Justice.

Defendant Wiles moves to dismiss an appeal by plaintiff from an order denying her motion for judgment notwithstanding the verdict. The motion is on the ground that the appeal was taken too late. The facts are as follows:

Plaintiff brought an action for damages for personal injuries received by her when struck by an automobile driven by one Rosati. Wiles was joined as a defendant on the allegation that he permitted Rosati to drive the car. The jury, on March 10, 1942, returned a verdict against Rosati, but in favor of Wiles. Thereafter, the following occurred:

March 10, 1942—plaintiff moved for judgment against Wiles notwithstanding the verdict, reserving the right to move for a new trial if the motion were denied. The order denying the motion was entered the same day.

March 12, 1942—judgment entered.

March 16, 1942—plaintiff filed a notice of motion for a new trial against Wiles.

April 21, 1942—motion for a new trial granted as to Wiles.

May 15, 1942—plaintiff filed her notice of appeal from the order denying her motion for judgment notwithstanding the verdict. It is this appeal defendant seeks to dismiss.

May 21, 1942—defendant appealed from the order granting the new trial.

Section 963, sub. 2, of the Code of Civil Procedure specifically includes an order "denying a motion for judgment notwithstanding the verdict" in cases where a jury trial is a matter of right, among the appealable orders. Section 939 of the Code of Civil Procedure provides that: "An appeal may be taken from any * * * order * * * from which an appeal lies under any provision of this code, * * * within sixty days from the entry of said * * * order." The time limit thus fixed is jurisdictional.

Defendant urges that, inasmuch as the order here appealed from was entered March 10th, and the appeal was not taken until May 15th, more than sixty days thereafter, the appeal must be dismissed. Although plaintiff filed no written opposition to the motion as required by the rules, at the hearing he urged that under § 629 of the Code of Civil Procedure his time for appeal was extended by implication until after the determination of the motion for a new trial. Section 629 provides that a motion for judgment notwithstanding the verdict must be made before entry of judgment, and may be made, as it was in the instant case, in the alternative, reserving to the moving party the right to move for a new trial if the motion is denied. The section further provides that in such a case the trial court on the motion for a new trial, or the appellate court on appeal from the judgment or order denying the motion for judgment notwithstanding, may order judgment notwithstanding the verdict to be entered, "where a new trial was denied." But "where a new trial is granted * * * the order denying the motion for judgment notwithstanding the verdict shall not be reviewed on appeal, unless the adverse party appeal from the order granting a new trial, in which case the order denying judgment notwithstanding the verdict may be reviewed on appeal."

[1] Plaintiff argues that if she must appeal within sixty days from the entry of the order denying her motion for judgment notwithstanding the verdict, she will be appealing during a period in which the trial court on the motion for a new trial still retains jurisdiction to grant the same relief sought by the appeal. She also points out that if she be required to appeal during the sixty days after entry of the order

denying her motion for judgment notwithstanding the verdict, that appeal may be defeated if the trial court should grant her motion for a new trial, and if the adverse party should fail to appeal from that order. There can be no doubt that these results will follow if defendant is correct in his contentions. If there were any room for interpretation the results flowing from defendant's interpretation would be a reasonable ground for refusing to reach the result desired by him. But there is no room for interpretation. Section 939 provides that the appeal must be filed within sixty days "from the entry" of the order. No exceptions are there set forth. It is that section that deals with the time within which appeals must be taken from orders. Section 629 does not purport to deal with the time within which an appeal from an order must be taken. To hold that § 629 extends, by implication, the period as set forth in § 939 would not be to interpret, but to legislate.

[2, 3] It is true that this conclusion creates a most anomalous and confusing situation. Normally, an appeal vests jurisdiction in the appellate court. But in the situation under discussion a party is required to appeal during a period in which the trial court retains jurisdiction on the motion for a new trial to grant the identical relief sought by the appeal. Moreover, if an appeal from the order denying the motion for judgment notwithstanding the verdict is seasonably filed it may be defeated by the trial court granting the motion for a new trial and the other party failing to appeal from that order. The other side has sixty days from the date of entry of the order granting the new trial to appeal. Until that time expires the party appealing from the order denying his motion for a judgment notwithstanding the verdict cannot possibly know whether he can have his appeal from that order heard by the appellate court, but is compelled to appeal therefrom many days before that date. Thus, a party is required to appeal before the order from which he appeals is final. However, absolute finality of a judgment or order is not an indispensable requirement of appealability. Whether an order or judgment is appealable, and at what stage of the proceedings the order or judgment becomes appealable, are matters of legislative determination. The legislature having spoken, and there being no room for interpretation, the appellate courts, through the guise of interpretation, should not attempt to amend the statute by judicial mandate. The clarification required must come through the legislative and not through the judicial process.

It will be noted that defendant has appealed from the order granting the motion for a new trial. That appeal is now pending. At this time we express no opinion on the question as to whether, in view of the last sentence of § 629 above quoted, the validity of the order denying the motion for judgment notwithstanding the verdict may be passed upon on that appeal.

The appeal from the order denying the motion for judgment notwithstanding the verdict is dismissed.

KNIGHT and WARD, JJ., concur.

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60 Cal.App.2d 50

JENKINS v. CITY OF LOS ANGELES et al.

Civ. 13857.

District Court of Appeal, Second District,
Division 3, California.
July 30, 1943.

1. Municipal corporations 🔑200

Under city charter requiring payment of pensions to "child" or "children" of deceased retired member of fire department until the child or children should attain age of eighteen years, quoted words referred to any child or children living on member's death, and included a child who was born after member's retirement.

See Words and Phrases, Permanent Edition, for all other definitions of "Child" and "Children".

2. Municipal corporations 🔑200

Under city charter requiring payment of pensions to "child" or "children" of deceased retired member of fire department until child or children should attain age of 18 years, a child who was born to the member and third party to whom the member was not married, and who was legally adopted by the member as authorized by statute was entitled to pension. Civ.Code, § 230.

3. Bastards ⚷13

Where father of an illegitimate child adopts the child as authorized by statute the eyes of the law are closed to the former illegitimate status of the child. Civ.Code, § 230.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Mandamus proceeding by Gertrude Jenkins, a minor, by Estelle Watt as guardian of the person and estate of the minor, against the City of Los Angeles and others to require granting to the petitioner of a pension under city charter, as a child of a deceased who had retired as a member of the fire department of the city. From an adverse judgment, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Robert J. Stahl, Deputy City Atty., and Edward J. Olstyn, Deputy City Atty., all of Los Angeles, for appellants.

R. Lee Heath, Bodkin, Breslin & Luddy, and E. E. Hitchcock, all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by the Board of Pension Commissioners of the City of Los Angeles, and its members, from a judgment in mandamus ordering them to grant to petitioner, Gertrude Jenkins, a minor, a pension under section 183 of Article XVII of the Charter of the City of Los Angeles, as a child of Charles S. Jenkins, deceased, who retired as a member of the fire department of said city on August 1, 1923.

Respondent herein was born January 3, 1926, to said Charles S. Jenkins and Estelle Olme, who were never married to each other. She later, by adoption, became a legitimate child of her father.

Two points are urged on the appeal, namely, that no child of a city pensioner, born after his retirement, is entitled to receive a pension, and further that a child born illegitimate but adopted by its father is not entitled to a pension under the city charter, regardless of when it was born.

Section 183 of the city charter provides in substance as follows: "Whenever any member of the Fire or Police Department shall die * * * after retirement * * * then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents * * * Said pension shall be paid to the widow during her lifetime or until she remarries, and thereafter * * * to the legally appointed guardian of the child or children of such deceased member until such child or children shall have attained the age of eighteen years, or to his child or children should there be no widow until such child or children shall have attained the age of eighteen years * *."

[1] We do not consider either of appellants' contentions to be sustainable. As to the first contention, we see no reason for holding that the child or children who have pension rights are those only who are in being at the time of the retirement of their father, to the exclusion of those born afterward. No such limitation is found in the charter, nor can the words which would be necessary to create that limitation be read into the charter under the guise of interpretation. From all that we find there, it would appear that the framers of its pertinent provisions had in mind any child or children living at the time of the death of the retired pensioner, without distinction between those born before and those born after retirement. The section would be no clearer to us if it referred in so many words to children born after retirement as well as to those born before. The word "child" as used means to us any child, and the word "children" means all children. They could have no other meaning unless the charter defines them, which it does not. No good reason has been suggested to us why the plan of the charter should have embraced a purpose to discourage the birth of children to city firemen after their retirement by depriving them of the right to receive their father's pension or to share it with the children born before his retirement. However that may be, no such purpose found expression in the charter.

[2] Upon the second point, we do not deem it necessary to discuss the cases cited by appellant in which it has been held that the words "child" or "children" refer to legitimate children, in the absence of words indicating that illegitimates are included and which express the thought that any tendency toward recognition of claims of illegitimate children would be a bad one. We may concede that illegitimates would have no pension rights under the charter. But at the time of the death of Charles S. Jenkins, respondent herein was his legitimate child by virtue of acts of adoption as found by the court and the force of the

statute. The court found that respondent was publicly acknowledged by her father, taken into his family with the consent of his wife, and otherwise treated as if she were a legitimate child, and that she was duly adopted as his child. Section 230 of the Civil Code reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." This has been the law for three-quarters of a century and it is not to be presumed that in adopting their charter the people of Los Angeles held an unsympathetic attitude toward this humane policy of the state.

The results which follow adoption of children by strangers under adoption statutes have been frequently stated. In Estate of Newman, 1888, 75 Cal. 213, at page 219, 16 P. 887, 7 Am.St.Rep. 146, the court construed the provision of section 228 of the Civil Code that the adopted child and the person adopting "shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation" and held that one of the rights acquired by the child was that of inheriting the estate of the adopting parent. In Estate of Jobson, 1912, 164 Cal. 312, 128 P. 938, 43 L.R.A.,N.S., 1062, it was held that by virtue of the same language the adopting parent is entitled to inherit the estate of an adopted child. These are but some of the rights of the legal relation of parent and child established by adoption. An adoption under section 230 of the Civil Code is no less potent. The declaration of the section that upon adoption by its father of a child born illegitimate, "such child is thereupon deemed for all purposes legitimate from the time of its birth" is as forceful and all-inclusive as words could make it. We do not doubt that the section was intended to mean just what it says. It is based upon an act of March 31, 1870 (Stats. 1869–70, p. 530, sec. 9), and our code commissioners, in speaking of its inclusion in the code, said: "This provision, like the rest, is new, but is so manifestly just, and the present state of the law so unmerciful to innocent children, that it is presumed that no objection will be made to the change. * * *" In Wolf v. Gall, 1916, 32 Cal.App. 286, 293, 163 P. 346, 349, 350, after quoting the above the court further said of section 230: "This is perhaps the most liberal of all enactments removing the disabilities of children born out of wedlock" and the court later, on the same page, made reference to the "increasingly liberal and humane tendency of legislation in respect to illegitimate children."

[3] In Estate of Wardell, 1881, 57 Cal. 484, it was held that an illegitimate child is the "child" of its mother within the meaning of a statute preserving rights of children omitted from wills of their parents, because the word is to be given its statutory rather than its common-law meaning. And if because of its statutory right to inherit from its mother an illegitimate is her "child," upon what reasoning could we conclude that such a one is not the "child" of its father after its adoption by him? Any reason that might be advanced would be irreconcilable with the provisions of section 230. When adoption takes place, the eyes of the law are closed to the former status; so must the former status of respondent remain unseen to the Board of Pension Commissioners.

The judgment is affirmed.

PARKER WOOD, J., and SHAW, J. pro tem., concur.

ADAMS v. AMERICAN PRESIDENT LINES, Ltd.

No. 12380.

District Court of Appeal, First District, Division 1, California.

Aug. 2, 1943.

Rehearing Denied Sept. 1, 1943.

Hearing Granted Sept. 30, 1943.

1. Master and servant 🔑302(6)

Where employee is required to live or board on the premises where employed, either by the contract or by necessities of his work, performance of acts necessary to his life, comfort and convenience, although strictly personal to himself and not acts of service, are incidental to the service and hence within the "scope" and in the "course of his employment" even though he is not actually performing the particular tasks for which he was employed.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment" and "Scope of Employment".

2. Seamen 🔑6

Employment aboard ship includes not only particular tasks required, but ordinary tasks for employee's own comfort and convenience which are incident to and necessarily connected with the employment, including the taking of meals, sleeping, and resting. Jones Act, 46 U.S.C.A. § 688.

3. Seamen 🔑29(5)

Where shipowner supplied fruit to crew members as part of their regular meals, and permitted them to eat fruit on deck, crew member's act in carelessly discarding orange peel was within the "scope" and in the "course of his employment", and hence in action by other crew member injured after slipping on peel, instructions omitting qualification that negligence of employee must be within scope and course of employment were not erroneous. Jones Act, 46 U.S.C.A. § 688.

4. Seamen 🔑29(3)

That crew violated instructions in disposing of refuse of fruit given them to eat did not relieve shipowner of liability to crew member injured after slipping on orange peel. Jones Act, 46 U.S.C.A. § 688.

5. Trial 🔑260(1)

Failure to qualify instructions was not prejudicial where the omitted element was covered by other instructions.

6. Trial 🔑296(1)

"Formula instructions" are not prejudicial where standing alone, they omit an element essential to recovery, but the very method of giving them indicates that they were not intended to state essential elements in detail, and that such matters are the subject of separate specific instructions.

7. Trial 🔑296(1)

The rule that error in omitting elements from formula instructions cannot be cured by general instructions is relaxed when the record fails to show a miscarriage of justice.

8. Trial 🔑260(1)

Refusal of proposed instruction was not error where subject matter thereof was covered by instructions given.

9. Master and servant 🔑301(1)

The same rules of measurement are used in cases of respondeat superior as in workmen's compensation cases, in determining whether a particular act was performed by employee within the "scope" and in the "course of his employment". St.1937, p. 265, § 3201 et seq.

10. Seamen 🔑29(1)

In action by crew member against ship owner for injuries suffered after slipping on orange peel discarded by other crew member, it was not necessary to show ship owner's actual or constructive knowledge of presence of the peel on stairway. Jones Act, 46 U.S.C.A. § 688.

11. Seamen 🔑29(1)

Proof of ship owner's knowledge of dangerous condition which caused injury to crew member is necessary only where the condition is brought about by natural wear and tear, third persons, acts of God, or other causes other than negligence of owner or his employees. Jones Act, 46 U.S.C.A. § 688.

12. Negligence 🔑48

Where dangerous condition is brought about by employees acting within scope of employment, knowledge of the condition is imputed to employer as a matter of law.

13. Judgment 🔑199(3)
Seamen 🔑29(5)

In action by crew member against shipowner for injuries suffered after slipping on orange peel discarded by other crew member, evidence required denial of defendant's motions for directed verdict and judgment notwithstanding verdict. Jones Act, 46 U.S.C.A. § 688.

◆

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by O. D. Adams against the American President Lines, Ltd., for injuries suffered in fall on stairway. From an order granting a new trial after verdict for plaintiff, plaintiff appeals.

Reversed.

John J. Taheny, of San Francisco, for appellant.

Treadwell & Laughlin, of San Francisco (Robert A. Grantier and Raymond M. Farley, both of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

Plaintiff was employed as a seaman aboard the S. S. President Pierce, and while carrying a case of canned goods on his shoulder up a stairway in the regular course of his duties, he slipped and fell, and was injured. The accident happened while the ship was four days out from San Francisco, on its return from the Orient, and plaintiff brought this action for damages against his employer under a federal statute known as the Jones Act, 46 U.S.C.A. § 688. The cause of action was based on allegations to the effect that plaintiff's injuries were caused by his employer's negligence in failing to maintain the stairway in a safe condition, the particular charge made being that it failed to keep the steps free from refuse and other foreign substances, as the result of which plaintiff slipped on an orange peel which had been carelessly discarded on the stairway by a fellow employee. The action was tried before a jury and defendant moved for a directed verdict. The motion was denied and the jury returned a verdict in favor of plaintiff for $1,750. Defendant then moved for judgment in its favor notwithstanding the verdict, and the motion was denied. Judgment was entered on said verdict in favor of plaintiff; but the trial court thereafter granted defendant's motion for a new trial; and from the order made in that behalf plaintiff appeals.

Insufficiency of the evidence was not specified in the order as a ground for granting the motion; consequently "it will be conclusively presumed that the order was not based upon that ground". § 657, Code Civ. Proc. The order recites merely that the motion was granted upon the grounds of "error in law at the trial and excepted to by the defendant," and in support of the order defendant contends that the trial court erred in giving and refusing to give certain instructions, and in denying defendant's motions for directed verdict and for judgment notwithstanding the verdict. It is our conclusion that the order is not sustainable on either of those grounds.

The following are the essential facts: The ship had four decks, designated as decks "A", "B", "C", and "D". The dining room for passengers was located on B deck and the engine crew and sailors ate in a messroom on C deck. Plaintiff was working as a galley scullion and as part of his daily duties he was required to bring up food-stuffs from the storeroom located on D deck to the galley on B deck. The food supplies kept in this storeroom were dry stores, such as canned goods, beans, cereals, etc.—no fresh fruits or vegetables; and in going to and from the storeroom it was necessary to use this particular stairway. It ran from C deck only to the storeroom on D deck, and was used exclusively by members of the crew, the passengers not being allowed below B deck. On the morning of the accident, about 10:15, plaintiff went down this stairway and got from the storeroom a case of canned vegetables, containing six one-gallon cans, each weighing about 7½ pounds. He placed the case on his right shoulder, held it with his right hand, and using his left hand to hold on to a railing on the left side of the stairway he started up the stairs to C deck. When he reached the fourth or fifth step from the top his foot slipped from under him and as he fell he put his right hand out in front of him to protect his face. The case of vegetables fell on his hand, the edge of one of the cans severely lacerating and breaking the bone of his right little finger. It was a comminuted fracture and the finger was "hanging off." He went immediately to the office of the ship's doctor, but the doctor was not in his office at the time and plaintiff waited for him for about 45 minutes. The doctor then stitched the finger together with two stitches and placed a metal clamp on the finger to hold it. The finger was then bandaged with a splint to hold it in place, but afterwards it became infected, and he was still suffering from the effects thereof at the time of trial. Immediately after plaintiff had fallen he looked back down the stairway to see what had caused him to slip, and he saw a large piece of orange peel that had been stepped on; and as soon as the doctor had finished bandaging his finger plaintiff went back to the stairway, picked up the orange peel and threw it into a garbage receptacle which was placed on C deck about four feet from the head of the stairway. The evidence supporting the implied finding of the jury that the presence of the orange peel on the stairway was due to the carelessness of some fellow employee was in substance as follows: Every day fresh fruit was placed in the crew's messroom on C deck, and it was the custom of the crew, after finishing their meals, to take the fruit out on C deck and eat it while standing around talking with each other. This was done with the knowledge of the company. The men had been instructed to put any refuse in the receptacles which had been placed on the deck for that purpose, but it was common for them to throw the fruit peels and other refuse on the deck or down the stairway. Sometimes this was done deliberately, and at other times in aiming for the garbage receptacle they would miss it and leave the refuse lying on the deck, and afterwards it would be kicked down the stairway, either purposely or accidentally; and there is evidence showing that the ship's officers were aware of this practice. In this regard the steward in charge of the storeroom testified that many times he had seen and picked up refuse on this stairway leading to the storeroom which members of the crew had dropped on the deck and then kicked so that it had fallen on the stairs; also that many times he had seen refuse and peelings lying on C deck close to the stairway. The doctor also testified that many times during the course of his daily inspection of the ship he had picked up pieces of peeling or debris lying on C deck, and other witnesses testified that they had on many occasions seen orange peelings and other refuse on C deck in the vicinity of the garbage receptacle and on the stairway leading to the storeroom. Several members of the crew testified that on this particular morning they had made their regular inspection of the ship between 10 and 11 o'clock, and that they did not remember having seen any orange peel on the stairway; and one of them testified that shortly after the accident he went to the stairway for the purpose of seeing if there was any orange peel there and that he found none. But the testimony so given at best could do no more than raise a conflict with that given by plaintiff. The jury's determination of that issue is therefore conclusive. Furthermore, the evidence definitely shows that the orange peel could not have been discarded by any of the passengers, because passengers were not allowed to go below B deck and consequently had no access to C deck or the stairway in question; nor is there the slightest evidence from which the inference may be drawn that the presence of the orange peel on the stairway was due to some malicious act.

With respect to the matter of the instructions, the trial court gave several upon the doctrine that an employer is responsible for the negligent acts of an employee committed within the scope and in the course of his employment. Defendant concedes that the doctrine was correctly stated in some of them, but three of those given are challenged upon the ground that they omitted the qualification that in order to hold the employer liable it must be shown that the negligent act of the employee was committed within the scope and in the course of the employment. The first of the three instructions so given was as follows: "You are instructed that the master or captain of the ship had the authority and the duty to maintain discipline aboard ship and to issue such orders as were reasonably necessary to keep the stairways and passageways safe for use by the employees. You are also instructed that it was the duty of the officers and crew to obey all reasonable orders and commands issued by or under the authority of the master or captain pertaining to the safety of stairways and passageways. If you find from the evidence that any officer or member of the crew negligently deposited or negligently caused to be deposited, a fruit peeling on the stairway in question, whether because of the absence of a rule or in disobedience of a rule prohibiting the same, and if you further find that the stairway in question was thereby made unsafe for use by the plaintiff, then you are instructed that under such circumstances, if you so find, the defendant is liable in damages for injury, if any, proximately caused plaintiff thereby." The other two instructions complained of are couched in different language, but the qualification above referred to was omitted therefrom, and defendant contends, therefore, that all three were prejudicially erroneous.

Plaintiff's answer to defendant's contention is two-fold: first, that the challenged instructions were not erroneous for the reason that as a matter of law the evidence established that the negligent act of the employee which caused plaintiff to slip and fall was committed by said employee within the scope and in the course of his employment; and secondly, that in any event the jury could not have been misled by the omission complained of because it was embodied in other instructions which the trial court gave. Both points, in our opinion, are well taken.

[1-3] As shown by the authorities cited in plaintiff's briefs, where an employee is required to live or board on the premises where he is employed, either by the terms of the contract or the necessities of his work, the performance of such acts on his part as are necessary to his life, comfort and convenience, although strictly personal to himself and not acts of service, are held to be incidental to the service, and therefore are deemed to fall within the scope and in the course of his employment, even though he is not actually performing the particular tasks for which he was employed. Union Oil Co. v. Industrial Acc. Comm., 211 Cal. 398, 295 P. 513; Whiting Mead Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518; see, also, Campbell on Workmen's Compensation, Vol. 1, §§ 196, 208. And in the cases of persons employed aboard ship, it is held that such employment "includes not only the performance of the physical tasks required of him, but also includes the performance of such ordinary tasks for his own comfort and convenience as are incident to and necessarily connected with the employment" (States S. S. Co. v. Berglann, 9 Cir., 41 F.2d 456, 457); and that this includes the taking of meals, sleeping, resting, etc. Charles R. Davidson & Co. v. M'Robb, [1918] L.R.App.Cas. 304, 327. Here it is admitted that the fruit was supplied by the employer to the members of the crew as part of their regular meals, and that they were permitted to eat the fruit outside on C deck; and the uncontroverted evidence shows that the piece of orange peel on which plaintiff slipped had been carelessly discarded by one of the crew while eating the fruit on C deck. Therefore, applying the foregoing legal principles to the above uncontroverted facts, it appears as a matter of law that the negligent act of the employee was committed within the scope and in the course of his employment.

Defendant does not claim that the eating of the fruit would not be in the course of the employment, but contends that the instructions were not predicated upon eating the fruit, but upon the disposal of the refuse from it, and that the disposal of the peel was not necessarily incidental to eating the fruit; but there is no evidence that the disposition of the peel was intentionally wanton or malicious, and obviously it was as much incidental to the employment as the eating of the fruit itself, and the discarding of the refuse from the fruit must have been contemplated by the employer because garbage receptacles were placed on C deck and the crew was instructed to place the refuse therein.

[4] Defendant states that in determining whether the employee "was acting in the scope of his employment the jury should have been permitted to consider the fact that he ate the fruit in an unauthorized place and likewise disposed of the refuse in an unauthorized and forbidden place, neither of which situations were covered by the instructions." The uncontroverted facts of the case show, however, that the custom of the men to eat the fruit out on C deck was carried on with the approval of the ship's officers, and the fact that the crew may have violated instructions as to the disposal of the refuse could not have the effect of relieving defendant of liability, because it has been held in numerous cases that an employer is liable for acts of his employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders or instructions of the employer. 35 Am.Jur. p. 993; Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Johnson v. Monson, 183 Cal. 149, 190 P. 635; Griffin v. Industrial Acc. Comm., 19 Cal. App.2d 727, 66 P.2d 176; Dowdall v. Gilmore Oil Co. Ltd., 18 Cal. App.2d 1, 62 P.2d 1051.

[5, 6] Furthermore, it is apparent, as plaintiff points out, that defendant was not prejudiced by the challenged instructions because the omitted element was covered by the following instructions which were given to the jury: "You are instructed that an employer is responsible for the acts or omissions of his employee, agent or servant committed by such employee, agent or servant within the course and scope of such employment, agency or service." "The negligence of an officer or employee of the defendant committed while such officer or employee is engaged within the course and scope of his employment is in law the negligence of the defendant." "You are instructed that any negligence committed by an officer or employee of defendant *cannot be imputed* to such de-

fendant *unless it be shown that such negligence was committed by such officer or employee while engaged within the course and scope of his employment.*" (Italics added.) Defendant contends that the instructions complained of were formula instructions and the error in omitting the above element could not be cured by the giving of other general instructions. Doubtless such is the general rule, but there are several well recognized qualifications thereto, one of them being that where the so-called formula instructions, when separated from the other instructions given, omits an element essential to recovery by plaintiff, but the very method of giving the so-called formula instructions indicates plainly that they were not intended, nor did they purport to state the several elements essential to a verdict as such in detail, but instead, those matters are made the subject of separate specific instructions, the giving of the so-called formula instructions does not constitute prejudicial error. Brower v. Arnstein, 126 Cal.App. 291, 14 P.2d 863. And such was the case here, for at the beginning of the court's charge and as part thereof the court stated: "If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by the Court, and none must be inferred by you. For that reason, you are not to single out any sentences, *or any individual instruction or portion thereof, and ignore the others, but you are to consider all the instructions as a whole, and to regard each instruction in the light of the other instructions.*" (Italics added.) Moreover, as said in Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390, which is cited with approval in Klenzendorf v. Shasta, etc., School Dist., 4 Cal.App.2d 164, 40 P.2d 878, there is a disposition to relax the rigid application of the rule regarding formula instructions when the record fails to show a miscarriage of justice, and that, in our opinion, is the situation here. As will be seen, the instructions above quoted were clear and correct statements of the law; and that being so, it cannot be fairly said that the jury was misled by the omission of that element from those challenged or that the defendant was prejudiced thereby.

[7] Likewise without merit is defendant's contention that the trial court erred in refusing to give defendant's proposed instruction No. 7, for the reason that the subject matter thereof was covered by other instructions which the court gave, especially those appearing on page 238 of the transcript.

[8-13] Defendant's second major point, that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict, is based largely upon the contention that the evidence fails to show that the negligent act of the employee in discarding the orange peel was committed within the scope and in the course of his employment. This contention has already been disposed of adversely to defendant's view in the consideration of the matter of the instructions. It is true that most of the cases involving the question as to whether a particular act was committed or performed by an employee within the scope and in the course of his employment are cases arising out of the application of the Workmen's Compensation Act, St.1937, p. 265, § 3201 et seq.; but as will be seen from the following cases, the same rules of measurement are used in determining that question in cases of respondeat superior. Curcic v. Nelson Display Co., 19 Cal.App.2d 46, 64 P.2d 1153; Breland v. Traylor Eng., etc., Co., 52 Cal.App.2d 415, 126 P.2d 455; Richards v. Metropolitan Life Ins. Co., 19 Cal.2d 236, 120 P.2d 650. Nor was it necessary for the plaintiff to establish that the defendant had actual or constructive knowledge of the presence of the orange peel on the stairway. Such proof is necessary only where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God, or by other causes which are not due to the negligence of the owner or his employees. Where, as here, the dangerous condition is brought about by the employees acting within the scope of their employment, knowledge of the condition is imputed to the defendant as a matter of law. Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841; Lorenz v. Santa Monica, etc., School Dist., 51 Cal.App.2d 393, 124 P.2d 846. Therefore the court would not have been legally justified in granting either of defendant's motions on that ground.

The remaining points urged by defendant in support of the trial court's order are incidental to those already discussed, and do not require special attention.

The order is reversed.

PETERS, P. J., and WARD, J., concur.

Rehearing denied; WARD, J., dissenting.

DICKEY v. RAISIN PRORATION ZONE No. 1 et al.

Civ. 3084.

District Court of Appeal, Fourth District, California.

July 19, 1943.

Hearing Granted Sept. 17, 1943.

1. Agriculture 🔑1

The Agricultural Proration Act is constitutional. St. 1933, p. 1969, as amended.

2. Agriculture 🔑1

The purpose of the Agricultural Proration Act is to stabilize the market price of agricultural products by withholding from market surplus portion of crop that cannot be marketed without crowding the market price of the product below the cost of production. St. 1933, p. 1969, as amended.

3. Agriculture 🔑2

The Agricultural Proration Act requiring proration program committee to handle surplus agricultural products in stabilization pool and to account for products on a pool basis implies obligation to account to each producer for his product in the stabilization pool. St. 1935, pp. 1537, 1539, 2089, §§ 19.1, 20, 21.

4. Agriculture 🔑2

Where Agricultural Proration Act authorizing stabilization of market price of agricultural commodity by withholding from market surplus portion of crop empowered program committee to "dispose of" surplus commodity or to "turn over" surplus to charitable or other similar organizations, the committee had authority to give away surplus portion of crop. St. 1935, p. 1537, § 19.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Dispose Of" and "Turn Over".

5. Statutes 🔑205

Provision of Agricultural Proration Act, authorizing proration zone to acquire and operate facilities for preparation for market and disposal of stabilization pool commodity in any manner so as to maintain market stability and to sell commodity, must be read as a whole and its language construed together. St. 1935, p. 1537, § 19.1.

6. Statutes 🔑190

Where statutes are free from ambiguity and their meaning is clear, there is no need for interpretation by court.

7. Statutes 🔑188

Court should not legislate by extending the clear meaning of language used by Legislature, but court should give to statutory words their common and ordinary meaning.

8. Constitutional law 🔑70(1)
Statutes 🔑190

The Agricultural Proration Act is clear and unambiguous and court cannot read into its provisions powers which the Legislature fails to include. St. 1933, p. 1969, as amended.

9. Statutes 🔑212

An intention to legislate by implication is not to be presumed.

10. Statutes 🔑233

There must be some direct connection between powers sought to be implied and powers expressly granted, and implied powers must be necessary to carry out inherent and express powers granted by act.

11. Agriculture 🔑2

The Agricultural Proration Act adopted to stabilize price of agricultural products by withholding from market surplus portion of crops does not authorize the pledging of stabilization pool commodity of nonborrowing growers as added security for loans to borrowing growers. St. 1935, p. 1537, § 19.1.

12. Agriculture 🔑2

Where Agricultural Proration Act authorized creation of stabilization pool and placed duty on proration zone of processing and selling surplus commodity, power to borrow money to pay expense of performing such duties was implied. St. 1935, p. 1537, § 19.1.

13. Estoppel 🔑52

Acts which are either contrary to express statute or against public policy or both cannot form basis for an "estoppel".

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

14. Estoppel 🔑52

An unauthorized act in excess of a power may be ratified and form the basis of an "estoppel" whereas an unlawful act contrary to law or to public policy cannot.

15. Estoppel ⇨95

Silence and inaction may form the basis for an "estoppel" where the person against whom the estoppel is invoked in good conscience and good morals should have spoken or acted.

16. Estoppel ⇨83(1)

Ordinarily, misrepresentation as to matters of law afford no sufficient basis for an "estoppel".

17. Agriculture ⇨2
Estoppel ⇨101

Where stabilization pool commodity of nonborrowing growers was pledged as added security for loans to borrowing growers, in action by nonborrowing grower claiming right to share in proceeds of stabilization pool commodity which were insufficient to repay loans, defense of consent, acquiescence, ratification, "laches" and "estoppel" were available. St. 1933, p. 1969, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

18. Pleading ⇨87

Laches is a plea that is available to a party in a court of equity.

19. Equity ⇨72(1)

"Laches" is such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party operates as a bar in a court of equity.

20. Parties ⇨10

Under statute, to authorize a class action, the question must be one of common or general interest of many persons or the parties must be so numerous that it is impracticable to bring them all before the court. Code Civ.Proc. § 382.

21. Evidence ⇨20(1)

The District Court of Appeal could take judicial notice of facts concerning the raisin industry of California.

22. Parties ⇨10

A nonborrowing raisin grower could maintain class action to determine whether pledging of stabilization pool raisins of nonborrowing growers as added security for loans to borrowing growers was authorized where questions presented were of common and general interest to all of raisin growers in raisin proration zone and fair implication of complaint was that there were many growers in stabilization pool who were not borrowing growers. St.1933, p. 1969, as amended; Code Civ.Proc. § 382.

23. Pleading ⇨42

The sufficiency of a complaint is to be judged by the allegations it contains.

24. Estoppel ⇨110

Estoppel is usually an affirmative defense that should be pleaded by a defendant.

25. Constitutional law ⇨107
Limitation of actions ⇨3(2)

No person has a vested right in any particular period of limitations and ordinarily the duration of that period is within the sound discretion of Legislature which may lengthen or shorten it subject to exception that existing rights cannot be cut off summarily.

26. Limitation of actions ⇨6(1)

Where a statute of limitations takes effect after a cause of action has accrued, and bars the remedy, the plaintiff will be given a reasonable time after such effective date in which to comply with its terms.

27. Limitation of actions ⇨6(1)

Where raisins in stabilization pool had been unauthorizedly pledged as additional security for loans to borrowing growers but it could not be determined whether nonborrowing growers might be injuriously affected until November, 1939, so that under Agricultural Proration Act as it existed in 1938, cause of action of nonborrowing growers would not have been barred until December, 1939, but the 1939 amendment barred cause of action on October 19, 1939, before nonborrowing growers could tell whether they had been injuriously affected, the 1939 amendment did not give nonborrowing growers reasonable time within which to exercise their right to contest legality of the pledge of their stabilization pool raisins to secure debts of other growers and the amendment would not be given effect. St.1935, p. 1535, § 17; St.1939, p. 2495, § 17.

28. Agriculture ⇨2

Provision of Agricultural Proration Act imposing a limitation on time in which proceeding may be instituted to review order of Agricultural Prorate Commission does not afford a complete remedy to review commission's order. St.1935, p. 1535, § 17; St.1939, p. 2495, § 17.

29. Certiorari ⚷14

A writ of review cannot be directed to a board having state-wide jurisdiction.

30. Statutes ⚷174

A construction of statute which would nullify it will be avoided if possible.

31. Agriculture ⚷2

The word "review" in statute imposing a time limitation in which proceeding may be instituted to review order of Agricultural Prorate Commission is used in the very general sense of critical study or examination in any appropriate action in a court of competent jurisdiction. St.1935, p. 1535, § 17; St.1939, p. 2495, § 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Review".

32. Injunction ⚷114(1)

Where stabilization pool of raisins of nonborrowing growers had been unauthorizedly pledged as added security for debts of borrowing growers and nonborrowing grower instituted action to enjoin payment to lender of money derived from sale of nonborrowing grower's raisins in stabilization pool and to recover money paid to lender which had its source in such sale, the Agricultural Prorate Commission, which had charge of the proration program, might have been a "proper party" but it was not a "necessary party" to the action. St.1933, p. 1969, as amended.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party" and "Proper Party".

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Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action for injunction by R. Bernard Dickey against Raisin Proration Zone No. 1 and others. From an adverse judgment, defendants appeal.

Reversed with directions.

Francis M. Shea, Asst. Atty. Gen., Leo V. Silverstein, U. S. Atty., and William F. Hall, Sp. Atty., Department of Justice, both of Los Angeles, and Ronald Abernethy, Asst. U. S. Atty., of Pasadena, Sidney J. Kaplan, Sp. Asst. to Atty. Gen., and W. S. Ward and Jerome C. Strumpf, Attys. Department of Justice, both of Washington, D. C. (Strother P. Walton, of Fresno, of counsel), for appellants.

Walter M. Gleason and Morgan J. Doyle, both of San Francisco (William B. Acton, of San Francisco, of counsel), for respondent.

MARKS, Justice.

This is an appeal from a judgment restraining defendants from transferring or disposing of funds derived from the sale of raisins in a surplus commodity pool and ordering Commodity Credit Corporation to pay to plaintiff, and those growers of raisin grapes occupying a similar position with him, the sum of $145,166.04 after deducting attorneys fees and other expenses of suit.

The judgment followed the granting of a motion to strike considerable portions of the answers of Commodity Credit Corporation and of other answering defendants, and a motion for judgment on the pleadings. This necessitates a rather careful examination of the pleadings of the parties.

To properly understand the pleadings a brief summary of the purposes of the Agricultural Proration Act of 1933, Stats. 1933, p. 1969, as amended, seems advisable.

The act contains a legislative declaration of its purpose which is to prevent agricultural waste by removing from the competitive market the surplus of an agricultural product which can not be marketed profitably in the usual channels of trade, and also a declaration that the act was passed under the police powers of the State to promote the general welfare.

It provides for an Agricultural Prorate Commission of the State, its members to be appointed by the Governer, by and with the consent and approval of the Senate. This Commission is given power to permit the organization of Proration Zones in which the marketing of a particular agricultural commodity may be regulated. Each Zone must have a Proration Program Committee which, after a hearing before a duly called meeting of the agriculturists in the Zone affected thereby, may propose and adopt a marketing program for the commodity, the marketing of which is to be regulated. The marketing program cannot go into effect until approved by the Agricultural Prorate Commission. After its adoption it becomes binding on every producer of the commodity in the Zone and must be followed by all of them. Penalties are provided for any disobedience.

Speaking very generally, the program should determine the total of the regulated commodity to be produced in a crop year, the percentage of that total that can be marketed profitably in the usual and ordinary channels of trade, and the percentage that cannot be so marketed without flooding the market and breaking the market price. The percentage of the commodity that can be absorbed by the market is left under the free control of the producers who may market and dispose of that proportion of their crops as they please without any restrictions. As the subject of the proration program in this case is sun-dried, or partly sun-dried, raisins we will refer to this portion of the crop as free raisins. The balance of the crop that cannot be absorbed in the usual channels of trade is designated as surplus which must be delivered to the Proration Program Committee of the Zone and put into what is called a stabilization pool, and must be held, cared for and disposed of by that committee so that it will not be marketed or disposed of in competition with the portion of the crop designated as free raisins. It will be necessary to consider in considerable detail the powers of the Proration Program Committee in connection with the disposition of surplus raisins in the stabilization pool in a subsequent part of this opinion.

With this brief explanation of the purposes of the Agricultural Proration Act, and the machinery set up to carry out those purposes, we may proceed to a consideration of the pleadings of the parties.

The complaint was filed on March 14, 1940. The events leading up to the cause of action occurred in 1938 and 1939, so references made to statutes will be to those laws in effect at that time, unless otherwise indicated.

Sun-Maid Raisin Growers of California, a corporation, was originally joined as a defendant, but the action was dismissed as to it so no further reference need be made to it.

Paragraphs 1 to 5, inclusive, of the complaint allege that Raisin Prorate Zone No. 1 (hereinafter called the Zone) was established and organized under the provisions of the Agricultural Proration Act, Stats. 1933, p. 1969, as amended; that it included the producers of raisins in Fresno, Kings, Kern, Tulare and other adjacent counties; that certain named persons comprise the membership of the Proration Program Committee of the Zone; that Raisin Proration Association is a corporation organized under the laws of California; that the members of the Proration Program Committee of the Zone compose its board of directors; that Commodity Credit Corporation is a corporation organized under the laws of the United States for the purpose of making commodity loans and other financing.

Paragraph six alleges that, in September, 1938, pursuant to provisions of the Agricultural Proration Act, the Proration Program Committee of the Zone adopted a program for raisins for the 1938–1939 marketing season, which required the producers of raisins in the Zone to deliver twenty per cent of their raisins to the Zone to constitute a stabilization pool of surplus raisins to be withheld from the usual channels of trade and commerce in competition with the balance of the raisin crop which we will call the free raisins.

Paragraph seven alleges that plaintiff was a grower and producer of raisins in the Zone and delivered approximately thirty-five tons of raisins, which represented twenty per cent of his crop, to the stabilization pool as his surplus raisins; that other growers of raisins in the Zone delivered into the stabilization pool about fifty-two thousand tons of surplus raisins.

Paragraph nine alleges that the Zone has raisins delivered into the stabilization pool by the various growers have been commingled; that plaintiff and the other growers contributing surplus raisins to the stabilization pool are beneficial owners of those raisins and of any funds derived from the sale thereof which were held in trust by the Proration Program Committee as trustee.

Paragraph nine alleges that the zone has delivered the surplus raisins composing the stabilization pool into various warehouses and that Raisin Proration Association and other named defendants, as agents of the Zone, are in possession of parts of them and of funds derived from sales.

Paragraph ten alleges that Raisin Proration Association, the Zone, and other defendants negotiated a loan by Commodity Credit Corporation to such producers of raisins in the Zone who desired to make loans of $50 per ton on free raisins; that various producers of raisins in the Zone secured such loans from Commodity Credit Corporation in amounts that exceeded the total sum of $500,000.

Paragraph eleven alleges, on information and belief, that Raisin Proration Association and its board of directors, and the Zone and its Proration Program Committee purported and attempted to pledge to Commodity Credit Corporation all of the raisins in the stabilization pool as security for the loans made to the various producers of raisins in the Zone; that plaintiff did not consent to, approve of, or ratify such pledge; that it was not consented to, authorized or ratified by plaintiff's co-owners of the raisins in the stabilization pool; that plaintiff borrowed no money from Commodity Credit Corporation or from any other defendant and has neither pledged nor hypothecated any of his raisins in the stabilization pool.

Paragraph twelve alleges that Commodity Credit Corporation claims the right to hold all of the raisins placed in the stabilization pool, by reason of the pledge, to secure repayment of the loans made by it to the various raisin growers; that the other defendants acquiesced in that claim and unless enjoined will co-operate with Commodity Credit Corporation in holding such raisins and the proceeds from their sale as security for the loans to the individual growers; that the Zone has caused a portion of the stabilization pool raisins to be sold and the proceeds to be paid to Commodity Credit Corporation to apply on the loans made to individual growers; that contracts for the sale of other raisins in the stabilization pool have been made and that the proceeds will be paid over to Commodity Credit Corporation unless defendants are enjoined from so doing; that the raisins remaining in the stabilization pool amount to more than ten thousand tons; that large balances remain unpaid on the loans to the individual growers and cannot be paid even by the sale of all the raisins, including those in the stabilization pool, as the loans to the individual growers were made "without recourse".

We quote paragraph thirteen of the complaint as follows: "That plaintiff brings this action for and in behalf of himself and all of his co-owners of said Stabilization Pool similarly situated, to protect and conserve the raisins, funds, and other assets of said pool against the aforementioned threatened and illegal acts of the said defendants aforementioned; that the total value of the raisins and other assets comprising said pool was, and is, largely in excess of one hundred thousand dollars ($100,000); that it is necessary, and meet and proper, for plaintiff to bring this action to protect said pool and its said assets, because the officers and agents thereof have failed to do so, and will not do so, but to the contrary intend to, and will, unless enjoined, fully cooperate with the defendant Commodity Loan Corporation in its aforementioned illegal and unauthorized effort and plan to deprive plaintiff and the other beneficial owners of said pool of their property and rights as aforesaid."

The answer of Commodity Credit Corporation admitted the allegations of paragraphs one to five, inclusive, of the complaint and added the allegations that Raisin Proration Association is a nonprofit corporation and that Commodity Credit Corporation is an instrumentality and agency of the United States organized under the laws of Delaware pursuant to an Executive Order of the President; that the direction and management of its affairs are under the general direction of the Secretary of Agriculture.

The allegations of paragraph six of the complaint were denied except that it was admitted that on September 12, 1938, the Zone adopted a proration program for raisins grown within its boundaries. A copy of the resolution establishing the program is attached to the answer. That program does not differ materially from the summary of it contained in the complaint.

The allegations of paragraph seven of the complaint are denied except that it is admitted that "Dickey Properties", the name under which plaintiff transacted his business, delivered not to exceed twenty tons of raisins into the stabilization pool; that all of the producers of raisins in the Zone delivered approximately 52,004 tons of raisins into that pool.

Defendants denied the allegations of paragraph eight of the complaint but admitted that the majority of the raisins were commingled in October and November, 1939, when they were sold and that a small portion was "dumped" in March of that year. It was alleged that the members of the Proration Program Committee did not act as trustees for the growers in taking possession of the raisins in the stabilization pool.

The allegations of paragraph nine of the complaint were denied, but it was admitted that on or about October 15, 1938, an agreement was entered into by Commodity Credit Corporation and the Program Committee of the Zone and Raisin Proration Association under the terms of which all raisins in the stabilization pool were pledged to Commodity Credit Corporation. A copy of the agreement was attached to the pleading. It was there recited that the Proration Program Committee proposed to deliver to Raisin Proration Association all of the raisins in the stabilization pool; that Raisin Proration Association will pledge those raisins to Commodity Credit Corporation "as additional collateral to all loans made or purchased by Commodity upon the security of raisins of the 1938 crops". The resolution of the Zone, adopted September 12, 1938, establishing the market program, did not disclose nor contain any reference to the plan of having the Commodity Credit Corporation furnish funds for loans to the raisin growers to the amount of $50.00 per ton on the free raisins, nor was there any intimation in it that the stabilization pool raisins were to be pledged to Commodity Credit Corporation as security for these loans to individual raisin growers. The same is true of the contract of October 15, 1938, with the exception that it contained the following: "Whereas, Commodity (Credit Corporation) has authorized loans upon the security of raisins of the 1938 crop in accordance with a certain resolution approved by Commodity under date of September 24th, 1938, which shall be considered as a part thereof; * * *." In this resolution it was disclosed that Commodity Credit Corporation proposed to loan individual growers, through Raisin Proration Association, $50 per ton on their free raisins and take as partial security for those loans a pledge of each grower's free raisins and also a pledge of all raisins in the stabilization pool as additional security for the total of the loans. We will have occasion to advert to other provisions of this resolution in a subsequent portion of this opinion.

It was also alleged that plaintiff, and all the other raisin growers in the Zone, consented to, acquiesced in and ratified such agreement and pledge.

The allegations of paragraph ten of the complaint are not denied. Therefore it must be accepted as an admitted fact that the Zone, in conjunction with Raisin Proration Association, a non-profit California corporation not organized under the Agricultural Proration Act, made the arrangement with Commodity Credit Corporation for the loans to individual growers of $50 a ton on their free raisins; that these loans were made to individual growers by Commodity Credit Corporation. It elsewhere appears that these were non-recourse loans to individual growers made through the agencies of the Reconstruction Finance Corporation and Raisin Proration Association; that all of the raisins in the stabilization pool, including the raisins of plaintiff and other non-borrowing growers, were pledged to secure the payment of the loans made by the individual borrowing growers.

The allegations of paragraph twelve of the complaint were denied, but it was alleged that Commodity Credit Corporation claimed a valid and subsisting lien on the raisins in the stabilization pool or the proceeds from their sale. It was also alleged that all of the free raisins had been sold and the proceeds properly applied; that the loans made to the individual growers had not been paid; that "there is and was at the time of the filing of the complaint also due, owing, and unpaid to this defendant a large sum of money on account of advances or loans made to the Zone and the Raisin Proration Association to defray the expenses of operating, maintaining, and handling the stabilization pool. That the balance due, owing and unpaid to this defendant, as aforesaid, exceeds the amounts obtained from the sale or disposition of both said free tonnage pool raisins and said surplus pool raisins."

The allegations of paragraph thirteen of the complaint were denied except that it was admitted that the total value of the raisins in the stabilization pool was largely in excess of $100,000.

The answer of the Commodity Credit Corporation set forth a second, separate and further defense in which estoppel was pleaded. It set forth the due organization of the Zone which included the counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings and Kern, and all growers of Thompson Seedless, Sultana and Muscat grapes therein which were cured into sundried or partly sundried raisins. It also alleged the corporate existence of Sun-Maid Raisin Growers of California and of Commodity Credit Corporation.

After setting forth some of the difficulties of the growers in disposing of the 1937 raisin crop, and the financial assistance of Commodity Credit Corporation in marketing that crop, it was alleged that on or about and prior to September 1, 1938, the Proration Program Committee of the Zone and the directors of Raisin Proration Association negotiated with Commodity Credit Corporation and applied for a loan of $9,000,000 to be made available to Raisin Proration Association, the California corporation, in the form of non-recourse loans to producers of raisins in the Zone who desired the same to aid in stabilizing the prices to be received by all producers of raisins within the Zone. It was alleged that pursuant to notice a meeting of all the growers within the Zone was called by the Agricultural Prorate Commission of California to consider amendments to and modification of the existing raisin program; that such meeting was held on September 7, 1938; "that on or about September 10, 1938, the Commission duly made its Order and Decision, approving said program as amended and modified at said hearing; that, among other things, the said program as modified and amended and as approved by the Commission authorized the pledging or hypothecation of raisins in the stabilization pool to Commodity in order to secure loans made to the Committee and the Association for the purpose of handling and storing said stabilization pool raisins, and also for the purpose of providing further security for loans or advances proposed to be made to such producers as desired same."

It was further alleged that on September 12, 1938, the Proration Program Committee of the Zone adopted the resolution, hereinbefore described, setting forth the proration program; that the Agricultural Prorate Commission of California, the Proration Program Committee of the Zone and the Board of Directors of the Raisin Proration Association all assured Commodity Credit Corporation that the Zone and its Proration Program Committee, and the Raisin Proration Association and its board of directors, had power and authority under the Agricultural Proration Act of 1933, as amended, to pledge and hypothecate the twenty per cent of the raisins produced, which was to constitute the stabilization pool, as additional security for the non-recourse loans which Commodity Credit Corporation proposed to make; that Commodity Credit Corporation relied on these representations and on September 24, 1938, adopted and promulgated its resolution, heretofore referred to, whereby it agreed to make available to Raisin Proration Association (the California corporation) an amount not to exceed $9,000,000 upon the security described in that resolution; that on October 10, 1938, Commodity Credit Corporation accepted and received from Raisin Proration Association its promissory note for $9,000,000, payable on or before November 1, 1939, such sum to be available for making the non-recourse loans to growers desiring the same; that relying on the assurances of lawful authority to make the agreement hereinbefore referred to, Commodity Credit Corporation executed the pledge agreement with the Proration Program Committee of the Zone, and with Raisin Proration Association, whereby all raisins in the stabilization pool should be delivered by the Zone to the Raisin Proration Association and be pledged and hypothecated by it to Commodity Credit Corporation as added security for the loans made to growers; that Commodity Credit Corporation advanced to Raisin Proration Association $3,000,000 which was used by it in making non-recourse loans of $50 per ton on the free raisins of growers desiring such loans; that approximately 2500 growers of raisins made such non-recourse loans and delivered approximately 54,919 tons of free raisins into a free raisin pool as security for such loans; "that, pursuant to agreement between Commodity and the (Raisin Proration) Association, Commodity agreed to advance, and did advance and lend, to the Zone and Association not to exceed the sum of $4.00 per ton for carrying charges of the stabilization pool raisins, including storage, insurance, and handling expenses incurred in operating such pool, and received from said Zone and Association the pledge and hypothecation of the stabilization pool raisins as security therefor."

It was also alleged that all of the raisins in the free raisin pool had been sold and those in the stabilization pool either had been sold or were contracted for sale and that a large amount of money advanced by Commodity Credit Corporation to those growers making the non-recourse loans remained unpaid with no source of payment of that balance being available.

The balance of this defense contains allegations upon which Commodity Credit Corporation relies to estop plaintiff and his associates from maintaining this action. It is alleged that, from September 7, 1938, plaintiff knew, or had the opportunity of knowing the financing plan adopted; that he made no objection thereto and consented to, acquiesced in and ratified it, including the pledge of his raisins in the stabilization pool to secure the non-recourse loans to other growers; that he had eighty tons of free raisins and twenty tons of raisins in the stabilization pool; that he sold his free raisins in the usual channels of trade at a price considerably in excess of the price he would have received but for the financing made possible by the money advanced by Commodity Credit Corporation; that plaintiff and all other growers in the Zone, having knowledge or means of knowledge of the financing plan put into effect, having largely benefitted thereby and having stood by while the money furnished by Commodity Credit Corporation was expended for their benefit and the benefit of all other growers in the Zone, are estopped from denying the legality of the pledge of their stabilization pool raisins to secure the non-recourse loans made to other growers.

In a third defense it was alleged that Commodity Credit Corporation had advanced and loaned to the Zone and to Raisin Proration Association the sum of $226,418.11 to be used, and which was used, in handling, storing, insuring and otherwise caring for the raisins in the stabilization pool; that no part of this sum had been repaid.

As a fourth defense it was alleged that there was no other grower of raisins in the Zone who was similarly situated as to the stabilization pool raisins as plaintiff and that he could not bring a class or representative action and could only bring an action for himself.

As a fifth defense Commodity Credit Corporation incorporated all of the allegations of its second defense therein and alleged that the cause of action was barred by the provisions of section 17 of the Agricultural Proration Act of 1933 as amended.

As a sixth defense Commodity Credit Corporation pleaded laches.

All defendants except Commodity Credit Corporation and Sun-Maid Raisin Growers of California joined in a separate answer containing two separate defenses which did not materially differ from the first and second defenses of Commodity Credit Corporation except in containing somewhat more detail.

The resolution of Commodity Credit Corporation made the manager or acting manager of the San Francisco Loan Agency of Reconstruction Finance Corporation its agent in connection with the $9,000,000 loan to the Raisin Proration Association and the loans to individual growers. It provided Raisin Proration Association should execute a note for $9,000,000, payable November 1, 1938, bearing interest at four per cent per annum, payable quarterly; that each advance made to an individual grower be endorsed on this note as credit; that $50 per ton be advanced to growers desiring such loan on non-recourse agreements signed by each grower assigning his free raisins as well as his raisins in the stabilization pool as security for the loan; that the raisins be stored and insured.

The agreement to which a copy of the resolution is attached provided that all raisins in the stabilization pool be delivered to Raisin Proration Association and be pledged by it to Commodity Credit Corporation to secure the loans to the individual growers. This pledge agreement contained the following: "Commodity may sell all or any part of the pledged raisins at any time, without demand or notice, at one or more pledge sales (which may be public or private, as determined by Commodity) on such terms and for such prices as Commodity may deem fair, subject only to the same restrictions as if such raisins were sold or otherwise disposed of by the Committee or the Association, or Commodity may release all or any part of such surplus raisins to the Association on trust receipt for disposition and the net sales proceeds upon such disposition will be remitted by the Association promptly to Commodity."

The material factual situation presented by these involved pleadings may be summarized as follows: That the Agricultural Prorate Commission of California was duly and regularly appointed as an existing agency of the State of California; that the Zone was regularly organized under the provisions of the Agricultural Proration Act; that there was adopted pursuant to that act an agricultural prorate marketing program for the Zone which was approved by the Agricultural Prorate Commission;

that the resolution of the Proration Program Committee adopting this program contained nothing concerning loans to individual growers in the Zone or a pledge of the raisins in the stabilization pool to secure such loans; that Raisin Proration Association, a nonprofit California corporation, was organized with its directorate composed of the members of the Proration Program Committee of the Zone; that these directors negotiated with Commodity Credit Corporation for loans of $50 per ton on the free raisins of growers in the Zone who desired such loans which served as a floor under the price of raisins keeping the price equal to or above that figure; that Commodity Credit Corporation agreed to supply $9,000,000 for such loans; that the Zone delivered the raisins in the stabilization pool to Raisin Proration Association which pledged them to Commodity Credit Corporation as security for such loans; that about $3,000,000 was actually loaned to individual growers through Raisin Proration Association which acted as the conduit through which the money for each loan flowed; that each grower making a loan executed a non-recourse agreement pledging his free raisins and his raisins in the stabilization pool as security with authority given to Commodity Credit Corporation to foreclose the pledge and sell the pledged raisins under restrictions already mentioned; that in excess of fifty-two per cent of the growers in the Zone made loans and executed the non-recourse contracts; that in excess of forty-seven per cent of the growers in the Zone, of which plaintiff was one, did not make loans, but sold their free raisins in the open market; (these percentages are admitted in all the briefs); that plaintiff and other non-borrowing growers had no actual knowledge of the pledge of his stabilization pool raisins when the pledge was made but had available means of acquiring that knowledge; that all of the pledged raisins have been sold but there remains a considerable balance unpaid to Commodity Credit Corporation on loans to individual growers after crediting thereon all receipts from the pledged raisins; that Commodity Credit Corporation advanced $226,418.11 which was used in paying the expenses incurred by Raisin Proration Association in handling, storing, insuring and caring for raisins delivered into the stabilization pool, no part of which sum has been repaid.

The trial court on motion of plaintiff struck out the allegations in the first defense of Commodity Credit Corporation and the other answering defendants to the effect that plaintiff and his associates had consented to, acquiesced in and ratified the agreement for the pledge of their raisins in the stabilization pool to secure the loans made to borrowing growers. It also struck out from both answers the defenses of estoppel and all the other special defenses numbered three to six, inclusive, in the answer of Commodity Credit Corporation.

The motion for judgment on the pleadings was then granted and an interlocutory judgment entered in favor of plaintiff and his associates and an accounting was ordered. To obviate the long accounting it was stipulated that the Zone should prepare and file a report showing the data as to which an accounting was ordered. Defendants reserved their rights to appeal and urge any grounds on the appeal which they might have done had the stipulation not been entered into.

This account was filed. Attached to it was a list of the names of four thousand twenty-six non-borrowing growers who had contributed raisins to the stabilization pool and the quantity delivered by each. This list contains the names of two defendants who were members of the Proration Program Committee of the Zone and of the board of directors of the Raisin Proration Association.

The report showed that there was a balance of $145,166.04 remaining from the sale of the raisins of the non-borrowing growers in the stabilization pool after deducting all charges and expenses charged against that pool. $56,281.27 of that amount was paid into court to await disposition on final judgment in this case and judgment was rendered against Commodity Credit Corporation for the balance.

The first important question argued by counsel is the authority of the Zone to pledge the raisins of non-borrowing growers in the stabilization pool to secure the debts of the borrowing growers. In this connection it should be observed that the pledge was not made by the Zone but by an independent corporation to which the Zone had delivered the raisins. The loans were not made to the Zone or by the Zone to borrowing growers but through an independent corporation to individual growers.

[1] The Agricultural Proration Act has been held constitutional by both the State and Federal courts so that question is settled. See, Agricultural Prorate Commission of California v. Superior Court, 5 Cal.

2d 550, 55 P.2d 495; Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 312, 87 L.Ed. —.

In the opinion in the Parker case we find the following: "The committee is authorized to pledge the raisins held in those pools in order to secure funds to finance pool operations and make advances to growers." The question of the pledge of the raisins was not an issue and was not involved in that case. The cause of action in that case arose after the amendments of 1939 went into effect and whether or not those amendments lend support to the quoted statement is not important here. In the instant case it is sufficient to say that the provisions of the act in effect in 1938 contained no language giving express authority to the Zone or to the Proration Program Committee to pledge any of the stabilization pool raisins to secure loans to any one. This seems to be admitted by counsel for all parties. It is argued by defendants that the pledge of the stabilization pool raisins must be implied and incidental power flowing from the express powers granted to the Proration Program Committee of the Zone and necessary to carrying out and accomplishing the purpose of the act which is to withhold from the market, surplusses that would glut it and crowd prices down to a point below the cost of production. It is argued that to accomplish this the Proration Program Committee has almost unlimited power to deal with surplus raisins so long as its acts do not violate the express provisions of the Agricultural Proration Act. In this connection it is also argued that the Zone is not trustee for the growers in handling the surplus raisins in the stabilization pool so that plaintiff and his associates cannot demand an accounting of any funds derived from their sale.

The powers granted the Proration Program Committee are set forth in section 19.1 of the act, St.1935, p. 1537, from which we quote the following:

"In any marketing program approved by the commission, a program committee shall be empowered to determine the method, manner and extent of proration and the movement of the prorated commodity from harvest into a primary channel of distribution. * * *

"(a) To establish and maintain surplus pools which shall be authorized to receive from each producer from time to time his surplus of the prorated commodity and market the same by grades for the account of the producer when it can be advantageously disposed of either in its original or some converted state; provided, however, such surplus shall not be marketed in any form which would directly compete with that part of the crop which is regularly certificated; and provided, further, that any part of any such surplus may be turned over by a program committee to charitable organizations, self-help cooperatives, and similar agencies under proper safeguards to prevent any part of the commodity so disposed of from directly competing with the part of the crop marketed through the usual channels of trade. In operating any such surplus pools, a program committee may fix grading, packing, and servicing charges to be assessed against such commodities received by the pool and requiring such surplus pool, a program committee shall handle all commodities received by a surplus pool and account for the same on a pooled basis. Each producer delivering his surplus to a pool shall be credited for his proportionate share of the surplus so delivered.

"(b) To create, establish or otherwise obtain and operate facilities for the grading, packing, servicing, processing, preparing for market and disposal of such surplus in such manner as to maintain stability in the markets and to sell such surplus and/or any of its derived products. * * *

"The cost of the exercise of such powers as are herein granted to the program committee shall be a part of the cost of the operation of the program and shall be obtained through fees in the same manner as other costs of the program."

The act provides for the appointment of an agent for the Zone by the Proration Program Committee. This agent is entrusted with the primary administration of the proration program. Section 20 of the act, St.1935 p. 1539, requires the agent to issue to each producer primary and secondary certificates. The primary certificate indicates the total volume of free raisins each producer may dispose of. The secondary certificate entitles each grower to place in the primary channels of trade the quantity of free raisins therein specified, not to exceed the total of his free raisins specified in the primary certificate.

Section 21 of the act, St.1935, p. 2089, requires the agent to "collect for each certificate issued to the producers, a reasonable and proportional fee to be fixed by the program committee so calculated as to produce the expenses of the administration of the program, the costs of the institution of the program, and a proper proportion of the cost of the maintenance of the commission which shall be fifteen per cent of the fees collected for certificates, by the agent of the zone unless the commission determines that a lesser precentage will provide sufficient revenue for its maintenance." This is the only provision in the act which provides a fund with which to pay the administrative and other costs of the Agricultural Prorate Commission and the Zone. The purpose of these fees is expressly to defray the costs (1) of initiating the program, (2) the maintenance of the Agricultural Prorate Commission, and (3) the administration of the program.

[2] We cannot agree with the argument of defendants to the effect that the act grants to the Proration Program Committee general implied powers to deal with the surplus raisins in the stabilization pool in any manner it desires in order to stabilize the market price of the free raisins at a point above the cost of production. While it is the purpose of the act to stabilize prices, it is clear from its provisions that this purpose is to be accomplished by removing the surplus raisins from the channels of trade until the free raisins are marketed. If those free raisins are marketed before the end of a marketing season it would seem to be the duty of the Proration Program Committee to market the surplus raisins in the stabilization pool, or as many of them as may be sold "by grades for the account of the producer when it can be advantageously disposed of either in its original or some converted state." If they cannot be so marketed it seems clear that the whole or any part of the raisins in the stabilization pool may be turned over, given, if necessary, to charitable organizations, self-help cooperatives, and similar agencies under restrictions preventing the surplus raisins from competing with the free raisins in the usual channels of trade.

[3] The act requires the Proration Program Committee to handle the surplus raisins in the stabilization pool and to account for them on a pooled basis. This clearly implies an obligation to account to each producer for his raisins in the stabilization pool for he is to be "credited for his proportionate share of the surplus so delivered" into the stabilization pool.

This language clearly imports an agency on the part of the Zone and its Proration Program Committee to receive and dispose of the raisins in the stabilization pool for the benefit of the growers who are the owners of at least an equitable interest in them. It also creates the obligation to account to the growers for the net receipts, if any, derived from the disposition of the surplus raisins.

Defendants argue that the relation created is not that of a trust. They contend that "clearly the Zone and the Program Committee were not trustees of a formal or statutory trust for the benefit of contributors to the stabilization pool nor were the contributors as such cestuis of a trust. On the contrary the Agricultural Prorate Commission and the Program Committee were official administrative agencies of the State of California and the members of these agencies were officers of the State. In inaugurating and carrying out a prorate program they were acting in behalf of the State and for the public at large and not primarily for the benefit of the contributors to the stabilization pool."

This argument lacks convincing force and is not borne out by the clear language of the statute. Whether the relationship created be called that of a trust or by some other name, it possesses the characteristics of a true trust. The corpus is created and is composed of the surplus raisins in the stabilization pool. This corpus is placed in the possession of the Proration Program Committee with the power of sale or other disposition under the limitations imposed. The Proration Program Committee is required to account for the same on a pooled basis to the beneficiaries who are the growers having surplus raisins in the stabilization pool. We can see no reason why such a trust may not be created by statute. Nor can we see why the mere fact that its operation might benefit all the people of the State by improving the financial condition of the raisin growers, should be a sufficient reason for the defeat of the clear purposes of the statute in creating such a trust. It was primarily for the benefit of the raisin growers, who form an important class of the population of the State, with a secondary benefit to the other inhabitants of the State.

Defendants argue that since the Proration Program Committee is empowered by the act to give surplus raisins in the stabilization pool to charitable and like institutions, under the restriction that the raisins given away do not compete with the free raisins in the usual channels of trade, the power to pledge those raisins to Commodity Credit Corporation for a loan should be implied.

This argument divides into two separate heads: First: There is the loan of about $3,000,000 to the individual growers who borrowed parts of this sum from Commodity Credit Corporation, each borrowing grower giving to it a non-recourse agreement whereby he pledged his free raisins, and his surplus raisins in the stabilization pool, as security for the loan to him, and where Raisin Proration Association, a private non-profit corporation, and not the Zone nor the Proration Program Committee, pledged the raisins in the stabilization pool placed there by non-borrowing growers as further security for the loans to borrowing growers. The second question is the right to pledge the raisins in the stabilization pool to secure the loan of $226,418.11, made by Commodity Credit Corporation to the Zone and Raisin Proration Association to pay the expenses of handling, storing, insuring and otherwise caring for the raisins in the stabilization pool. This will be considered when we come to the order of the trial court striking out the third separate defense of Commodity Credit Corporation.

[4] The arguments, by defendants, that the Agricultural Proration Act gives the Zone the implied power and authority to pledge the raisins in the stabilization pool to secure debts is based upon the express authority given to turn over and to "dispose of" (give away, as they argue) those raisins. This authority is contained in the second paragraph of section 19.1 of the act already quoted.

We believe that the expressions "turn over" and "dispose of", as they are used in this paragraph, must be given synonymous meanings. We agree that these expressions must include the right to give the raisins away. See "dispose of", Black's Law Dictionary; State v. Deusting, 33 Minn. 102, 22 N.W. 442, 53 Am.Rep. 12; Scott v. State, 6 Ga.App. 332, 64 S.E. 1005. But the right to give the surplus raisins away is strictly limited in this paragraph of the section so that the gift may be made only to charitable and other similar organizations and then only upon condition that those raisins will not compete with the free raisins in the usual channels of trade. The raisins were first delivered by the Zone to the Raisin Proration Association, a non-profit California corporation. There is no intimation in the record that this corporation could be classed as a charitable organization, or as a self-help corporation, so a gift to it would not have been authorized under the statute. This corporation pledged these raisins to Commodity Credit Corporation. There is no claim that Commodity Credit Corporation is a charitable organization nor a self-help cooperative even though its lavish use of public funds might have indicated that some of its officers had charitable impulses.

[5] The third paragraph of section 19.1 of the act empowered the Zone to acquire and operate facilities for preparing for market and disposal of the stabilization pool raisins in any manner so as to maintain market stability and to sell them. This paragraph must be read as a whole and its language construed together. Its purpose seems to be to give the Zone latitude in preparing for market and disposing of the surplus raisins within the limitation of the last conjunctive clause "and to sell such surplus and/or any of its derived products". The language used would seem to indicate an intention on the part of the legislature to give the Zone rather broad powers in preparing the surplus raisins for market, either as raisins or in some converted form, and in selling them for the benefit of the producer.

[6, 7] It is a cardinal rule of construction of statutes that when they are free from ambiguity and their meaning is clear there is no need for interpretation by the courts. In such cases the courts should not legislate by extending the clear meaning of the language used by the legislature but should give effect to that language as it is used in the statute and give to the words their common and ordinary meaning. Davis v. Hart, 123 Cal. 384, 55 P. 1060; Frinier v. C. J. Kubach Co., 177 Cal. 722, 171 P. 952; Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868; McNamara v. Steckman, 202 Cal. 569, 262 P. 297. The same rule is recognized in the Federal courts. United States v. Missouri Pac. R. Co., 278 U.S. 269, 49 S.Ct. 133, 73 L.Ed. 322; Commissioner v. Gottlieb, 265 U.S. 310, 44 S.Ct. 528, 68 L.Ed. 1031; In re Kunkle, D.C., 40 F.2d 563.

[8] We can see nothing obscure, uncertain or ambiguous in the language used in the Agricultural Proration Act. Its purposes are clearly set forth. They are to stabilize the market price of an agri-

cultural product by withholding from market the surplus portion of the crop that cannot be marketed without crowding the market price of the commodity below the cost of production. That end is to be accomplished in the manner already set forth. The whole plan is to sustain the market price by withholding the surplus and by feeding into the market the amount of free raisins it will conveniently absorb, thus maintaining the price under the familiar law of supply and demand. The Agricultural Proration Act being clear and unambiguous we cannot read into its provisions powers which the legislature failed to include.

[**9, 10**] Defendants maintain that the power to make the loans and pledge the stabilization pool raisins to secure their payment must be implied from the provisions of the act. "An intention to legislate by implication is not to be presumed." First M. E. Church v. Los Angeles County, 204 Cal. 201, 267 P. 703, 704; Crowell v. Gilmore, 18 Cal. 370. There must be some direct connection between the powers sought to be implied and the powers expressly granted, and the implied powers must be necessary to carry out the inherent and express powers granted by the act. In re Allowance of Myers' Claim by Board of County Commissioners, 146 Minn. 103, 177 N.W. 1013.

Here the express purpose of the act is to stabilize the market price of raisins by determining the quantity the market can absorb and withholding the surplus from the market until the free raisins have passed into the hands of purchasers so that the surplus raisins cannot compete with them. The methods to be used in obtaining this end are clearly set forth in the act and ample powers to accomplish that purpose by use of those methods are granted.

The methods here used to effect the loans to the individual growers are entirely without the machinery set up in the act for the stabilization of the price of raisins. The Zone did not make the loan, or loans, and did not pledge the raisins in the stabilization pool to secure its, or their, repayment. It surrendered possession of those raisins to a private corporation which executed a promissory note for $9,000,000 payable to Commodity Credit Corporation. That private corporation did not receive, and was not intended to receive, as its own, any part of this money which it promised to pay. It served as the conduit through which passed the money loaned to individual borrowing growers by Commodity Credit Corporation. It received credit on its note for money it did not repay to Commodity Credit Corporation but which that corporation loaned to individual growers. These were non-recourse loans and each was secured by the pledge of each borrowing grower of his free raisins in the stabilization pool. The loans were also secured by an attempted pledge of the stabilization pool raisins by the private corporation to which they had been delivered by the Zone.

[**11**] As far as the pleadings are concerned the only connection the Zone had with the transaction was the activity of its Proration Program Committee, the members of which also constituted the board of directors of the private corporation, in negotiating with Commodity Credit Corporation to furnish money for financing these loans and the surrender of the raisins in the stabilization pool to the private corporation. The Zone then passed out of the picture and thereafter the transaction became one between Commodity Credit Corporation, the private corporation and the borrowing growers. This transaction was private in its nature and entirely without the contemplation of anything in the Agricultural Proration Act. None of the powers assumed and used in this complicated transaction were necessary to carry out the inherent or express powers granted by that act and it would be judicial legislation of the worst kind to hold that those powers were granted by implication. We must hold that the transaction we have described, whereby the raisins of plaintiff and his associates in the stabilization pool were pledged by Raisin Proration Association, a private corporation, to secure the note of the private corporation for money which it did not receive, and the debts of borrowing growers, were unauthorized by any express or implied powers granted by the Agricultural Proration Act.

We are fortified in this conclusion by the case of Hawxhurst v. Rathgeb, 119 Cal. 531, 51 P. 846, 847, 63 Am.St.Rep. 142, where an agent entrusted with securities pledged them as security for his own debt. The Supreme Court there said: "This transaction was not within the terms of the power conferred. The language of the power was, 'to sell, transfer, and release two certain mortgages executed by Gotthard Kunz (describing them); to indorse and transfer the notes secured by said mortgage; to sell and transfer my claims for said notes and mortgages filed in the superior court of said San Luis Obispo county, state of California, in the matter of the estate of said Gotthard Kunz, now deceased; and to receive payment of said claims, and give acquittances therefor.' The effect of this language was to confer a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of Kunz. There is nothing in the language which by any proper construction purports to confer a power to pledge or hypothecate the securities for any purpose, or to borrow money thereon. The words 'sell and transfer', as there used, are of no broader signification than the words 'sell and convey,' used with reference to a conveyance of real estate; and the latter, employed as the operative words in a power to convey land, do not carry authority to mortgage or otherwise dispose of the property."

We will next consider the third separate defense of Commodity Credit Corporation which was stricken out on motion of plaintiff. This defense alleged that on October 15, 1938, Commodity Credit Corporation, Raisin Proration Association and the Zone entered into an agreement whereby Commodity Credit Corporation agreed with the Zone and Raisin Proration Association to advance the sum of $4.00 per ton to be used in handling, storing, insuring and otherwise caring for raisins to be delivered into the stabilization pool; that it did advance $226,418.11 to the Zone and Raisin Proration Association which was used for such purposes; that no part of that sum has been repaid.

The creation of the stabilization pool and the delivery of surplus raisins into it was expressly authorized by the Agricultural Proration Act. The Zone was given power to create, establish or otherwise obtain and operate facilities for grading, packing, servicing, processing, preparing for market and disposing of, in a certain manner, the raisins in the stabilization pool and to assess grading, packing and servicing charges against those raisins requiring such handling.

Also the Zone was required to receive the surplus raisins in the stabilization pool and keep them off the market for a time at least. This would require storing or warehousing these raisins during that time. It is clear there would be an expense in connection with this operation as well as expenses in connection with preparing those raisins for market. While such costs and charges were "to be assessed against such commodities" it would seem that the act failed to provide an immediate fund to pay those expenses as they accrued as the assessments might not be collected until the surplus raisins were disposed of.

[12] As the direct duty of caring for, processing and selling (if possible) these raisins is expressly placed on the Zone, it would seem to follow that the power to borrow money to pay those charges, if other funds were not available, must be implied as the borrowing of such money might have been necessary to carry out the duties expressly placed on the Zone by the statute. As was said in Southern Pac. R. Co. v. Stibbens, 103 Cal.App. 664, at page 678, 285 P. 374, at page 379: "The duties of a public officer include, not only those which lie within the direct definition of the statute, but also those which are necessary to the accomplishment of the purpose of his office, even though they may be an incident of his main duties, where they promote the execution of a mandate of law."

The exact status of the Raisin Proration Association in this part of the transaction is not made very clear by the pleadings. Whether or not the money advanced to it and used by it to care for the stabilization pool raisins may be set off by Commodity Credit Corporation against any judgment obtained by plaintiff and his associates may be left to the trial court when the cause is returned for trial. It is sufficient to reach the conclusion here that it was error to strike out this defense and to grant a motion for judgment on the pleadings in its absence from the answer of the Commodity Credit Corporation.

We may now proceed to consider the defenses of consent to, acquiescence in, and ratification of the agreement to pledge the stabilization pool raisins as well as the estoppel of plaintiff and his associates to maintain that the pledge of their raisins was illegal and void. These several defenses are so closely related here and rely on similar allegations of the answers that we will not extend this opinion by considering them separately although the elements of the several defenses may not be the same in every case. Acquiescence, consent and ratification may sometimes amount to equitable estoppel. 10 Cal.Jur. 625, sec. 13.

Plaintiff seeks to support the ruling of the trial court on the ground that the pledge of the stabilization pool raisins was void and contrary to law. In support of this argument he quotes the first two sentences of section 11, 10 Cal.Jur. p. 623, and cites the case of Silverthorne v. Percey, 120 Cal. App. 83, 7 P.2d 746; Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A., N.S., 244, 20 Ann.Cas. 158; Raisch v. City and County of San Francisco, 80 Cal. 1, 22 P. 22; Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670, and Edge v. City of Lexington, 277 Ky. 750, 127 S.W.2d 393.

The author of the quoted paragraph of California Jurisprudence cites Lukens v. Nye, supra, in support of the text. In that case the legislature passed a bill appropriating money to pay a claim against the State. The Governor signed the bill but before doing so exacted a contract from the claimant to accept in full payment an amount considerably less than the amount appropriated and directed to be paid in the approved bill. In holding this void and thus not furnishing any basis of estoppel against the claimant, the court said [156 Cal. 498, 105 P. 596, 36 L.R.A.,N.S., 244, 20 Ann.Cas. 158]:

> "The Constitution expressly declares that no payment of public funds shall be made upon any claim against the state, under any contract made without express authority of law, and that all unauthorized agreements or contracts therefor shall be null and void. Article 4, § 32. The entire proceeding was clearly contrary to public policy.
>
> "The agreement in question being wholly void, and also against public policy, it cannot be the foundation for an estoppel."

[13] The other California cases cited by plaintiff involved void acts that were either contrary to express statutes or against public policy or both. It is thoroughly settled that an estoppel cannot arise under such circumstances and this is all that is held by those cases relied upon by plaintiff.

[14] We have no such situation here. There is no provision in the Agricultural Proration Act prohibiting individual growers from borrowing money and pledging their free raisins for security. Nor does the act contain any provision prohibiting a borrowing grower from encumbering his interest in his raisins in the stabilization pool subject to the right of the zone to dispose of them as provided in the act. Those transactions are not prohibited by any law called to our attention and may be regarded here as private transactions between the borrowing growers and the Commodity Credit Corporation entirely without the purview of the Agricultural Proration Act. There is no express and direct provision of law prohibiting the Zone from pledging the stabilization pool raisins of the non-borrowing growers as added security for the debts of the borrowing growers. As such a pledge was not within the powers granted the Zone, either expressly or by implication, we regard the attempted pledge as invalid because it was an unauthorized act and not because it was in violation of an express statute. There is a vast difference in effect between an unauthorized act in excess of a power and an unlawful act contrary to law or to public policy. The former may be ratified and form the basis of an estoppel while the latter cannot. California C. P. Growers v. Harkey, 11 Cal.2d 188, 78 P.2d 1137; Julian v. Schwartz, 16 Cal.App.2d 310, 60 P.2d 887; New York Life Ins. Co. v. Occidental Pet. Corp., 43 Cal.App.2d 747, 111 P.2d 707; Carlston v. Shenson, 47 Cal.App. 2d 52, 117 P.2d 408; Lukens v. Nye, supra.

In this case defendants have pleaded estoppel by silent acquiescence in acts which were not contrary to express statutory provisions nor against public policy but which were in excess of authority. If the other elements of estoppel, acquiescence and ratification were properly pleaded the trial court erred in striking out those portions of the answers.

Plaintiff maintains there can be no estoppel here because, (1) he and his associates did nothing which "led or induced another to do that which he otherwise would not have done", and (2) that Commodity Credit Corporation relied on misrepresentations of law which do not form a proper basis for estoppel and that those representations were neither made by plaintiff nor his associates.

[15] It is true that plaintiff did nothing affirmatively to mislead Commodity Credit Corporation. He simply stood by silent and inactive while Commodity Credit Corporation loaned about $3,000,000 to growers on security partly composed of plaintiff's raisins in the stabilization pool. Silence and inaction may form the basis for an estoppel where the person against

whom the estoppel is invoked in good conscience and good morals should have spoken or acted. Julian v. Schwartz, supra; New York Life Ins. Co. v. Occidental Pet. Corp., supra; 10 Cal.Jur. 631, sec. 16.

It is true that plaintiff personally was not a party to the contracts made by the borrowing growers, Raisin Proration Association and the Zone with Commodity Credit Corporation, but the Zone took an active part in the plan in delivering the raisins to Raisin Proration Association for pledge and plaintiff maintains the Zone was his trustee. If plaintiff had knowledge of these transactions and was to profit from them, as alleged, it seems to us he should have objected to the pledge of his raisins if he did not approve the plan, before Commodity Credit Corporation had loaned very large sums of money to borrowing growers, the total of which it now appears it cannot recover. This may well be a case where plaintiff should in good conscience and morals have spoken and acted, or, upon failing to have done so, be estopped from contesting the legality of the transaction. If plaintiff should have spoken or acted and if his silence and inaction misled Commodity Credit Corporation to its damage, and plaintiff profited thereby, a case for the application of the doctrine of estoppel was presented.

It is urged by plaintiff that the Agricultural Prorate Commission, the Proration Program Committee and the board of directors of Raisin Proration Association, upon advice of the Attorney General of California given in a letter dated August 8, 1938, advised Commodity Credit Corporation that there was legal authority for the pledge of the raisins in the stabilization pool for the loans made to the individual growers; that plaintiff and his associates did not join in these representations and cannot be bound by them; that these representations were made concerning matters of law and not of fact; that misrepresentation as to matters of law ordinarily cannot form the basis for an estoppel.

[16] Subject to certain exceptions not important here, misrepresentations as to matters of law afford no sufficient basis for an estoppel. 10 Cal.Jur. 630. However this does not answer the problem before us. The misrepresentation charged against plaintiff was his failure to object to the pledge of his raisins in the stabilization pool to secure the debts of others thus giving rise to the belief that he consented to, acquiesced in, and ratified such a pledge. This was not a representation that he considered the pledge lawful, but was a representation of a fact and may be sufficient, if proved, to establish the defense of estoppel.

[17] We therefore conclude that the defenses of consent, acquiescence, ratification and estoppel were available to defendants and should not have been stricken from their answers.

[18, 19] Laches is a plea that is available to a party in a court of equity. It was defined in Cahill v. Superior Court, 145 Cal. 42, 78 P. 467, 469, as follows: "'Laches' is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' [18] Am. & Eng.Ency. of Law, 2d Ed., p. 97. 'In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay.'"

While laches is not the same as estoppel it has been called quasi estoppel. Although the rules governing equitable estoppel do not apply to laches (Bell v. Hudson, 73 Cal. 285, 14 P. 791, 9 Am.St.Rep. 791) they both may involve acquiescence and consent. Under the facts pleaded in the answer of Commodity Credit Corporation, the defenses of laches and estoppel are so closely related that no good could be accomplished by considering the defense of laches in detail. It should be sufficient to say that this defense should have been made available to Commodity Credit Corporation and that it was error to strike that defense from the answer.

Commodity Credit Corporation strenuously argues that the allegations of the complaint are insufficient in law to permit plaintiff to maintain a class or representative action to recover for non-borrowing growers other than himself. It urges that the complaint fails to allege there were many non-borrowing growers who stood in the same position as plaintiff, for whom he could act. It asserts that the only allegations on this subject are those contained in paragraph thirteen of the complaint, which we have quoted. Were this true there would be much justification for this argument. In this connection it must be admitted that the allegations on this subject could have been much more clear and specific.

[20] Section 382 of the Code of Civil Procedure provides in part that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." It is clear that either or both of the factors set forth in the section must appear from the allegations of the complaint. The question must be one of common or general interest of many persons or the parties must be so numerous that it is impracticable to bring them all before the court.

[21, 22] We are permitted to take judicial notice of facts concerning the raisin industry of California. Agricultural Prorate Commission v. Superior Court, supra; Parker v. Brown, supra. It is a matter of common knowledge to each one of us and to every inhabitant of those counties composing the Zone that there are many thousands of persons engaged in the growing of raisin grapes in those counties. The questions presented here which involve the Raisin Proration Program, adopted and put into effect, must have been of common and general interest to all of those growers because the stabilization of the market price they would receive for their raisins depended to a considerable extent on the details of the marketing program, some of which are before us for consideration.

Further, we believe that the fair implication may be drawn from paragraphs seven, ten, eleven, twelve, and thirteen of the complaint that there were many growers having raisins in the stabilization pool who had not borrowed from Commodity Credit Corporation and so occupied positions similar to that of plaintiff in so far as this action is concerned.

[23, 24] Plaintiff points out that the judgment discloses that two members of the Proration Program Committee of the Zone, who were directors of Raisin Proration Association and as such negotiated with Commodity Credit Corporation, were nonborrowing growers and were given judgment against Commodity Credit Corporation. It is argued that at least these growers should be estopped from obtaining such judgment. On the face of the record, including the judgment, this argument would seem to possess considerable merit. However the sufficiency of a complaint is to be judged by the allegations it contains. Estoppel is usually an affirmative defense that should be pleaded by a defendant. It may defeat the cause of action set up in the complaint. The purpose of estoppel is not to test the sufficiency of a complaint but to defeat the cause of action set forth in it. If these two growers, and others, be estopped to bring the action or benefit by the judgment, this is a matter to be determined at the trial either because of failure of proof on the part of plaintiff or of successful defense. Such growers might be permitted to intervene in the action if they so desire or to join in its defense.

There are numerous cases in this State involving the right to bring class or representative actions. We cite the following which support the conclusions we have reached. Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841; Coachella Valley County Water Dist. v. Stevens, 206 Cal. 400, 274 P. 538; Peterson v. Donelley, 33 Cal.App.2d 133, 91 P.2d 123.

Commodity Credit Corporation pleaded the defense of the limitation on the time of bringing the action contained in section 17 of the Agricultural Proration Act. That section in effect in 1938, provided as follows: "Any order of the commission instituting a proration program and any other order of the commission substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within thirty days after the effective date of the order complained of or within thirty days after the injurious effect complained of." (Stats.1935, p. 1535.)

This section was amended by the legislature in 1939, Stats.1939, p. 2495, to read as follows: "Any order of the director instituting a proration program and any other order of the commission or director substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within thirty days after the effective date of the order complained of."

This amendment went into effect on September 19, 1939, so it had been in full force and effect for almost six months when this action was filed.

The section in effect in 1938 when the proration program was adopted, and when the attempted pledge of the raisins in the stabilization pool was made, contained two limitations on the time in which an order of the Agricultural Prorate Commission could be reviewed. One was thirty days after the effective date of the order. The other was thirty days after such an order had injuriously affected a complaining party. Thus, as applicable here, the limitation on a review was not necessarily a fixed thirty day period after the order went into effect, but might be thirty days after it appeared that the order would injuriously affect the rights of plaintiff. Thus the date on which the plaintiff's right of action would be barred by the provisions of the section then in effect could not be fixed until the determination of the date that the order injuriously affected him.

The amendment of 1939 removed this uncertainty from the section and fixed the 30th day after the effective date of the order on or before which the proceeding to review it must be instituted. It seems to be clear that under some circumstances the 1939 amendment would materially shorten the time in which a plaintiff might seek to review an order of the Agricultural Prorate Commission such as we have before us here. The effective date of the order under attack was in September, 1938. If the 1939 amendment be given the exact effect of its language the proceeding to review the order would have been barred thirty days thereafter, or in October, 1938.

[25] No person has a vested right in any particular period of limitation. Ordinarily the determination of that period is within the sound discretion of the legislature which may lengthen or shorten it subject to the important exception thus stated in Edwards v. Kearzey, 96 U.S. 595, 603, 24 L.Ed. 793, as follows: "Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon preexisting contracts, which was part of their obligation, we should pronounce the statute void. Otherwise, we should abdicate the performance of one of our most important duties."

The same rule was announced in Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673, 674, as follows: "The authorities appear to be uniform in holding that the Legislature has the right to either lessen or lengthen a statute of limitations, subject only to the exception that an existing right cannot be cut off summarily, that is, without giving a reasonable time after the act becomes effective to exercise such right."

The general rules governing changes in periods of limitations of action are clearly stated in 34 Am.Juris. 29, et seq., secs. 21 to 26, inclusive. The cases there cited support those rules.

[26] By analogy the case of Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365, should govern the decision of the effective date of the bar of the statute under the 1939 amendment. In the Shea case one of the plaintiffs was injured in an accident which happened on April 19, 1931. In 1931 the legislature passed an act (Stats. 1931, p. 2475) requiring claimants to file a verified claim for damages sought to be recovered from a municipality. This act went into effect on August 14, 1931, more than ninety days after the happening of the accident so that it was impossible for the plaintiffs to comply with the language of the statute. A claim was filed on the 90th day after the effective date of the statute which was held to be compliance with it. The effect of that holding is this: Where a statute of limitation takes effect after a cause of action has accrued, and bars the remedy, the plaintiff will be given a reasonable time after such effective date in which to comply with its terms. The 90 days provided in the statute for filing the verified claim was held to be a reasonable time after the act went into effect within which to file the claim, and filing it within that time was held to be compliance.

When we apply the holding in the Shea case to the facts of the instant case we must conclude that the plaintiff had thirty days after the effective date of the amendment, or until October 19, 1939, in which to review the order in question. The question remains: Was this a reasonable time within which plaintiff could act to protect his rights?

What is a reasonable time within which to exercise a right has been the subject of a multitude of decisions in the courts of the various states and of the United States. It was remarked in Kinyon v. Kansas Soldiers' Compensation Board, 118 Kan. 367, 234 P. 949, that under some circumstances a period of three months within which to institute an action had been held insufficient, while under others a limitation restricted to thirty days had been upheld. Merely by way of illustration, we cite the following cases where limitations of from thirty days to eight months have been held reasonable: Randolph v. City of Springfield, 302 Mo. 33, 257 S.W. 449, 31 A.L.R. 612; Mulvey v. City of Boston, 197 Mass. 178, 83 N.E. 402, 14 Ann.Cas. 349; Osborne v. Lindstrom, 9 N.D. 1, 81 N.W. 72, 46 L.R.A. 715, 81 Am.St.Rep. 516; Steele v. Gann, 197 Ark. 480, 123 S.W.2d 520, 120 A.L.R. 754; Crawford v. Hunt, 41 Ariz. 229, 17 P.2d 802, and Wheeler v. Jackson, 137 U.S. 245, 11 S.Ct. 76, 34 L.Ed. 659, 664.

In California we have various statutes of repose. In certain street improvement proceedings a property owner must file objections in periods ranging from ten to thirty days or he will be considered to have waived non-jurisdictional objections. See Warren v. Russell, 129 Cal. 381, 62 P. 75; Williams v. Bergin, 108 Cal. 166, 41 P. 287; Smith v. Hazard, 110 Cal. 145, 42 P. 465; Chase v. Trout, 146 Cal. 350, 80 P. 81. A contest of an election, except on certain grounds, must be filed in thirty days (Sec. 8511, Elections Code, St.1939, p. 263; McClintock v. Abel, 21 Cal.App.2d 11, 68 P.2d 273), but formerly in forty days. Carlson v. Burt, 111 Cal. 129, 43 P. 583. An action on a rejected claim against an estate must be filed within three months after notice of rejection. Sec. 714, Probate Code; Fifield v. Bullwinkel, 81 Cal.App. 440, 253 P. 962.

The foregoing cases are illustrative of those in which quite brief periods of limitations have been upheld. On the other hand there are well considered cases holding that a reduction of the time for bringing an action to three years was unreasonable and could not be enforced. Some of those cases are cited in the notes to American Jurisprudence already referred to.

Our study of the question has led us to the conclusion that there is no hard and fast rule as to what is a reasonable limitation of time within which to bar a party bringing an action or protecting a property right. That question is usually left to the sound discretion of the legislature, which will not be disturbed except in case of an abuse of that discretion, subject to an exception important here, that where the period of limitation has been reduced it cannot be so reduced as to destroy an existing right of action. This exception seems to be generally recognized in the various jurisdictions.

In applying these rules to the instant case we must first consider when plaintiff's cause of action would have been barred under the statute in effect in 1938, or in other words, when he would have been injuriously affected by the pledge of his stabilization pool raisins to secure the debts of others.

[27] We must remember that each borrowing grower signed a non-recourse contract whereby he pledged both his free raisins and his raisins in the stabilization pool as security for the money loaned him by Commodity Credit Corporation. This was the primary security for repayment of the loan. As further and additional security the raisins of the non-borrowing growers in the stabilization pool were pledged to secure the total of all loans. It would seem that in accordance with the principles of equity the creditor should be required to exhaust its primary security, given by the borrowing growers, before resorting to the secondary security belonging to the non-borrowing growers. If this be true all of the free raisins pledged and the raisins in the stabilization pool belonging to borrowing growers would have had to have been disposed of before it could have been determined if resort would be had to the raisins in the stabilization pool of the non-borrowing growers, for if the debts were fully paid by the raisins of the borrowing growers there would be no occasion to resort to the raisins of the non-borrowing growers. Thus the time when it would appear that plaintiff and his associates might be injuriously affected by the pledge of their stabilization pool raisins would not have arrived until November, 1939, when, it is alleged in the answers, that the stabilization pool raisins were finally disposed of. Thus (assuming the truth of the allegations in the answers) under the provisions of section 17 of the Agricultural Proration Act, as it existed in 1938, the cause of action of plaintiff would not have been barred until December, 1939. The 1939 amendment barred the cause of action on October 19, 1939, before the stabilization

pool raisins had been disposed of and before plaintiff and the other non-borrowing growers could have determined whether or not they had been injuriously affected by the pledge of their stabilization pool raisins. Under these circumstances we must conclude that the amendment of 1939 did not give plaintiff and his associates a reasonable time within which to exercise their right to contest the legality of the pledge of their stabilization pool raisins to secure the debts of others, and that the provisions of the amended section cannot be controlling here as they would destroy an existing cause of action. The appropriate statute of limitation, contained in the Code of Civil Procedure, would be the only one applicable to this action as the limitation of section 17, in effect in 1938, had been abrogated by the 1939 amendment and that amendment cannot be given effect.

Whether or not the limitation of thirty days, as contained in the 1939 amendment, as affecting actions arising after its effective date is reasonable, is not involved here and has not been considered.

[28] Commodity Credit Corporation argues that section 17 of the Agricultural Proration Act furnishes a complete remedy through which the validity of a marketing program and its effect on the public, growers and packers may be judicially determined; that this is an exclusive remedy which must be followed; that the Agricultural Prorate Commission is a necessary party to any attack on its marketing program. Richfield Oil Corporation v. City of Syracuse, 287 N.Y. 234, 39 N.E.2d 219, and Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638, are cited in support of this argument. The Richfield Oil Corporation case involved an attack on a street widening proceeding under a local improvement act which specified a procedure that must be followed to attack such proceedings where such attack did not involve the constitutionality of the act. The court held that the property owner attacking the proceeding on grounds not involving constitutionality must follow the procedure there prescribed. The Myers case involved an attack on the jurisdiction of the National Labor Relations Board in a case involving a labor dispute. The action was started in the Federal District Court. All that was held was that the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., vested exclusive jurisdiction of such proceedings in the Circuit Court of Appeals so the Federal District Court had no jurisdiction of the action. Neither case can be controlling here as the brief provisions of section 17 of the Agricultural Proration Act cannot be said to lay down the procedure and afford a complete remedy to review an order of the Agricultural Prorate Commission. Its purpose is to impose a limitation on the time in which such proceedings may be instituted.

[29-31] The reasoning of defendants in support of this argument is not at all clear. We take it to be this: It is provided in the section that an order may be *reviewed* by a court within thirty days of the effective date of the order; that the word "review", we assume the argument to be, must be construed as a writ of review as known in the law. Such an argument cannot prevail in California as a writ of review can not be directed to a board having state wide jurisdiction. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119. To give the act such a construction would be to nullify it which is contrary to the established rules of statutory construction. We believe the word "review" is used in the section in the very general sense of a critical study or examination in any appropriate action in a court of competent jurisdiction.

[32] While the Agricultural Prorate Commission might have been a proper party to this action it was not a necessary party. The purpose of the action was to enjoin the payment to Commodity Credit Corporation of money derived from the sale of raisins of non-borrowing growers in the stabilization pool and to recover from that corporation money paid to it which had its source in such sale. Agricultural Prorate Commission had none of that money under its control and, as far as the pleadings disclose, had nothing to do with the sale of those raisins and the payment of money to Commodity Credit Corporation.

In view of the present state of the pleadings the parties should be given a reasonable time within which to file amended pleadings.

The judgment is reversed with directions to the trial court to permit the parties to file amended pleadings if they be so advised.

BARNARD, P. J., and GRIFFIN, J., concur.

TRASK v. MOORE et al.

MOORE et al. v. EALEY.

Civ. 12444.

District Court of Appeal, First District, Division 2, California.

July 30, 1943.

Hearing Granted Sept. 27, 1943.

1. Appeal and error 🔑770(1)

Where respondent filed no brief, appellate court was entitled to accept as true statement of facts in appellants' brief.

2. Trial 🔑404(1)

Findings that water distributing system was used to deliver water to about 75 residences in unincorporated residence district adjacent to municipality in consideration of monthly payments supported contention that such system was a "public utility" subject to regulation of railroad commission. Gen.Laws 1937, Act 6386, § 52(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Public Utility".

3. Waters and water courses 🔑188(2)

A water company is a "public utility" subject to regulation of railroad commission when it holds itself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as can be served by its system, as contradistinguished from one holding itself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. Gen.Laws 1937, Act 6386, § 52(d).

4. Waters and water courses 🔑188(6)

A note and deed of trust so far as they attempted to make property of public utility water company security for the debt without an order of the railroad commission authorizing note and deed of trust were void. Gen.Laws 1937, Act 6386, § 52(d).

5. Appeal and error 🔑78(3)

An order striking from the files a cross-complaint against one not otherwise a party to the action was a "final judgment" and appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

6. Appeal and error 🔑870(5)

Where appeal was not taken from order striking from files a cross-complaint against one not otherwise a party to the action and appeal from judgment for plaintiff against defendant was taken after time for taking appeal from such order had expired, appeal as to cross-complainant would be dismissed.

Appeal from Supreme Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Dora B. Trask against Joseph A. Moore and Arlie S. Moore to quiet title to water distributing system, for an accounting and other relief, wherein the defendants filed a cross-complaint against Edward Ealey. From a judgment for plaintiff and cross-defendant, the defendants and cross-complainants appeal.

Attempted appeal as to cross-defendant dismissed, and judgment in favor of plaintiff reversed.

T. B. Scott and Nathan B. McVay, both of Modesto, for appellants.

Francis O. Hoover, of Modesto, for respondent.

DOOLING, Justice pro tem.

Defendants appeal from a judgment quieting title in plaintiff to "that certain water distributing system including the pipes, situate in the Modesto High School Tract now in the possession of defendants and formerly connected to wells and pumping plants located upon Lots 7 and 8, in Block 'D' and Lots 22 and 23, in Block 'B' of the Modesto High School Tract"; directing defendants to reconnect said distributing system to said wells and pumping plants; and decreeing that plaintiff is entitled to an accounting by defendants of all moneys received by them from the operation of said distributing system from November 18, 1940. The notice of appeal further recites that defendants as cross-complainants appeal from the judgment in favor of cross-defendant Ealey.

[1] Plaintiff and respondent Trask has filed no brief on this appeal and this court is therefore entitled to accept as true, in deciding the appeal from the judgment in

her favor, the statement of facts set out in appellants' brief. Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118; Ramacciotti v. Galiano, 59 Cal.App.2d 8, 137 P.2d 722. From this source the following facts appear: The Modesto High School Tract is an unincorporated residence district adjacent to the City of Modesto. On and prior to February 21, 1939, cross-defendant Ealey owned the lots mentioned in the judgment. On that date he executed a deed of trust of these lots to secure the payment to respondent Trask of a promissory note. Upon default in the payment of this note the property was sold under the deed of trust, and respondent Trask purchased the property at the trustee's sale. Before this sale, but after execution of the deed of trust, cross-defendant Ealey sold the same lots to appellants Moore and by a separate conveyance transferred to appellants the water distributing system. The portion of the distributing system here involved lies entirely outside the lots covered by the deed of trust, and consists largely of pipes and mains laid in the streets and alleys of the Modesto High School Tract. Before the trial of the action appellants Moore had disconnected the distributing system from the pumps on plaintiff's lots and connected it to a pumping system on other lands owned by themselves. The court found that the distributing system, although lying entirely outside the lots described in the deed of trust, was covered by such deed, apparently on the theory that the distributing system was an appurtenance of such lots. This conclusion is attacked on appeal but we need not decide that question.

The trial court made the following findings with regard to the distributing system:

"II. That at that time there was situated upon said premises two wells and pumping plants. That the said pumping plants were established for the purpose of furnishing water to residents in said Modesto High School Tract, and did furnish to approximately 75 homes water pumped by the said pumping plants from underneath said lots and also other lots not owned by said Ealeys, said distribution being by means of a system of pipes connected to said pumping plants and leading to the various homes so served.

"That on or about 1935 there was one pump on said Lots 22 and 23 in Block B, and that said pump was used to pump water which was distributed through pipes to certain people living in said Modesto High School Tract; that in 1937 a second pump was installed from which water was pumped to people living in said Modesto High School Tract; that said people who used said water paid so much a month to said Ealeys."

"IV. That at the time said deed of trust was made, executed and delivered by said Ealeys to said plaintiff, Dora B. Trask, and for a long time prior thereto, said pumping plants and pipes leading from said pumping plants were used to deliver water to residences in said Modesto High School Tract.

"That the Railroad Commission of the State of California did not authorize said Ealeys to execute said note and said deed of trust on said property.

"That at the time said note and deed of trust was given by Ealeys to said plaintiff there were about seventy residences in which people lived that were being supplied with water and were making monthly payments to Ealeys for same."

[2, 3] These findings support appellants' position that the system here in question was a public utility. "A water company is a public utility when it holds itself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as can be served by its system, as contradistinguished from one holding itself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them." 26 Cal.Jur. 459; Samuel Edwards Associates v. Railroad Comm., 196 Cal. 62, 70, 235 P. 647; Nail v. Jacks, 201 Cal. 668, 258 P. 593; Babcock v. C. W. Clarke Co., 213 Cal. 389, 2 P.2d 155.

The public utilities act provides in § 52(d), Deering's Gen.Laws 1937, act 6386, p. 3167: "All stock and every stock certificate or other evidence of interest or ownership, and every bond, note or other evidence of indebtedness, of a public utility, issued without an order of the [railroad] commission authorizing the same then in effect shall be void * * *."

[4] Under the express language of this section the note and deed of trust insofar as they may have attempted to make the property of a public utility security for the debt "without an order of the commission authorizing the same then in effect" were rendered void. For this rea-

son the judgment in favor of plaintiff and respondent Trask must be reversed.

On the attempted appeal from the judgment in favor of cross-defendant Ealey the following appears from the record. A cross-complaint was filed against Ealey and he was brought in as a cross-defendant by order of court. On January 15, 1942, the trial court made an order striking the cross-complaint from the files. The judgment was rendered on May 11, 1942, and contains by way of recital only the statement "the cross-complaint having been stricken from the files upon motion of the cross-defendant." Notice of appeal was filed July 17, 1942, and purports to appeal only from the judgment entered on May 11, 1942.

[5, 6] The order of January 15, 1942, striking the cross-complaint from the files was as to Ealey the cross-defendant, not otherwise a party to the action, a final and appealable judgment. Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363; Halterman v. Pacific Gas & Elec. Co., 22 Cal.App.2d 592, 71 P.2d 855. The notice of appeal, even if liberally construed as an attempt to appeal from this order of January 15, 1942, was filed too late.

The attempted appeal as to cross-defendant Ealey is dismissed. The judgment in favor of plaintiff is reversed.

NOURSE, P. J., and SPENCE, J., concur.

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60 Cal.App.2d 79

FIRST NAT. BANK OF RICHMOND v. THOMPSON et al.

Civ. 12418.

District Court of Appeal, First District, Division 1, California.

Aug. 2, 1943.

1. Limitation of actions 🔑55(5)

Where conditional buyer of gas shovel sold it without consent of conditional seller to innocent third parties who openly removed and retained the shovel, a cause of action for "conversion" of shovel arose immediately on sale to third parties without demand for return thereof, and hence action in claim and delivery brought against third parties more than three years after date of sale to them was barred by limitations. Code Civ.Proc. § 338, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

2. Limitation of actions 🔑95(1)

Where there was an actual conversion of gas shovel resulting from its wrongful sale by conditional buyer to innocent third parties, that conditional seller had no knowledge of its cause of action did not toll running of three-year limitation from date of sale to third parties. Code Civ. Proc. § 338, subd. 3.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by the First National Bank of Richmond against Ira Thompson and another in claim and delivery to recover possession of a gas shovel or judgment for its value together with damages for its detention. From an adverse judgment, the plaintiff appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

Preston & Gibson, of Ukiah, for respondents.

WARD, Justice.

This is an action in claim and delivery to recover possession of a Speeder gas shovel, or a judgment for its value, together with damages for its detention by defendants.

The facts are undisputed. On September 13, 1934, plaintiff, the owner of the shovel, entered into a conditional sales contract with E. H. Higgins for its sale for the amount of $1,000. Twenty-five dollars was paid on the execution of the contract, and the balance was to be paid in monthly installments, with interest on balances at the rate of 6% per annum. The contract gave the seller the option, upon default, to declare all unpaid sums immediately due with the right to sue therefor, or to retake possession of the equipment and credit the purchaser with the reasonable value thereof, or resell it, and in either event, to recover any deficiency. Notwithstanding Higgins paid only the initial payment of $25, and on November 4, 1937, the sum of $77.64 as interest, plaintiff allowed the shovel to remain in his possession, and he used it in construction work in which he was engaged. When the equipment had been badly wrecked Higgins placed it in his storage lot, located about two blocks from plaintiff's establishment, where it remained for a period of more than two years, during which time the bank endeavored to find a purchaser at a price of $300. At the same time it gave Higgins "verbal authority to sell the equipment on approval of the bank of any deal that was made." In July 1938, Higgins, representing himself to be the owner, offered to sell the equipment to defendants for the sum of $400. He advised the bank that "he had a friend up on the coast that might desire to take this machine up there and repair it and use it in digging a drainage ditch across his place, and he would do that repair work for the use of the machine." Incidentally, no evidence was offered to prove that this "friend up on the coast" was either of the defendants. The bank, relying upon such representation, agreed to the arrangement, and on July 28, 1938, defendants paid Higgins the $400 and received delivery of the equipment, which they removed to their ranch, repaired at an expense of approximately $600 and have ever since used in their work. They at all times continued to believe Higgins to be the owner of the equipment. Appellant states that at no time did it suspect that the transaction with the "friend up on the coast" was other than a "use-repair" job as had been represented; that from time to time its representative attempted to learn from Higgins and his son the name and location of the party in possession of the shovel, but that they evaded him in various ways and the information was never furnished. Finally, it became necessary for the bank to take over all the equipment that Higgins had under conditional sale, and Higgins disappeared. Shortly thereafter, the bank, having a prospective purchaser for the shovel, located it in the possession of respondents, upon whom, on November 22, 1941, it served a demand in writing for its possession. Delivery was refused and this action was filed on January 7, 1942. The value of the equipment at the date of the trial was stipulated to be the sum of $350.

The court held that plaintiff's cause of action was barred by subdivison 3 of section 338, Code Civ.Proc., the complaint having been filed on January 7, 1942, more than three years after July 28, 1938, the date of the purported sale by Higgins to respondents; also, that the plaintiff was estopped to set up its title as against defendants. Judgment followed in defendants' favor and plaintiff appeals.

Appellant points out in its argument that Higgins was given verbal authority to sell the shovel only "on approval of the bank of any deal that was made"; that the bank's consent to his transfer of possession to respondents was upon his statement that the transaction represented "a use-repair job"; that Higgins sold not only without appellant's approval, but without its knowledge; that appellant is not presumed to have waived facts of the existence of which it was unaware, and, finally, that in any event no cause of action arose until demand was made on November 22, 1941, which fixes the date from which the statute commenced to run.

An action to recover personal property, or for the taking, detaining or injuring of such property must be commenced within three years. Code Civ.Proc. sec. 338. Appellant's demand on respondents for the return of the shovel was made, and this action filed, more than three years after the transfer from the conditional vendee to respondents.

[1, 2] According to the agreement, the conditional vendee had no authority to sell without appellant's consent. To sell surreptitiously was a breach of that agreement. The sale constituted a representation that he was transferring an absolute title, and a cause of action against the transferee of the property immediately arose, their claim being hostile to that of appellant. The latter made no demand for payments of installments due, and respondents did not pay or offer to pay such installments. The facts prove a conversion by respondents though innocent purchasers of the property. 24 Cal.Jur., p. 1028, sec. 6, 6 Cal.Jur. 525. The court found that "said shovel is not wrongfully detained by said defendants or either of them" and the evidence shows that the taking by Higgins was wrongful from the outset. In California under such circumstances no demand was legally necessary as a prerequisite to the accrual of the cause of action. Coy v. E. F. Hutton & Co., 44 Cal.App.2d 386, 112 P.2d 639; 141 A.L.R. 375. Appellant consented to the use, not the sale, of the shovel. It may be mentioned that while the sale was sur-

reptitious on the part of Higgins, respondents removed and retained the shovel openly and notoriously. The tortious act of Higgins, who is not a party to this action, and the acts of respondents, constitute a conversion of appellant's property. Harpending v. Meyer, 55 Cal. 555; San Francisco Credit C. House v. Wells, 196 Cal. 701, 239 P. 319; Reed v. Molony, 38 Cal. App.2d 405, 101 P.2d 175. The fact that the appellant had no knowledge of its cause of action does not toll the statute of limitations where there has been an actual conversion. Coy v. E. F. Hutton & Co., supra; Byer v. Canadian Bank of Commerce, 8 Cal.2d 297, 65 P.2d 67; Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 46 P.2d 242.

The finding and conclusion that the action is barred by the statute of limitations (Code Civ.Proc. sec. 338, subd. 3) must be upheld. This conclusion eliminates the necessity for considering respondents' contention that appellant was estopped to maintain the action.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 5

LLOYD CORPORATION, LIMITED, et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14037.

District Court of Appeal, Second District, Division 3, California.

July 27, 1943.

Hearing Denied Sept. 23, 1943.

1. Workmen's compensation 🔑1432

Evidence *held* sufficient to support Industrial Accident Commission's finding of decedent's special employment by oil well owner and operator when fatally injured while working as welder in completion and bringing in of well under contract of his general employer with such owner.

2. Workmen's compensation 🔑208

A corporate oil well owner and operator, directing work on its own equipment by welder, sent to owner by contractor at owner's request, exercised sufficient control over work to render owner jointly liable with contractor, as such welder's general employer, for compensation for welder's death from injuries sustained while doing work, even if there was some division of authority and control over work as between owner and contractor.

Proceeding on writ of review by the Lloyd Corporation, Limited, the Zurich General Accident Liability Insurance Company, Limited, and others to annul an award of compensation by the Industrial Accident Commission to Rachel Bethel Burleson and others for the death of Arthur A. Burleson, employee, as against the insurance company.

Award affirmed.

J. L. Kearney and Herbert S. McCartney, Jr., both of Los Angeles, for petitioners.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

SHINN, Acting Presiding Justice.

Upon a hearing before the Industrial Accident Commission an award was made, which was confirmed on rehearing, in favor of the widow and daughters of Arthur A. Burleson, who was fatally injured in an explosion while working as a welder in the completion and bringing in of an oil well. The award was against State Compensation Insurance Fund, as insurer of the drilling contractor, Drilling and Exploration Company, and Zurich General Accident Liability Insurance Company, Ltd., insurer of Lloyd Corporation, Ltd., owner and operator of the well, upon findings that the contractor was the general employer and that Lloyd was the special employer of Burleson at the time of the accident. Zurich Company and Lloyd Corporation seek annulment of the award as against the former upon the ground that the evidence before the commission was insufficient to prove that the relationship of employer-employee existed as between Lloyd and Burleson.

[1] The contractor agreed to do certain drilling and repair work upon two oil wells of the operator, was to receive a flat sum for rigging up and taking out its equipment, a stipulated daily rental for the

equipment, and its pay roll expenses in the work. The arrangement between the companies was one which called for a measure of collaboration in the work. The wells had been drilled two or three years before and D. & E. was working under a contract of re-employment to do repair work on them at the time of the accident. The agreement, which was evidenced by a letter from the contractor to the owner, did not specify the repair work to be done. It does not appear that Lloyd had anything to do with this work, which consisted in part of further drilling, other than to direct D. & E., generally, as to the results to be accomplished. We have referred to the terms of the agreement and the nature of the work undertaken not because they are material to the questions to be decided, but only because they explain the relations between the two companies in the work and the fact that Lloyd had equipment of its own at the wells on which welding was sometimes required and which was entirely separate from the equipment furnished and used by D. & E. Burleson was in the employ of the contractor as a welder at wages of approximately $1 per hour; his services were furnished by the contractor to the operator to work upon the latter's equipment whenever requested, and for the time thus spent the contractor charged the operator $3 per hour, which covered Burleson's services, and a rental charge for the use of the contractor's truck and welding equipment, which Burleson used in his work.

The work on one of the wells had progressed to the point where it was being brought onto production. At the time of the fatal accident Burleson was in the cellar of the well, welding a riser nipple to a flange on the casing, the purpose of which was to extend tubing to the floor of the derrick where a "Christmas tree" was to be added for control of the well.

The commission was called upon to decide whether Burleson in this welding operation was in the employ of D. & E. exclusively or had been furnished by that company to Lloyd and was then also in the employ of Lloyd for the special purpose of doing welding on the latter's equipment. After reviewing extensive evidence addressed to this point, we conclude that it was sufficient to support the finding of a special employment.

D. & E. had a superintendent on the job who directed the work of the drilling crews and also Burleson's work as a welder when working for D. & E. Burleson's compensation was the same whether he was working for D. & E. or for Lloyd, but when he worked for the latter he kept his time separate, which was billed to and paid by Lloyd at the rate we have stated. At these times he also turned in time cards to Lloyd, which were O. K.ed by the latter's foreman. His services on the day of the accident were billed and paid for in this manner. Lloyd kept a superintendent of its own on the job, who called for the services of Burleson when they were required by Lloyd. Under the superintendent was a foreman who conferred with him each day about the work to be done and carried out the instructions he received. On the day of the accident the foreman informed the superintendent that there was welding to be done, was advised that Burleson would be sent for, and Burleson shortly thereafter came to do the work. Burleson and the foreman brought up the welding truck, and at the foreman's direction Burleson made one weld in an oil line and did some work on bolts to fit the "Christmas tree." The foreman and Burleson then talked to Lloyd's superintendent about welding the riser nipple and were told to "get busy and get it done." After the cellar was tested for gas, the welding was undertaken and the explosion occurred. Burleson was an experienced welder, was given no specific instructions as to how to make any of the welds and needed none. Lloyd's foreman helped him in his work by measuring pipe, lining it up, and directing where welding was to be done. There was testimony that it is customary for the well owner to issue orders when the well is being brought in and to direct the manner in which the work shall be done, and that Lloyd, upon the occasion in question, was supervising the work of bringing in the well. There was further testimony that the welding which Burleson was doing at the time was a part of the bringing in of the well and that the superintendent of D. & E., although present while the well was being brought in, was there only part of the time, took no part in the work, and gave no orders as to how the well was to be completed. This, he testified, was because the work of bringing in a well is customarily under the direction of the owner.

[2] A reasonable conclusion from the facts thus briefly stated would be that Burleson, immediately before and at the time of the accident, was subject to and was

working under the directions of Lloyd. He was not receiving directions from D. & E. and was working on equipment which was being installed under the direction of Lloyd. The general purport of the testimony is to the effect that when Burleson was sent to Lloyd, at the latter's request, he worked under Lloyd's direction, and that he was so working at the time of the fatal accident. During the times when he was working on Lloyd's equipment there seems to have been no division of authority and control over his work as between Lloyd and D. & E., although D. & E. might have had the right to recall him at any time. But even if there had been some division of authority and control, certainly that exercised by Lloyd was sufficient to make it jointly liable with the general employer, under the principles stated in Department of Water and Power v. Industrial Acc. Comm., 1934, 220 Cal. 638, 641, 32 P.2d 354, and cases there cited. See also Silberman v. Industrial Acc. Com., 1943, 21 Cal.2d 609, 134 P.2d 228.

The award is affirmed.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

59 Cal.App.2d 715

CALIFORNIA TRUST CO. v. OTT et al.
OTT v. CALIFORNIA TRUST CO. et al.

Civ. 13881.

District Court of Appeal, Second District, Division 3, California.

July 17, 1943.

Rehearing Denied July 30, 1943.

Hearing Denied Sept. 13, 1943.

1. Wills 🔑437

The Civil Code provision that property embraced in power to devise should pass by will purporting to devise all property of testator, as it existed before its re-enactment as part of Probate Code, was controlling in case involving trust agreement creating power in settlor and will disposing of settlor's property, which were both executed before the re-enactment. Civ. Code, § 1330.

2. Wills 🔑589

Where trust instrument executed by husband and wife in 1930 gave husband power of appointment regarding distribution of corpus on death of settlors, and provided that in default of appointment corpus should go to husband's heirs, husband's will purporting to dispose of husband's entire estate was construable as constituting an exercise of the power, even though will was written before trust agreement was executed. Civ.Code, § 1330.

3. Wills 🔑589

A power existing at time of death of donee of power but created after execution of his will is effectively exercised thereby if will is an otherwise effective appointment. Civ.Code, § 1330.

4. Trusts 🔑9

A provision that property held in trust for benefit of a person during his lifetime shall vest absolutely in him on his death is not so incongruous that it is not to be given effect.

5. Wills 🔑589

Where trust executed by husband and wife gave husband power of appointment regarding distribution of corpus on death of settlors, that wife would of necessity be deceased when trust property was to be delivered to person to be appointed by husband's will did not preclude finding that husband intended provision of will that residuary estate should go to wife to constitute an exercise of the power. Civ.Code, § 1330.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by the California Trust Company, as trustee, against Louis L. Ott and another to secure judgment designating proper distributee of trust corpus, wherein the named defendant filed a cross-complaint against the plaintiff and defendant Marshall L. Cooper, as administrator of the estate of Phebe Ott Cooper, deceased. From an adverse judgment, Louis L. Ott appeals.

Affirmed.

Gibson, Dunn & Crutcher, E. H. Conley, and Robert F. Schwarz, all of Los Angeles, for appellant.

Geo. F. Wasson, of Los Angeles, for respondent Marshall L. Cooper.

BISHOP, Justice pro tem.

Plaintiff, as a trustee faced with rival claims to the corpus of the trust which it had become duty bound to distribute to someone, brought this action to secure a judgment designating the proper distributee. From the judgment, which instructs the plaintiff to deliver the trust fund and property to the estate of the widow of Francis S. Ott, his brother appeals.

Francis S. Ott and Phebe Ott, husband and wife, executed the trust agreement appointing the plaintiff as trustee. The property assigned to the trustee was the separate property of the husband, consisting of the personal property to be distributed to him from the estate of his sister. In general, the trust provided for semi-annual payments of income and of a small fraction of the principal to the two trustors so long as they both live, and to the survivor of the two during his or her lifetime. The first paragraph of the Fifth subdivision of the trust instrument leads us toward the point of conflict in this case. It reads: "Fifth: Upon the death of the survivor of the Trustors, the Trustee shall distribute the entire principal of the Trust Estate, or so much thereof as then remains, together with any undistributed income therefrom, to such persons and in such manner and proportions as the Trustor, Francis S. Ott, shall appoint by his Last Will and Testament duly admitted to probate in the State of California, or in default of such appointment or to the extent to which same shall not be effective, to the heirs of such Trustor, as such heirs shall then be determined in accordance with the laws of succession of the State of California now in full force and effect, and this Trust shall thereupon cease and terminate."

The trust agreement was executed in March of 1930. Francis S. Ott died in June of the same year, leaving a will which he had made in July of the previous year and which was duly admitted to probate in the State of California. By this will two specific bequests were made, one to Louis L. Ott, his brother, the appellant here, in "the sum of Ten Dollars ($10.00) in cash, and no more," and the other, the sum of five hundred dollars, to the Midnight Mission, Inc. Again it is the fifth subdivision of the instrument that merits detailed attention: "I give, devise and bequesth to my beloved wife, Phebe Ott, of Los Angeles, California, all the rest and residue of my estate, both real, personal and mixed, of every kind and nature, wherever the same may be situate, absolute, forever." Upon the death of the wife in February of 1941, the plaintiff, as trustee, had one remaining duty to perform, that is, to distribute the trust estate, consisting of about twenty-five thousand dollars in cash and one hundred shares of stock, to the proper person. If by his will Francis S. Ott had effectively appointed anyone to receive the trust estate, then the trustee's duty was to deliver it to that person. In default of such appointment, or if the appointment should prove ineffective, the trust estate should go to Louis L. Ott, the brother and only surviving heir of Francis S. Ott. The problem, before the trial court, then, was to determine whether or not Francis S. Ott had by his will made an effective appointment of some one to take the trust estate. An antecedent question may be phrased in these words: Did Francis S. Ott intend that his will should be an exercise of his reserved power?

[1, 2] The trial court found "that said Francis S. Ott, Deceased, intended to and did exercise in his Last Will above set forth, his power of appointment." We have reached the conclusion that the finding is supported. The will of Francis S. Ott purports, certainly, to devise all his real and personal property; the fifth subdivision clearly gives it that effect, following as it does the two specific bequests. Section 1330 of the Civil Code, as it read from the adoption of that code in 1872 until the section was repealed to emerge as a part of section 125, Probate Code, in 1931, provides: "Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator." We entertain no doubt that the effect of section 1330 has not been affected by its reenactment in a new context and in new words (Prob.Code, sec. 2; Childs v. Gross, 1940, 41 Cal.App.2d 680, 687, 688, 107 P.2d 424), but we do not need to so hold, for the section, being one of interpretation, continues to control in this case, where the will and trust agreement were both drawn before the section was rewritten into the Probate Code. See Medical Finance Ass'n v. Wood, 1936, 20 Cal.App.Supp.2d 749, 750, 63 P.2d 1219, and cases cited. By virtue of section 1330, therefore, the will was properly interpreted as an exercise of the power, to devise the

trust property, which the trustor-husband had retained.

[3] The fact that the will was written before the trust agreement was executed does not except it from the effect section 1330, Civil Code, gives it. "A power existing at the donee's death but created after the execution of his will is effectively exercised thereby if the will is an otherwise effective appointment." Restatement, Property, sec. 344, "donee" having been defined, in section 319, as the person in whom the power to appoint is created or reserved. See also Annotation, 91 A.L.R. 631-642.

[4, 5] It is true, of course, that Phebe Ott would never receive the trust property into her own hands, because so long as she lived the trustee would hold it. But a provision that property held in trust for the benefit of a person during his lifetime shall vest absolutely in him upon his death, is not so incongruous that it is not to be given effect. In Estate of Wilson, 1920, 184 Cal. 63, page 68, 193 P. 581, 583, it is stated: "* * * it has often been held that there is no legal inconsistency in an heir who is made a life tenant by a will being included among 'the heirs' to whom the remainder is given." In Estate of Goldberg, 1938, 10 Cal.2d 709, 76 P.2d 508, 509, there was involved a will which placed certain property in trust for Fritz, a son of the testator, followed by the provision: "Should my son Fritz die without either wife or child then said property shall vest absolutely in my children Gustave-Fritz-Amelia and Mrs. Emma Blue." Some thirty-five years later Fritz died, and the question before the court had to do with the proper decree of distribution. It was held that Fritz (though deceased) should have been named as a distributee, the court stating (page 714 of 10 Cal.2d, page 511 of 76 P.2d): "it appears as a matter of law that the estate of Fritz was empowered to take as a remainderman." The circumstance that Phebe Ott would of necessity be deceased when the trust property was to be delivered to the person to be appointed by the will of her husband, does not require us to conclude that the trial court should not have found that her husband intended his will to be an exercise of his reserved power of appointment.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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59 Cal.App.2d 801

CHURCHMAN v. SONOMA COUNTY et al.

No. 12412.

District Court of Appeal, First District, Division 1, California.

July 24, 1943.

Rehearing Denied Aug. 23, 1943.

Hearing Denied Sept. 20, 1943.

1. Negligence ⚷56(1)

Where one has been put in sudden peril by negligence of another and, in an instinctive effort to escape such peril, either suffers injury himself or does injury to a third person, negligent act is "proximate cause" of injury notwithstanding that under different circumstances such person might and ought to have seen and avoided latter danger.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Negligence ⚷58

Where defendant's negligence creates a condition which plaintiff reasonably apprehends to be a source of danger to himself, defendant is liable to plaintiff for an injury received by plaintiff in a natural and reasonable attempt to escape from apprehended danger.

3. Automobiles ⚷282

Where, by reason of county's negligence in maintaining road, motorist was placed in a position in which imminent peril was reasonably apprehended when his automobile overturned and motorist was injured while attempting to escape from automobile after it had come to rest, county's negligence was "proximate cause" of motorist's injuries.

4. Automobiles ⚷282

Where plaintiff's automobile, by reason of county's negligence in maintaining road, overturned and was teetering at an angle of 45 degrees, and plaintiff, an elderly man, was unsuccessful in effort to get out by himself, plaintiff was in a "perilous situation" which authorized attempt to escape from automobile when assistance arrived and injuries received in such attempt were "proximately caused" by original negligence of county.

See Words and Phrases, Permanent Edition, for all other definitions of "Perilous Situation".

5. Appeal and error 🔑1008(1)

Where motorist's automobile overturned as result of county's negligence in maintaining road and came to rest teetering at a 45 degree angle, whether motorist exercised due care in attempting to extricate himself from automobile was for trier of facts.

6. Automobiles 🔑306(8)

In motorist's action against county for injuries sustained when motorist was attempting to extricate himself from automobile which overturned as result of county's negligence in maintaining road, evidence sustained finding that motorist was not negligent.

7. Automobiles 🔑306(8)

Where evidence disclosed that defective condition of pavement which gave way under motorist's automobile by reason of erosion of soil underneath pavement was not apparent to one driving along road, motorist's testimony that he was familiar with highway and had observed holes and depressions therein which had been filled with dirt did not establish contributory negligence on motorist's part so as to relieve county of liability for injuries sustained by motorist in attempting to extricate himself from his overturned automobile.

8. Automobiles 🔑284

Where pavement at edge of highway gave way under motorist's automobile causing it to overturn as motorist was meeting another automobile and there was nothing to warn motorist of danger, county's contention that motorist should have stopped to let other automobile pass was without merit.

9. Automobiles 🔑306(7)

Where motorist was injured while attempting to extricate himself from automobile which overturned when pavement gave way, evidence sustained finding that motorist's injuries were proximate result of defective condition of highway and thereby authorized judgment against county road commissioner. St.1919, p. 756.

* * *

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by J. W. Churchman against County of Sonoma and others for injuries sustained as plaintiff was attempting to leave his automobile after it had overturned as the result of defendant's negligence in maintaining roadway. Judgment for plaintiff, and defendants County of Sonoma and Marshall M. Wallace, as County Road Commissioner of the County of Sonoma, appeal.

Affirmed.

Barrett & McConnell, of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Geary & Tauzer, of Santa Rosa (John H. Moskowitz, of Santa Rosa, of counsel), for respondent.

KNIGHT, Justice.

Plaintiff sued the County of Sonoma, its road commissioner, and the members of its board of supervisors to recover damages for personal injuries of a permanent nature sustained by him in attempting to extricate himself from his capsized automobile which had partly overturned into a drainage ditch alongside of the highway, as the result of the defective and dangerous condition of the edge of the pavement. The cause was tried before the court sitting without a jury, and judgment was rendered against the county and the road commissioner, from which they have appealed.

The judgment is based upon findings to the effect that the northerly side of the paved roadway at the place of the accident was in a dangerous and defective condition, in that the pavement was deprived of lateral support to the extent of rendering it incapable of carrying the weight of a motor vehicle; that the failure of the lateral support was caused by erosion of the south bank of a ditch constructed along the edge of the pavement through and along which storm and drainage waters were conveyed; that such dangerous and defective condition existed for many months prior to the accident, and that appellants were aware of such condition but did not remedy the same, nor place any signs or barriers on the road to warn the motoring public of its dangerous and defective condition; that on account of such dangerous, defective and generally unsafe condition the edge of the pavement underneath the wheels of respondent's automobile gave way, causing the automobile to tip over into the drainage ditch; "That as a direct and proximate result of the dangerous and defective condition of said highway as hereinbefore described and the failure and neglect of said Defendants County of Sonoma and the said County Road Commissioner, and each of them, for a reasonable time after acquiring knowledge and receiving notice of the dangerous, hazardous and defective condition thereof to remedy the same and the failure and neglect of said Defendants for a reasonable time after acquiring knowledge and receiving notice of the dangerous and hazardous and defective condition of said highway hereinbefore described the said Plaintiff received severe injuries consisting of the following: A fracture of the right temporal bone, a fracture of the right clavicle, concussion of the brain, two fractured ribs and severe nervous and mental shock and strain, all of which has rendered and does now render the said Plaintiff lame, sick, sore and disabled; that said injuries received by the Plaintiff are permanent in character and by reason thereof the Plaintiff has been damaged in the sum of Twenty-five Hundred Dollars ($2500.00)." The trial court further found that in no manner connected with the accident was plaintiff guilty of contributory negligence.

Appellants make no claim that the evidence is insufficient to support the trial court's findings as to the dangerous and defective condition of the highway, nor do they assail the soundness of the finding that they were guilty of negligence in failing to remedy such condition or to give suitable warning of the existence thereof to the motoring public; but they contend that since plaintiff's injuries were sustained in attempting to extricate himself from his car after it had toppled over into the ditch, the trial court was in error in holding that either the dangerous and defective condition of the roadway or their negligence in failing to repair the same or give warning thereof was the proximate cause of such injuries. In other words, it is their theory that the act of respondent in attempting to extricate himself from the overturned car broke the chain of causation created by their negligence and initiated a new chain of events for the consequences of which they were not responsible. They further contend that in any event respondent was operating his automobile over and along the highway in a manner which constituted contributory negligence as a matter of law. There is no merit in any of the foregoing contentions.

The accident happened in the afternoon during the dry season of the year on a road known as the Lewis road, which lies back of Santa Rosa and leads to Healdsburg. The travelled portion of the road varied in width from 14½ to 15 feet, and was paved with a so-called California pavement approximately two inches in thickness and consisting of a combination of macadam and tar or some similar substance, and gravel and crushed rock. Along the northerly side of the road and running parallel with and adjacent to the paved portion was a dirt ditch two to three feet deep and from three to six feet wide, which had been constructed to take care of the storm and drainage waters, and several months prior to the accident the waters had washed away the lateral support of the edge of the pavement. The respondent, J. W. Churchman, an elderly man, was driving westerly in a Studebaker sedan. His wife was riding on the front seat with him. As they approached the place of the accident they met a car travelling in the opposite direction. It was being driven by a Mr. Barham, and he was accompanied by a neighbor named Mrs. Laumann, who lived nearby. Both cars were travelling at a slow speed of eight or ten miles an hour, and as they passed each other with a clearance of about a foot or a foot and a half between them the right side of the pavement under the wheels of respondent's car gave way and the car lurched and then toppled over into the ditch, throwing respondent violently against the steering wheel. The car did not fall flat on its side, but was left teetering at an angle of about 45 degrees. After first ascertaining that his wife was not injured, respondent tried to get out of the car, but could not do so because he was unable to hold the door open. Immediately after passing respondent's car Barham swung back into the middle of the roadway to make a right turn off the Lewis road onto a side road leading to Mrs. Laumann's home, and looking into the rear vision mirror of his car he saw respondent's car topple over into the ditch. Barham knew respondent, and he stopped his car at once and went back to help extricate respondent and his wife from their car. As Barham reached the car respondent and his wife were still trying to get out. Barham opened the left front door and asked if they were hurt, and they replied they were not. Barham then told Mrs. Churchman to wait until he could get Mr. Churchman out and that he would then help her out. Barham then held the door open and steadied the car while respondent climbed out on the running board. He stood up partly on the running board and partly on the body of the car, and was about to jump down to the pavement; but the edge of the running board was more than waist high above the pavement, and on account of the distance and respondent's advanced age Barham suggested that respondent "come down around the front of the car and slide over the hood towards the low side." Respondent agreed but instantly slipped and fell, his head striking hard on the pavement, knocking him unconscious, and his body slid down underneath the car. There was imminent danger that the teetering car would tilt back and crush him, so Barham directed Mrs. Laumann, who was standing nearby, to steady the car while he pulled respondent from beneath it. Mrs. Churchman was then extricated from the car and respondent was taken to the hospital where it was found that he had sustained the injuries above mentioned.

[1, 2] The legal doctrine governing cases such as this is well stated in 38 American Jurisprudence at page 736 as follows: "Where a person has been put in sudden peril by the negligent act of another, and, in an instinctive effort to escape from that peril, either suffers injury himself, or does injury to a third person, the negligent act is the proximate cause of the injury, and it is immaterial that under different circumstances he might and ought to have seen and avoided the latter danger. The intervening attempt to escape does not supersede the negligent act as the proximate cause of the injury, since it is prompted or set in motion by the negligent act. * * * Accordingly, one whose negligence creates a condition which another reasonably apprehends is a source of danger to himself is liable to the latter for an injury received by the latter in a natural and reasonable attempt to escape from the apprehended peril. Thus, if a traveller leaps from his carriage because of its near approach to a dangerous defect in the highway, or if a passenger in a railroad train, placed by the carrier's negligence in imminent peril, endeavors to escape it by leaping from the car, and thereby sustains an injury, he may, if there is no contributory negligence on his part, recover for the injury, although had he remained in the carriage or car, he would not have been injured. * * * In order for the general principle stated above to be applicable, however, the act must have been the result of fear. Moreover, the principle does not apply to preserve a cause of action unless the plaintiff was in a position of peril, either actual or apparent, caused by the negligence of the defendant."

[3] In the present case the facts show beyond question that by reason of appellants' negligence respondent and his wife were placed in a perilous situation, or at least in a position in which imminent peril to them was reasonably apprehended; and that while respondent was attempting to escape from such peril and from the dangers which one in his position reasonably could anticipate he was injured. Therefore, the case falls clearly within the legal doctrine above quoted.

[4] Appellants argue that respondent was not in a perilous situation, and in this connection they say that "there is no conceivable reason why the plaintiff could not have remained seated there for an indefinite length of time had he so desired." The fallacy of this argument is at once apparent. Here was an elderly man and his wife trapped in a closed automobile which had overturned into a ditch on a country road, and according to the positive testimony of Barham the car was teetering. Respondent tried to get out of it through his own efforts, but was unable to do so, and there was no way he could drive his car out of the ditch while it was teetering at an angle of 45 degrees. In that situation respondent might well have believed that if the car did fall on its side he or his wife, or perhaps both, would be injured thereby, or that the car would catch on fire when it fell. It would seem idle to say, therefore, that respondent was not justified in apprehending that he was in a perilous situation. He had to get out of the car some time, and obviously to have remained in the car, under the existing circumstances, after Barham came to his aid, would have been contrary to common sense.

[5, 6] Appellants also state that "there was no excuse for the plaintiff to sustain these injuries in the simple act of leaving the automobile, even under the method adopted by him"; that he "had an easy and simple course to adopt" by following the suggestion of Barham; and that by doing so he could have "reached the ground upon

the right hand or low side of the car, without any risk of injury at all." The testimony given by Barham at the trial shows, however, that respondent agreed to his suggestion, but instantly fell. In any event, it is wholly immaterial whether or not he was attempting to follow Barham's suggestion when he fell, for the reason that the question of whether he failed to exercise due care in attempting to extricate himself from the overturned car was a question of pure fact for the trial court's determination, and the evidence amply supports its finding that respondent was in no way negligent or careless.

Numerous cases have been cited by appellants in furtherance of their theory that the act of respondent in seeking to extricate himself from the disabled automobile initiated a new chain of causation which brought about "a second accident"; but as shown by the analysis of those cases in respondent's brief the factual situations therein clearly differentiate them from the present case. Most of them deal with situations in which the negligent act of a third party intervened between the negligent act of the defendant and the plaintiff's injuries; others involve successive accidents wherein the act of a third party intervened; and another line of cases involves the element of intoxication, that is, where a drunken man has sustained injuries after having been ejected from a train, or where he has been injured after becoming intoxicated by reason of the sale of liquor to him by the defendant. The case upon which appellants seem particularly to rely is Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 87 P.2d 917, but a glance at the decision therein shows that factually it bears no resemblance to the present case; therefore it is not here controlling.

[7] Appellants' contention that respondent was operating his car in a manner constituting contributory negligence as a matter of law is based mainly upon respondent's testimony that he was familiar with the highway and that in travelling over it on several other occasions he had observed holes and depressions therein which had been filled with dirt. The evidence definitely shows, however, that the dangerous and defective condition of the edge of the pavement which gave way under respondent's car was not apparent to one driving along the road. The erosion of the soil was underneath the pavement, and the dangerous condition of the pavement was revealed only by an inspection of the ditch and the subsurface. As one witness described it, a person walking along the road would not "know it was undermined because you couldn't see it. The only way you could see it would be to get down in the ditch." Clearly, therefore, in the absence of any warning signs along the highway respondent had the right to assume that the entire paved portion of the road would be strong enough to support the weight of an automobile.

[8] Appellants argue also that there was no reason why respondent should not have stopped his car to let the Barham car pass. It will be noted, however, that this was a regular two lane highway along which no signs or other markings were displayed warning motorists against travelling along the edge of the highway, nor were there any physical conditions present indicating that any of the paved portion of the road was dangerous. Respondent was justified in assuming, therefore, that the two automobiles could pass abreast in safety; and the evidence shows that they would have done so with a clearance of about a foot and a half between them had the edge of the pavement not crumbled underneath the right wheels of respondent's car. The remaining points urged by appellants under this heading have less merit than those already discussed, and therefore need not be given special attention.

[9] The cause of action against the road commissioner is based on the provisions of a statute which requires proof that "the injury sustained was the *direct and proximate* result of such defective or dangerous condition" (Stats.1919, p. 756, Deering's General Laws, Act 5618; italics ours); and in his behalf it is contended that the evidence herein does not measure up to that standard of proof. However, as the trier of the facts, the trial court expressly found that respondent's injuries were sustained "as a *direct and proximate* result of the dangerous and defective condition of said highway" (italics ours); and it is our opinion that the circumstances attending the accident were such that no other reasonable conclusion could have been reached.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

59 Cal.App.2d 836

SMITH et al. v. BROWN.

Civ. 12441.

District Court of Appeal, First District, Division 2, California.

July 26, 1943.

Rehearing Denied Aug. 25, 1943.

1. Fraud ⚷20

In order for action based on fraudulent misrepresentation to lie, the misrepresentation must have been relied on by party to whom it was made.

2. Fraud ⚷10, 11(1)

Recovery for fraud cannot be had where alleged misrepresentations by one occupying no confidential relation toward the representee are but expressions of opinion or statements of law based on facts known to both alike.

3. Fraud ⚷13(1)

Where statements complained of are true in fact they will not support a charge of fraud or deceit unless they were made in manner designed to create a false impression and were so acted on.

4. Fraud ⚷58(1)

In action to rescind property exchange contract and for damages on ground of fraudulent misrepresentations, evidence was insufficient to sustain judgment for plaintiffs on ground that defendant falsely represented that the mortgage was satisfied. Civ.Code, § 2911.

5. Fraud ⚷58(1)

In action to rescind property exchange contract and for damages evidence failed to establish contention that defendant fraudulently represented that his land was unoccupied and that plaintiffs could take immediate possession thereof.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Suit by Columbus A. Smith, also known as C. A. Smith, and another, against Katherine S. Brown for rescission of property exchange contract and for damages, on ground of fraudulent misrepresentations. From an adverse judgment, the defendant appeals.

Reversed.

Clarence N. Riggins, of Napa, for appellant.

Wallace Rutherford, of Napa, and Joseph G. Gallagher, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiffs sued for the rescission of a contract exchanging real property and for damages on the ground of fraudulent misrepresentations. The plaintiffs had judgment and defendant appeals from the judgment and especially attacks the order denying her motion for a new trial.

Plaintiffs owned real property in Napa County and defendant owned real property in Merced County. On July 5, 1939, they exchanged their properties by deeds executed, delivered and duly recorded. The property belonging to the defendant in Merced County had been encumbered by a mortgage to secure a promissory note executed in June, 1929. The payee of the note deceased in May, 1939, and at the time of the negotiations between the parties hereto the defendant had possession of both the note and mortgage, exhibited them to plaintiffs, and informed them that she had legal advice that the lien of the mortgage had been lost because the statute of limitations had run against the note, and suggested to plaintiffs that they consult the same attorney upon the same subject, which they did.

The plaintiffs also claimed that the transaction was fraudulent because of representations that the land in Merced County was unoccupied and that they could take immediate possession. Further statement of the facts will appear in our discussion of these two issues.

[1, 2] "In order that an action may lie, at law or in equity, on account of a fraudulent misrepresentation, such misrepresentation must be relied upon by the party to whom it is made * * *." 12 Cal.Jur. p. 750. "Unless an untrue statement is believed and acted upon, it can occasion no legal injury." Spinks v. Clark, 147 Cal. 439, 82 P. 45, 47. "It is a fundamental principle of the law of fraud, regardless of the form of relief sought, that in order to secure redress, the representee must have relied upon the statement or representation as an inducement to his action or injurious change of position." 23 Am.Jur. 939. Just as essential as the element of reliance upon the truth of the representations is the representee's belief that they are true, otherwise there is no deceit. Idem. p. 943. Accordingly recovery is not permitted when the representee makes his own investigation,

discovers the true facts, and acts without reliance upon the representations. 12 Cal. Jur. p. 760. Nor may he recover where the alleged misrepresentations by one occupying no confidential relation toward him are but expressions of opinion, or statements of law, based upon facts known to both alike. Rheingans v. Smith, 161 Cal. 362, 365, 119 P. 494, Ann.Cas.1913B, 1140; Robbins v. Law, 48 Cal.App. 555, 560, 192 P. 118; 12 Cal.Jur. p. 731.

[3] In this we have assumed a case of fraudulent misrepresentations which is based upon statements which are both fraudulent and untrue. But, where the statements complained of are true in fact, they will not support a charge of fraud or deceit unless they were made in a manner designed to create a false impression and were so acted upon. 12 Cal.Jur. p. 743; 23 Am.Jur. p. 896.

Here the allegations of the complaint are: "That on the 5th day of July, 1939, the defendant, Katherine S. Brown, with intent to cheat and defraud the plaintiffs above named, did falsely and fraudulently represent to the plaintiffs that said property in Merced County belonging to the defendant Katherine S. Brown was free and clear of any encumbrances and that there was no cloud upon the title of the said defendant Katherine S. Brown to said property, save and except for certain accrued real estate taxes. That said defendants also represented that said property was unoccupied and that the said Katherine S. Brown could place the said plaintiffs in immediate possession thereof." The trial court found that defendant "falsely and fraudulently, and with intent to induce the plaintiffs to make such exchange, did represent that her property was free and clear of all encumbrances, save some back taxes. That said property was encumbered by a mortgage securing a note dated June 4, 1926, in the sum of Three Thousand ($3,000.00) Dollars payable to Alice Baker three years after date. That defendant knew said property was so encumbered, but falsely and fraudulently represented to plaintiffs that said mortgage was satisfied and had been released to said defendant by Alice Baker prior to the death of said Alice Baker."

[4] If this finding could have any evidence to support it the variance between the allegations and the finding would not be of serious importance. But the testimony of every witness was without the slightest conflict directly contrary to the finding. These witnesses all agreed that during the negotiations the defendant did not falsely or otherwise represent to plaintiffs that her property was "free and clear of all encumbrances," that, to the contrary, she did represent and inform them that the property was encumbered by a mortgage securing a promissory note for $3,000; that she put both note and mortgage in the hands of plaintiffs, that she informed them that she had been advised by her attorney that the note was outlawed and the lien lost, that she advised plaintiffs to seek legal advice as to the status of the mortgage, that plaintiffs consulted the same attorney and received the same legal advice.

The note and mortgage were dated June 17, 1929. Some interest had been paid on the note during the ten years it was outstanding. The payee had deceased in May, 1939. A short time before she visited the defendant and left with her the note and mortgage. The defendant has since claimed that a valid gift was made at that time, but this is not material to this litigation. What is material is that she "represented" to plaintiffs that the note and mortgage were outstanding—which was true; that she had them in her possession—which was true; that she had been advised by her attorney that the lien was extinguished because the note was outlawed—which was true (section 2911 of the Civil Code); that she advised the plaintiffs to seek legal advice as to the effect of the mortgage, that they consulted the same attorney, and received the same advice, but were further advised that some expense might be incurred "to clear the title." As a result of this advice the defendant executed a written agreement undertaking to hold plaintiffs harmless from any suit or claim arising out of the note, and to take such steps as might be necessary to secure the release of the mortgage and clear the title.

[5] The only other charge of fraud relates to the representation that the premises were vacant. The trial court made no finding on this issue, but the undisputed evidence is that a "share-crop" tenant was in possession through permission of defendant's agent without her knowledge, that plaintiffs visited the premises before the trade was made, found the tenant in possession, made an agreement with him to remain, and received about $90 from the tenant for the share of the crop.

As a part of the trade defendant paid to plaintiffs the sum of $322 which they agreed to use in payment of delinquent taxes. On the hearing of the motion for a new trial it appeared that plaintiffs had failed to pay the taxes, or to account for the money, and that the property is lost to defendant because of the forfeiture and the expiration of the period of redemption. Hence, plaintiffs are no longer able to restore the consideration—that is they cannot return to her the Merced property which they received in the trade. What rights and liabilities the respective parties may be able to establish on a retrial we cannot say. It is sufficient that the judgment appealed from has no evidentiary support.

The judgment is reversed.

SPENCE, J., and DOOLING, J., pro tem., concur.

59 Cal.App.2d 672

PEOPLE v. McDANIEL.

Cr. 3709.

District Court of Appeal, Second District, Division 1, California.

July 13, 1943.

Hearing Denied Aug. 12, 1943.

1. Poisons 🔑9

In prosecution for unlawfully possessing a preparation of codeine and apromorphine, evidence which did not disclose that defendant occupied residence wherein the preparation was found was insufficient to establish the "corpus delicti". St.1939, p. 758, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

2. Witnesses 🔑270(1)

Cross-examination on an immaterial matter is improper.

3. Witnesses 🔑274(1)

Even if question on direct examination of defendant's character witness regarding defendant's reputation had been proper, cross-examination of character witness as to whether he knew that defendant had committed certain specific acts was improper.

4. Witnesses 🔑338

"Reputation" is not what a character witness may know about defendant, but it is the estimation in which an individual is held, that is, the character imputed to an individual rather than what is actually known of him either by the witness or others.

See Words and Phrases, Permanent Edition, for all other definitions of "Reputation".

5. Witnesses 🔑268(1)

Legitimate cross-examination does not extend to matters improperly admitted on direct examination.

6. Witnesses 🔑270(1)

Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit irrelevant testimony.

On Petition for Rehearing.

7. Criminal law 🔑563

Generally, prima facie evidence is sufficient to establish corpus delicti.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Noah Edgar McDaniel was convicted of having unlawful possession of a preparation of codeine and apromorphine, and defendant appeals.

Reversed and remanded for a new trial.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was charged by information with the unlawful possession of a "preparation of codeine and apromorphine (opium derivatives) in violation of section 11160, Health and Safety Code of the State of California [St.1939, p. 758]". A jury trial resulted in a verdict of guilty as charged and the appeal is from the judgment which followed and from the order denying a motion for a new trial.

A careful reading of the reporter's transcript of the evidence reveals that one Mrs. Cloisea Harman, a witness for the plaintiff, testified that she was a deputy sheriff of Los Angeles County, that she visited what she described as a residence at 1226 East 58th Place in Los Angeles County. The following questions and answers then followed, viz.:

"Q. Was anyone there when you got there? A. Yes, the lady of the house, Mrs. McDaniel, and a friend of hers.

"Q. The wife of this defendant? A. Yes, sir."

The witness then testified further that she searched these premises and found the alleged opium derivatives in a small black satchel. The witness also testified "a doctor's kit and some instruments" were also found in the house. The following pertinent record of the same witness' testimony is as follows:

"Q. Now, I show you a glass jar or vial containing a lot of needles; I don't know how many, I will ask you to examine the jar and contents and state whether or not you have ever seen them before? A. I have.

"Q. When and where did you see those for the first time? * * * A. In the bag.

"Q. In the same bag which you have described to the jury which you found in the residence of this defendant? A. Yes. * * *

"Mr. Cochran (Deputy District Attorney): After you had found those objects, under the circumstances that you have related, did you later see the defendant in this case? A. Yes, sir.

"Q. When was it in reference to the time that you discovered the articles in his home? A. About a half hour later.

"Q. Where? A. At a paper box factory on Alameda, his place of employment."

The witness further testified that she, together with a deputy sheriff and one Mr. Brooks of the State Board of Medical Examiners, then visted defendant's place of employment, at which time defendant was informed that he was to be taken to the sheriff's substation for questioning. Further testimony elicited from the same witness included an alleged confession in which defendant, it was asserted in substance, admitted in reply to questions, that he practiced as a physician and surgeon; that he used the hypodermic needles and syringe on his patients and the narcotics as well.

The record further reveals that the drugs described in the information were found to be as alleged.

With the foregoing record the plaintiff rested.

[1] It is at once evident that the corpus delicti was not established. There was no evidence that defendant ever occupied the residence at 1226 East 58th Street. Reference by the witness to the so-called lady of the house as Mrs. McDaniels, the wife of the defendant, is no more than an assumption, and for all the record reveals, the information of the witness may have come from a crystal ball. The leading questions quoted from the transcript which include references to "residence of this defendant" and "in his home" are equally presumptuous and are not evidence, nor do the answers constitute evidence of anything. Nevertheless the trial proceeded. Defendant testified and in substance admitted possession; explained how the possession was obtained; denied knowledge of the nature of the substance and denied the confession.

A so-called character witness was called on behalf of defendant and on direct examination testified as follows:

"Q. Mr. Postelle, what is your business or occupation? A. I am a laborer at the Pioneer Flintkote Roofing Company.

"Q. How long have you been working there? A. Since July 1942.

"Q. Do you know whether or not the defendant was working there? A. Yes, he was when I came there.

"Q. Do you know his reputation around there where he was working for being a law abiding citizen? A. Yes.

"Q. Is it good or bad? A. Good."

[2] Notwithstanding the obvious immateriality of the foregoing testimony and notwithstanding the well-settled rule that cross-examination on an immaterial matter is improper, the following cross-examination was permitted. It is quoted by reason of its extraordinary character.

"Q. Now you say his reputation is good for being a law-abiding citizen, did you know him as a doctor? A. No.

"Q. Did you ever know that he practiced medicine on people? A. No.

"Q. Did you know that he had given people hypodermic injections of narcotics?

"Mr. Gleason: If the Court please, that is improper cross examination.

"Mr. Cochran: He has opened the gates, if the Court please.

"Mr. Gleason: Not within the issues.

"The Court: Objection sustained.

"Mr. Cochran: I might state for the purpose of the record that I can prove the particular things I am asking.

"The Court: If you intend to bring in evidence of that kind—

"Mr. Cochran: I certainly do intend to bring in that evidence.

"The Court: The objection will be overruled.

"Mr. Cochran: Q. Did you know that about this defendant? A. No.

"Q. And that he performed abortions on women and had used narcotic drugs on them? A. No.

"Q. Did you know that he had admitted having a child by another woman to whom he was not married? A. No.

"Q. You didn't know that? A. No.

"Q. Did you know that he performed an abortion upon a woman and she died? A. No.

"Q. Did you know that the defendant was charged with a felony, a sex offense against his daughter?

"Mr. Gleason: Just a moment, I cite that as misconduct for the reason that counsel knows that issue has not been heard yet. It is coming up for trial.

"The Court: Objection overruled.

"A. No.

"Mr. Cochran: That is all."

[3] Even assuming that the question on direct examination as to defendant's reputation had been a valid one, nevertheless the cross-examination recited above would have been improper. That it was highly prejudicial there can be no doubt. The questions alone were enough to produce such effect but, when the deputy district attorney asserted that, "I can prove the particular things I am asking", followed by the assertion, "I certainly do intend to bring in that evidence", the error was aggravated and the resultant injury, in the circumstances, was beyond recovery.

[4] Reputation is not what a character witness may know about defendant. Reputation is the estimation in which an individual is held; in other words, the character imputed to an individual rather than what is actually known of him either by the witness or others. By no rule of evidence would plaintiff have been permitted to "prove the particular things", referred to during the purported cross-examination.

In People v. Burke, 18 Cal.App. 72, at page 88, 122 P. 435, at page 442, appears the following: "Appellant complains bitterly of the conduct of the district attorney in his cross-examination of the character witnesses for the defense. Those witnesses testified to the good reputation of defendant for peace and quiet and also for chastity. On cross-examination they were asked if they had not heard that defendant had made a practice of committing abortions, and having improper intercourse with women, and of taking undue liberties with female patients. The court permitted these questions, but sustained an objection to the question asked of one witness if he had not heard of the defendant having been indicted by the grand jury of Lake county. No complaint is made of any question asked of the defendant himself. Under the authorities, the questions allowed by the court were properly permitted as affecting the weight of the testimony in relation to defendant's reputation. The district attorney did not claim anything as to the verity of the matters suggested or implied in his questions. The rule is that on cross-examination of character witnesses they may be asked as to specific reports concerning the trait of character involved, if they have a tendency to establish the bad reputation, although they may not be sufficient for that purpose."

There is a vast difference between inquiring about reports, rumors and the like, of a character witness and questions as to what the witness knows of defendant.

[5, 6] The argument that defendant's counsel "opened the gates" is unavailing. An error that is prejudicial is no less so because it results from a lack of knowledge on the part of either counsel or both. Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. The so-called "open the gates" argument is a popular fallacy. "Questions designed to elicit testimony which is irrelevant to any issue in the case on trial should be excluded by the judge, even though opposing counsel has been allowed, without objection, to introduce evidence upon the subject." 27 Cal.Jur. p. 74. "It is a set-

tled rule that cross-examination as to matters irrelevant to the issue may and should be excluded—even though, in some cases, testimony relative thereto was elicited upon direct examination—and that a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules." 27 Cal.Jur. p. 106.

The Supreme Court of the United States recently observed: "We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, at page 566, 87 L. Ed. 734.

Respondent relies on People v. Perry, 144 Cal. 748, 78 P. 284, and People v. Mayes, 113 Cal. 618, 45 P. 860, 862. The Perry case relies on the Mayes case and the Mayes case contains the following: "Witnesses were also called on behalf of the defendant for the purpose of sustaining the testimony of other witnesses that the prosecution had attempted to impeach, and upon the cross-examination of these witnesses the prosecution was allowed to question them with reference to specific acts. While it is not permissible to give evidence of wrongful acts for the purpose of impeaching a witness, it is proper, upon cross-examination of a witness who has given testimony, either for sustaining or impeaching the credibility of another witness, to question him with reference to his knowledge of specific acts, and with reference to the specific acts themselves, for the purpose of overcoming the effect of his testimony upon the direct examination." No authority is cited to support the above doctrine nor can any be found. The quotation concedes the inadmissibility of evidence of wrongful acts for the purpose of impeaching a witness, but approves of questions on cross-examination on the same subject. The inconsistency is obvious; it permits indirectly what is conceded to be prohibited directly.

The judgment and the order denying the motion for a new trial are, and each of them is reversed; and the cause is remanded for a new trial.

YORK, P. J., and WHITE, J., concur.

On Petition for Rehearing

PER CURIAM.

The petition for a rehearing is denied. A correction in the opinion, however, is necessary. In the second paragraph thereof, the following sentence appears: "The witness also testified 'a doctor's kit and some instruments' were also found in the house." Said sentence is modified to read as follows: "The witness also testified 'a doctor's kit and some instruments' were also found."

It is urged in the petition for a rehearing that the evidence established the corpus delicti because, it is argued, it tends to show that the narcotic was in the possession of some one, which is all that the law requires.

The only evidence revealed by the record that may be regarded as tending to establish the corpus delicti is the following testimony of the witness Harman:

"Q. Will you describe those premises briefly? A. It is a residence. * * *

"Q. Did you make a search of or in and about the premises? A. Yes, we did.

"Q. What if anything did you find there, Mrs. Harman? A. We found a medical book and a doctor's kit and some instruments and I believe an appointment book."

The witness testified in substance that the narcotics were in the doctor's kit.

[7] The rule is accepted generally that prima facie evidence is sufficient to establish the corpus delicti, but evidence as casual, indefinite, uncertain and wholly lacking in particularities as the finding of something of, in or about the premises, falls far short of proving possession, even prima facie.

60 Cal.App.2d 21

Ex parte CLARKE.

Cr. 3697.

District Court of Appeal, Second District, Division 1, California.

July 28, 1943.

1. Habeas corpus 🔑92(1)

On habeas corpus, scope of inquiry may extend to review of entire record in effort to ascertain whether court had jurisdiction and whether jurisdiction was exceeded.

2. Injunction 🔑230(3)

Where order enjoined defendant from withdrawing any fund of company from any bank except such as were reasonably necessary in ordinary and usual course of business, the burden was on plaintiff in contempt proceeding based on alleged violation of the order to prove what the money withdrawn from bank was used for.

3. Evidence 🔑386(1)

Oral statements made by judge at time injunction was granted and which were not incorporated in written order could not be considered in determining whether there had been contempt of court because of violation of injunction.

4. Contempt 🔑44

Jurisdiction of court in contempt cases depends on existence of evidence showing that an actual contempt of court has been committed.

5. Injunction 🔑230(3)

Where order enjoined defendant from withdrawing any funds of company from bank except such as were reasonably necessary in ordinary and usual course of business, evidence was insufficient to prove that withdrawals made by defendant were not reasonably necessary in ordinary and usual course of business and therefore court exceeded its jurisdiction in finding defendant guilty of contempt.

◆

Habeas corpus proceeding by F. A. Clarke, also known as Frederic A. Clarke, against the sheriff of Los Angeles County to secure release from custody after commitment for contempt of court.

Order of commitment annulled and petitioner discharged from custody.

Marshall Stimson and Noel Edwards, both of Los Angeles, for petitioner.

Fred N. Howser, Dist. Atty., of Long Beach, and Jere J. Sullivan, Deputy Dist. Atty., of Los Angeles, for respondent.

YORK, Presiding Justice.

Petitioner applied for a writ of habeas corpus and was granted a hearing upon his averment that he was "imprisoned, detained, confined and restrained of his liberty by the Sheriff of Los Angeles County, State of California, in the County Jail * * * that said imprisonment, detention, confinement and restraint are illegal * * *."

The commitment of petitioner to a jail sentence of ninety-five days and the infliction of fines in the sum of $9,500 for contempt of court arose out of the civil action of Taylor v. Clarke which was initiated March 6, 1940, seeking declaratory relief and an accounting, the complaint therein alleging a partnership between the parties to the action in the Boncquet Laboratories. The answer of defendant Clarke (petitioner here) denied the partnership and alleged the existence of a lease by Taylor to Clarke whereby the latter had leased for a term of three years certain assets which had theretofore been purchased by Taylor from the Trustee in Bankruptcy of Boncquet Laboratories. Further, that from April 1, 1937 with full knowledge of Taylor, said defendant Clarke had carried on the business individually under the fictitious name of Boncquet Laboratories for his own individual benefit and profit and as sole owner thereof.

On April 24, 1940, upon hearing on an order to show cause and for appointment of a receiver and for a restraining order in said civil action, at which hearing Clarke and his attorneys were present, an injunction pendente lite issued enjoining and restraining the said Clarke "*from withdrawing any funds of the business of the Boncquet Laboratories on deposit in any bank or banks, except such as are reasonably necessary in the ordinary and usual course of business,* and from disposing of any of the assets of the business of the Boncquet Laboratories, either directly or indirectly, except such as is reasonably necessary in the ordinary and usual course of business, until the further order of this court." (Emphasis added.)

Thereafter, from May 1, 1940, to and including August 6, 1941, petitioner Clarke from time to time withdrew sums of money, aggregating the sum of $35,761.39, from the bank or banks where accounts were maintained by Boncquet Laboratories. Under date of June 11, 1941, L. N. Dechene subscribed to an affidavit setting forth facts constituting the alleged contempt, which facts he averred were ascertained by him wholly from certain books of account of the Boncquet Laboratories; and an order to show cause was issued thereon on June 11, 1941, against petitioner and his attorneys. On June 17, 1941, said L. N. Dechene filed an amended affidavit reciting more specifically the matters covered by the first affidavit and alleging additional facts (also gleaned by him from certain books of account) charging petitioner with violating the injunction order of April 25, 1940, i. e., the withdrawal of various sums of money from the bank, whereupon a second order to show cause based upon the amended affidavit was duly issued directed to petitioner. Thereafter, on July 23 and 24, 1941, the matter came on for hearing before the Honorable Ruben S. Schmidt, as Judge of the Superior Court of Los Angeles County, who found petitioner and his attorneys "not guilty" of contempt and ordered them discharged and the proceeding dismissed. This order was later annulled by the Supreme Court (Taylor v. Superior Court, 20 Cal.2d 244, 125 P.2d 1), and said orders to show cause in re contempt were then set for hearing before the Honorable Charles S. Burnell, as Judge of the Superior Court, who, on January 18, 1943, made his findings of fact and issued an order and decree adjudging petitioner guilty of nineteen separate contempts of court and committed petitioner to the custody of the Sheriff of Los Angeles County. Having served over fifty days of the sentence imposed upon him, petitioner seeks to procure his release from custody through the instant proceeding in habeas corpus.

The injunction pendente lite was directed against petitioner "his agents and attorneys, and counsellors" and the amended affidavit of L. N. Dechene specifically averred that certain sums of money withdrawn from the bank by petitioner were paid to and accepted by his attorneys. Both orders to show cause in re contempt issued June 11 and June 17, 1941, respectively, were directed to petitioner and his attorneys therein named. However, at the hearing on said orders to show cause before Judge Burnell, the matter was dismissed as to said attorneys, leaving petitioner "as the sole person against whom this proceeding is prosecuted."

The court found, as to each of the nineteen violations of the injunction pendente lite, that the amount specified therein as having been withdrawn from the bank "was for the personal use and benefit of the defendant, F. A. Clarke; that the withdrawal and use of said sum by said F. A. Clarke, from said account was a deliberate, intentional, and willful violation of the terms of the Restraining Order and Judgment made by the Hon. Emmet H. Wilson, on the 25th day of April, 1940 * * *; that the withdrawal and use of said sum by said F. A. Clarke, was not reasonably necessary in the ordinary and usual course of business of Boncquet Laboratories."

Further, that petitioner "withdrew the total sum of $35,761.39, from time to time, subsequent to the 25th day of April, 1940, as specifically set forth hereinabove in Findings No. V to No. XXIII, inclusive. That all of the withdrawals made by said defendant, F. A. Clarke, totalling the sum of $35,761.39, were for the personal use and benefit of said defendant, F. A. Clarke, and which sums of money were used by said F. A. Clarke, and were not reasonably necessary in the ordinary and usual course of business of Boncquet Laboratories. * * * that * * * the withdrawals * * * constitute nineteen separate and distinct, deliberate, intentional, and willful violations of the terms and provisions of the Restraining Order and Judgment * * *."

The judgment in re contempt ordered that as punishment for *each* of the nineteen counts, petitioner be imprisoned in the county jail for a period of five days and pay a fine of $500, and in the event of nonpayment of such fines, that he be imprisoned one day for each $2 in default, the sentences on the nineteen counts to run consecutively. It was also provided that in lieu of serving the said terms of imprisonment and paying the fines imposed, petitioner might purge himself of said contempts by returning the sum of $35,761.39 withdrawn by him and by depositing the same in a named bank to the credit of Boncquet Laboratories.

In his petition for writ of habeas corpus, petitioner avers that the total sentences imposed upon him by said judgment amount to an imprisonment of 95 days in the county jail and the payment of $9,500 in fines; and "in the event of his failure to pay said fines * * * (he) is to be imprisoned an additional day for each two dollars of said fines, being in all 4,750 days in addition to said 95 days, or a total of 4,845 days, being thirteen (13) years and one hundred (100) days."

At the hearing in re contempt before Judge Burnell, the main witness was L. N. Dechene, a public accountant, who made the affidavits upon which the contempt proceeding is founded, and who testified directly from the books of the Boncquet Laboratories respecting the items of withdrawals alleged to have been made in violation of the injunction pendente lite. The contemner Clarke produced no evidence at said hearing, but the affidavits which he made in response to the affidavits of L. N. Dechene are before this court in the instant proceeding.

In petitioner's affidavit dated June 13, 1941, in response to the order to show cause dated June 11, 1941, he alleged "that at no time since the 25th day of April, 1940, have there been and there are not now any funds of the business of the Boncquet Laboratories on deposit in any bank or banks, and that Boncquet Laboratories is not, and at no time since April 25, 1940, has been, an entity, and owns no property, money or assets, and conducts no business.

"That affiant further says that all monies or funds withdrawn by affiant from any bank or banks between the 25th day of April, 1940, and the 1st day of April, 1941, have been such as are reasonably necessary in the ordinary and usual course of business of affiant, to-wit: F. A. Clarke, doing business under the fictitious firm name and style of Boncquet Laboratories; that any assets disposed of by affiant, directly or indirectly, between the 25th day of April, 1940, and the 1st day of April, 1941, have been disposed of in the ordinary and usual course of business. That any and all attorneys' fees and costs and expenses of litigation paid out by affiant from the 25th day of April, 1940, have been paid out of affiant's usual and ordinary drawing account, or from funds derived from sources other than the business known and designated as F. A. Clarke, doing business under the fictitious firm name and style of Boncquet Laboratories; that all attorneys' fees and costs and expenses of litigation paid by affiant since the 25th day of April, 1940, have been reasonably necessary and have been paid in the ordinary and usual course of business."

In petitioner's affidavit dated June 21, 1941, made in opposition to the amended affidavit of L. N. Dechene, it was alleged among other things: "That for several months prior to the 25th day of April, 1940, affiant (Clarke) had been withdrawing from the profits of his said business which he was conducting under the fictitious firm name and style of Boncquet Laboratories, approximately One Thousand Dollars ($1,000.00) per month, for the personal and living expenses of himself and family; that since the 25th day of April, 1940, and to the 1st day of April, 1941, affiant has continued to draw from the profits of his said business approximately the same amount per month for said purposes. Affiant alleges that such withdrawals were 'reasonably necessary in the ordinary and usual course of business', and were not directly, or indirectly, in violation of, or contrary to, said injunction pendente lite; that affiant was devoting all of his time to said business, and without assistance of any other salesman consummated the large sales which occasioned the said profits. That during the year 1939 the gross sales of the business conducted by affiant under the fictitious name of Boncquet Laboratories were in excess of One Hundred Eight Thousand Dollars ($108,000.00), but that due to the time necessarily spent by affiant in connection with the litigation in the above entitled case (Taylor v. Superior Court), and the obstructions caused by said litigation and by plaintiff in connection therewith the gross sales of affiant's said business for the year 1940 amounted to approximately Seventy-eight Thousand Dollars ($78,000.00)."

Petitioner specifies in his brief twenty-three grounds which he contends show that his imprisonment is illegal because the court exceeded its jurisdiction in adjudging him guilty of contempt of court, and concludes with the following statement:

"Upon consideration of the entire record on behalf of petitioner * * * and the authorities cited in this brief it has been shown:

"(1) That the injunction was invalid;

"(2) That the bond did not constitute a legal obligation;

"(3) That the affidavits upon which the injunction was based did not state facts which showed that there had been a violation of the injunction by the petitioner;

"(4) That there was no evidence to support the findings of the court;

"(5) That the order and commitment of the Superior Court was one which the court had no jurisdiction to make * * * because it violated the rights of the petitioner under both the Constitution of the State of California and of the United States."

[1] It is first contended by petitioner, and conceded by respondent, that on habeas corpus the scope of the inquiry may extend to a review of the entire record in an effort to ascertain whether the court had jurisdiction and whether such jurisdiction was exceeded. This contention is supported by the cases of Brunton v. Superior Court, 20 Cal.2d 202, 124 P.2d 831, Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983, and Rose v. Superior Court, 44 Cal.App.2d 599, 112 P.2d 713. See, also, In re Lake, 65 Cal.App. 420, 224 P. 126.

In the Lake case, supra, page 423 of 65 Cal.App., page 127 of 224 P., a proceeding in habeas corpus to review a contempt alleged to have been committed in the immediate view and presence of the court, it was held: "The statute, section 1222, of the Code of Civil Procedure, declares that the judgment in cases of contempt is final and conclusive. Thus, one who has been adjudged guilty of contempt has but two remedies—habeas corpus and certiorari. The scope of the inquiry which the court can make upon either habeas corpus or certiorari is precisely the same. (Citing cases.) While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. Hotaling v. Superior Court, [191 Cal. 501], 217 P. 73, 75, [29 A.L.R. 127]. This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. (Citing cases.) * * * In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused * * * and no intendments or presumptions can be indulged in aid of their sufficiency. * * *

"There is no deviation from the rule that, unless the affidavit charging constructive contempt 'contains a statement of facts which shows on its face that a contempt has been committed, the court is without jurisdiction to proceed in the matter, and any judgment of contempt thereon is void.' 5 Cal.Jur., pp. 938, 939. * * * The proceeding being one of a criminal nature, a conviction of the offense can be supported only on a showing that the acts charged come within the definition of the offense."

See, also, Wilde v. Superior Court, 53 Cal.App.2d 168, 127 P.2d 560; Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22.

The question raised by petitioner with respect to the validity of the bond required to be posted by the injunction order is sufficiently answered by the decisions in Taylor v. Superior Court, 20 Cal.2d 244, 125 P.2d 1, and Yellen v. Fidelity & Casualty Co., 115 Cal.App. 434, 1 P.2d 1019.

Petitioner's main contention is that the injunction order of April 25, 1940, is void, because "the language of the order enjoining petitioner from withdrawing any funds 'except such as are reasonably necessary in the ordinary and usual course of business', is so vague and uncertain as to render it impossible for petitioner to know what he might or might not do."

[2] There is no doubt that the language used in the order is subject to different interpretations. It clearly prohibits petitioner from withdrawing funds—either dissipating or throwing away the funds of the company, but on the other hand, it permits him to withdraw such funds as are reasonably necessary in the ordinary and usual course of business. It would therefore appear that the burden was upon the plaintiff in the contempt proceeding to prove what the money withdrawn from the bank was used for.

Inasmuch as the order which forms the basis of the alleged contempt is qualified and authorizes expenditures reasonably necessary in the ordinary course of business, the question as to what expenditures come within the meaning of the order is left open. Honest opinion can differ as to what constitutes expenditures reasonably necessary in the ordinary course of business. Manifestly, something more than a difference of opinion is necessary to sustain a judgment in contempt.

The amended affidavit of Dechene, which superseded his first affidavit and is the only basis for the proceeding in re contempt, avers in the first twenty-three paragraphs thereof that petitioner "contrary to and in violation of the restraining order" withdrew sums of money then on deposit with certain banks under the name of F. A. Clarke, doing business as Boncquet Laboratories, and paid the same to his attorneys. These are averments, not of fact, but of mere conclusions of law. There is neither averment nor proof to be found in the record that such payments were not reasonably necessary in the ordinary and usual course of business.

There then follow averments XXIV to XXX, amounting to conclusions of law only, that petitioner "contrary to and in violation of the restraining order" withdrew from certain named banks, specified sums of money "for his own use and benefit", which funds were on deposit in said banks under the name of F. A. Clarke, doing business as Boncquet Laboratories.

Petitioner in his affidavit in response to the first order to show cause averred that all attorneys' fees paid by him since April 25, 1940, "have been reasonably necessary and have been paid in the ordinary and usual course of business." Moreover, in his affidavit in opposition to the amended affidavit of Dechene, petitioner admitted he had withdrawn during the period of April 25, 1940, to April 1, 1941, the sum of $1,000 per month for his own salary, and that such withdrawals were reasonably necessary in the ordinary and usual course of business, for the reason that he was devoting all of his time to the business and, without the assistance of any other salesman, consummated sales which resulted in gross sales of $78,000 for the company's product in the year 1940.

At the trial in re contempt, Dechene, the author of the hereinbefore mentioned affidavits, was the principal witness. He testified he was a public accountant and had made an audit of the books of the Boncquet Laboratories. In answer to the question: "I will ask you if your books show that any of that money (withdrawals) was used—what the money was used for?", said witness replied: "It only shows that it was withdrawals, that were charged to his account." Again, when asked, "Referring to the books of the Boncquet Laboratories, are all expenditures that were made by Mr. Clarke during that time reflected in the books of the Boncquet Laboratories; that were expended in the business?", the witness answered: "Yes. There are various expense accounts set up, where any money that was primarily for the business would be charged to the respective accounts.

"Q. By Mr. Fox: These sums of money which you have referred to—there is no record kept of these expenditures being placed to any particular item, or account, for the business? * * * A. In Mr. Clarke's drawing account—* * *

"Q. And according to the books as you interpret them that was his drawing account for the maintenance of himself, in the management of the business? A. Not for the management of the business. They cover the personal expense, income tax and any money he may expend in any way he sees fit, but none of the money has ever come back into the business. * * *

"Q. None of that money, so far as the books show, was used for the necessary running expenses of the business of the Boncquet Laboratories? A. The amounts I have recorded are all drawing account, F. A. Clarke, or in payment of the account of Hastings and Baker (attorneys)."

On cross-examination, said witness testified that the books of the Boncquet Laboratories were kept as an individual account, and not as a partnership account; that they did not reflect anywhere that they were a partnership account; that, according to the books, all the money that came into the business was kept in an individual or personal account, as a sole proprietorship; that all the books and all the records of the company state that they were records of F. A. Clarke, doing business as Boncquet Laboratories.

In answer to a question put to him by the Court, i.e., "You have stated generally the method of bookkeeping. Was that method used in this concern, in these books?, the witness stated: "It was used in this set of books, as a sole proprietorship. The withdrawals, as I explained the other day, subsequent to April 24th, 1940, were in the amount of $12,046.92, chargeable directly to Mr. Clarke. There was an item also in addition to that—there was charged against his Investment Account the amount of $3,471.03 which * * * would reflect the net investment at the end of the period."

Upon cross-examination the following occurred:

"By Mr. Salem. Q. Mr. Dechene, as far as these books are concerned, do they indicate that they are the books of F. A. Clarke, doing business as Boncquet Laboratories? A. That is an interpretation, that anyone is a sole proprietor. They may operate under a name, doing business as any fictitious name.

"Q. Do these books reflect F. A. Clarke doing business as Boncquet Laboratories? A. That is the way the books are set up. * * *

"Q. As a matter of fact, those withdrawals set forth as of May 1st, 1940, to and including August 6th, 1941, were made from books which were audited by or prepared by some one other than yourself? A. Yes.

"Q. You were merely taking what the books reflected? A. Yes.

"Q. As a matter of fact, these are all withdrawals by F. A. Clarke from funds belonging to the Boncquet Laboratories, by F. A. Clarke doing business as Boncquet Laboratories? Answer 'Yes' or 'No'. A. Yes."

As to the various sums of money averred by the amended affidavit as having been withdrawn by petitioner from the funds of the company, the following is a typical example of the testimony offered to prove such averment:

"Q. The item under date of May 24th, 1941, $415, according to the books is that a correct notation that that amount of money was paid to Eldon V. Soper, Baker and Hastings? A. According to the books of the Boncquet Laboratories, that is just the same as the item just mentioned previously. It is a cash item, drawn from a check in the amount of $615. $415 is charged to Accounts Payable and $200 is charged to F. A. Clarke, drawing account, tracing the $415 from the Accounts Payable into the detail ledger, then we find it is posted to the account of Eldon V. Soper, Hastings and Baker. * * *

"Q. Do the books themselves show who made the withdrawals which are charged on the books to F. A Clarke drawing account? A. I don't get that question, exactly. The books reflect that this money has been withdrawn, and charged to F. A. Clarke's personal withdrawals.

"Q. But they do not disclose, in and of themselves, who made the withdrawals, do they? A. I cannot say only what the record shows, that there are certain accounts charged to Mr. Clarke and apparently he got them, or they would not be charged to him."

[3] Respondents rely upon an averment in the amended affidavit of Mr. Dechene to the effect that at the time the injunction pendente lite was issued by Judge Wilson, he "informed Girard F. Baker that it would be improper for him or any other person to withdraw from the funds of Boncquet Laboratories, any sum whatsoever for and on account of attorneys' fees pending the trial of said cause (Taylor v. Superior Court), and ordered said attorney, Girard F. Baker, or any other person on his behalf, not to withdraw any funds on account of attorneys' fees pending the trial of said case." Any oral statements made by the judge at the time the injunction was granted and which are not incorporated in the written order are completely dehors the record and cannot be considered by this court.

[4] In the case of Wilde v. Superior Court, 53 Cal.App.2d 168, 178, 127 P.2d 560, 565, it is stated: "Jurisdiction of the court in contempt cases, like those in which reviews of awards of the Industrial Accident Commission are sought, depends on the existence of evidence showing that an actual contempt of court has been committed. In the absence of such evidence a court pronouncing a judgment of contempt lacks jurisdiction and its order should be annulled. In re Lake, supra [65 Cal.App. 420, 224 P. 126]; In re Chaus, supra [92 Cal.App. 384, 268 P. 422]; In re Cunha, 123 Cal.App. 625, 11 P.2d 902, 18 P.2d 979; In re Cutler, 1 Cal.App.2d 273, 36 P.2d 441; In re Roberts, 2 Cal.App. 2d 70, 37 P.2d 477; King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268; In re Critchlow, 11 Cal.2d 751, 81 P.2d 966.

"The reasons for this rule in contempt cases are stated in King v. Superior Court, supra (12 Cal.App.2d 501, 56 P.2d 273), as follows:

" 'When jurisdiction to inquire and act depends upon the existence of certain facts, the absence of proof of such facts limits the power to that of inquiry only, and, if action is attempted it is in excess of jurisdiction. The same reasoning is applied to cases before the Industrial Accident Commission. * * *'

"As we have seen, neither the trial court nor this court can indulge in any presumptions against one charged with contempt. * * * There is a presumption 'that there was a good and sufficient consideration for a written contract' * * * and also, what has been characterized as one of the strongest presumptions 'That a person is innocent of crime or wrong'. Subd.1, § 1963, CodeCiv.Proc."

[5] A careful examination of the record in the instant proceeding discloses an absence of any substantial evidence tending to prove that the withdrawals made by petitioner were not "reasonably necessary in the ordinary and usual course of business" of the Boncquet Laboratories. Consequently, the trial court exceeded its jurisdiction when it found petitioner guilty of contempt.

For the foregoing reasons the order of commitment is annulled, and the petitioner is discharged from custody.

DORAN and WHITE, JJ., concur.

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60 Cal.App.2d 146

SAWAYA v. DeCOU et al.

Civ. 13998.

District Court of Appeal, Second District, Division 1, California.

Aug. 6, 1943.

1. Master and servant 🔑322

Though doctrine of "respondeat superior" does not ordinarily apply where injury results from negligence of independent contractor, such doctrine is applicable where property owner knowingly causes excavations to be made in or obstructions to be created on public street or sidewalk fronting his property, owner then owing duty to public to maintain sufficient warning signals thereon.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

2. Master and servant 🔑317

Where by statute or ordinance, owner is prohibited from excavating or obstructing public street without permit, he is liable for injuries resulting from failure of contractor to maintain proper warning signals, whether work was done with or without permit.

3. Master and servant 🔑322

Property owner who permitted or caused another to secure from city permit to excavate street for installation of sewer connections and who knew that work was to be done or was being done, could not escape liability for injuries sustained by third persons through independent contractor's negligent failure to maintain sufficient warning signals on ground that owner had no notice or knowledge of conditions of street.

4. Master and servant 🔑322

Whether property owner was liable for injury sustained by third person due to independent contractor's negligent failure to maintain sufficient warning signals on material excavated from and piled on city street under permit to excavate street for installation of sewer connections depended upon whether owner knowingly caused excavation and obstruction to be made or maintained in the street.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Amelia Sawaya, a minor, by her guardian ad litem, George A. Sawaya, against Bronson DeCou and others, for injuries sustained by plaintiff when automobile in which she was riding struck an obstruction in street fronting defendant's property. Elsie V. DeCou as executrix of the will of Bronson DeCou, deceased, was substituted as defendant in place of her deceased husband. From a judgment for plaintiff, and an order denying a motion for new trial, the substituted defendant alone appeals.

Appeal from order denying a new trial dismissed, and judgment affirmed.

A. J. O'Connor, of Los Angeles, for appellant.

Franklin B. McCarthy, of Los Angeles, for respondent.

WHITE, Justice.

This action was commenced by Amelia Sawaya, a minor, by her guardian ad litem, George A. Sawaya, to recover damages for injuries sustained by her when the automobile in which she was riding struck a mound of excavated dirt and macadam on Cahuenga Boulevard, in the City of Los Angeles. By her complaint plaintiff alleged that for the purpose of making sewer connections between defendant DeCou's property and the city's main sewer line, "defendants excavated or caused to be excavated and dug, a large and deep hole in the middle of Cahuenga Boulevard and in the course of said digging and excavating threw up and piled upon the middle of said boulevard a large mound of dirt, rocks and macadam * * * the said dangerous condition of said street or boulevard was known by defendants Bronson DeCou and Homer Toberman on said date of March 29th, 1941"; that defendants negligently suffered said excavation and dirt to remain unguarded and unlighted and without proper signals on the street, and as a proximate consequence thereof plaintiff was injured. Joined as defendants with the executrix of the will of Bronson DeCou, owner of the property where the sewer connections were being made, were the building contractor, Homer Toberman, and the sewer contractor, Andrew Jayich. By his answer defendant DeCou denied that he excavated the street or piled the dirt thereon; denied negligence and the injuries to plaintiff, and alleged that Andrew Jayich was an independent sewer contractor who had agreed to make the connection according to plans and specifications approved by the Engineering Department of the City of Los Angeles, and that if Andrew Jayich was at all negligent, DeCou was not liable therefor. A jury trial was had and a verdict in favor of plaintiff for $500 was returned against Andrew Jayich and defendant executrix who was substituted as a defendant in the place and stead of her deceased husband. The jury found in favor of the contractor, Homer Toberman. Said executrix, Elsie DeCou, alone appeals from the judgment and from an order denying a motion for a new trial, assigning as error the giving of certain instructions by the trial court.

Briefly the facts are that on October 15, 1940, Bronson DeCou entered into a contract with Homer Toberman, a licensed building contractor for the erection of some units of a motel on the property of DeCou which had been purchased by him from C. E. Toberman Company, a corporation. The contractor, Homer Toberman, son of C. E. Toberman, had no official connection with the corporation of which the latter was president, but at times acted as a part-time employee thereof. The record discloses that application to the city of Los Angeles for a permit to excavate the public street for installation of the sewer connections was made through a letter written by C. E. Toberman, President of C. E. Toberman Company, under date of October 4, 1940. The required $56 fee for said permit was paid by C. E. Toberman and a bond was furnished by the C. E. Toberman Company. C. E. Toberman testified that Bronson DeCou reimbursed him for the $56. Homer Toberman picked up the permit from the office of the L. A. City Engineering Department and signed therefor as follows: "C. E. Toberman Company, by Homer Toberman".

On January 18, 1941, Andrew Jayich, a licensed sewer contractor, entered into a contract with C. E. Toberman Company to install the sewer under the above-mentioned permit and connect with the main sewer line that extended out in the center of Cahuenga Boulevard. Jayich testified that he had a contract with Mr. C. E. Toberman, and that "Mr. C. E. Toberman gave me a payroll every week, that I didn't have no money, and so when I take the job I told him I didn't want the job, and he says he will give me—he will help me pay as I go along, and that was that"; and that he didn't see Mr. DeCou until after the accident here in question. But defendant DeCou, by way of separate and affirmative defense, alleged: "That on or about November 6, 1940, said defendant obtained the approval of the Engineering Department of the City of Los Angeles to plans and specifications for a sewer in Cahuenga Boulevard; that thereafter said defendant accepted a bid from one Andrew Jayich, sewer contractor, to construct a sewer according to said plans and specifications for the sum of $640.00; that said Jayich thereupon constructed said sewer; that said Jayich is not an employee of defendant Bronson DeCou but at all times herein mentioned was an independent contractor and acted under and pursuant to the contract for sewer construction alleged in paragraph I of this separate and affirmative defense".

Homer Toberman testified, under section 2055 of the Code of Civil Procedure, that he was a licensed general building contractor, and that he was not an official or stockholder of C. E. Toberman Company, but only a part-time employee. That in October, 1940, he started building operations on Mr. DeCou's property, which work was completed some time in April, 1941. Homer Toberman also testified that he entered into a contract with the Advance Plumbing Company to install the plumbing and fixtures but that this work only extended to the property line and that the sewer was to be brought into the curb by others.

Upon this appeal it is not denied by appellant that the excavation and the mounds of dirt resultant therefrom were not signed or marked with signals or warning devices as required by the City of Los Angeles in granting the permit to excavate, nor is respondent's contention, that the obstructions on the highway were improperly and ineffectively lighted, challenged.

Appellant's main ground for reversal is the trial court's refusal to instruct the jury that unless the owner himself takes out the permit to excavate, he can not be held liable for negligent acts of his independent contractor, and that the duty to use ordinary care in so excavating is imposed upon the person to whom the permit is issued; that the mere fact of ownership does not render the defendant DeCou liable if he employs an independent contractor and does not have the full and unqualified right to control and direct said independent contractor in the construction of the sewer; or if defendant DeCou employed the general contractor as an independent contractor, he, the defendant owner, would not be liable for acts of negligence of said general contractor, or if said general contractor employed a subcontractor, the negligence of said sub-contractor could not be imputed to said owner; or that negligence on the part of the independent contractor could not be imputed to said owner; that defendant DeCou was not bound to anticipate negligence on the part of the contractors; that there was no evidence that either Andrew Jayich and/or Homer Toberman was an agent, servant or employee of Bronson DeCou.

[1, 2] In these contentions appellant can not be sustained. The case of Robbins v. Hercules Gasoline Co., 80 Cal.App. 271, 251 P. 697, 698 (hearing denied by the Supreme Court), presents a factual situation quite similar to the one existing in the case at bar. In the cited case, speaking of the application of the doctrine of respondeat superior, the court said: "Generally speaking, the rule does not apply where injury results from the negligent acts of an independent contractor, but it is a well-known exception to this rule that where the owner of property knowingly causes excavations to be made in or obstructions to be erected on the public street or sidewalk fronting his property, he owes a duty to the public to maintain sufficient warning signals thereon and cannot pass this duty on to another. Thus, where by statute or ordinance an owner is prohibited from excavating or obstructing a public street without permit, he is liable for injuries resulting from the failure of his contractor to maintain proper warning signals *whether the work was done with or without permit*—in the first instance, on the theory that through the permit he has assumed the duty of the municipality to maintain the street in a safe condition, and in the second instance, on the theory that, having acted in violation of law, he has created a nuisance per se. Colgrove v. Smith, 102 Cal. 220, 224, 36 P. 411, 27 L.R.A. 590 * * *." (Emphasis added.)

The latter case is authority for the following: "It is commonly stated — and, in a large class of cases, correctly — that the principle of respondeat superior does not apply where the negligent or wrongful act is that of an independent contractor, or of his servant or employé, unless the superior has been guilty of negligence in contracting with an unfit person. * * * But there are exceptions to the general doctrine, and this case, we think, is one of them. The board of trustees of the city was charged by the law with the care and maintenance of the streets in a safe and proper condition for the use of the public. Appellants could not lawfully dig trenches and lay water pipes without express authority from the city. If they had undertaken to do so, and had contracted with another to do the work, they would not, by such contract, have relieved themselves from liability to the city for the trespass, nor to individuals who might have sustained special injury. Nor does the fact that they obtained from the city a franchise or permission to dig up the street and lay their pipes relieve them from more than the unlawful character of the work. They stand in a contract relation to the public, represented by the city authorities, to do the work in the manner required by the ordinance, *and cannot relieve themselves of the duty imposed by that contract by contracting with another to do the work.* These trenches could not be dug in the street without danger to the public. If done without authority, a nuisance would necessarily be created; and, if not done in the manner required by the ordinance, the departure creates a nuisance." (Emphasis added.) To the same effect see Luce v. Holloway, 156 Cal. 162, 103 P. 886.

Appellant urges that no evidence was adduced at the trial to prove that defendant DeCou had any notice or knowledge of the condition of the street. However, by his answer defendant DeCou alleged that he "accepted a bid" from the contractor Jayich for the installation of the sewer connection, and there is creditable evidence that he was aware of the impending excavation of the street as indicated by his reimbursement of Mr. C. E. Toberman for the $56 expended for the permit authorizing such excavation.

[3] Appellant places great reliance upon the case of Wise v. Maxwell Hardware Company, 94 Cal.App. 765, 271 P. 918, and particularly upon that portion of the decision on pages 768 and 919, respectively, wherein the court stated: "There can be no question that an abutting property owner is not ordinarily liable for injuries resulting from obstructions created by an independent contractor". But this language is immediately followed by this statement: "Where, however, he *knows* of the dangerous condition, *or as a careful, prudent man should have known of it, the rule is otherwise.*" (Emphasis ours.) As we have heretofore pointed out, the record contains sufficient evidence to justify a finding by the jury that while defendant DeCou may have caused or permitted another to secure the permit from the municipal authorities, he had knowledge that the work was to be done or was being done and could not, therefore, relieve himself of liability for injuries sustained through the negligence of the independent contractor who obtained the permit.

[4] The instructions given by the court were in accordance with and practically contained the identical language used in Robbins v. Hercules Gasoline Co., supra. Considered as a whole the instructions correctly advised the jury that while ordinarily the rule is that an owner is not liable for the negligent acts of an independent contractor, such rule has no application in cases like this where the owner of property knowingly causes excavations to be made in or obstructions to be erected or maintained on the public streets fronting his property. In such cases the duty he owes to the public to maintain sufficient warning signals can not be shifted to another. The jury was properly instructed that it was for them to determine whether the owner DeCou knowingly caused the excavation and obstructions to be made or maintained in the street before such owner could be held liable. As heretofore pointed out the record herein sustains the jury's affirmative finding upon that issue.

The attempted appeal from the order denying a new trial is dismissed. Finding no error in the record, the judgment must be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

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59 Cal.App.2d 783

CRUMRINE v. DIZDAR.

Civ. 13961.

District Court of Appeal, Second District, Division 3, California.

July 23, 1943.

1. Executors and administrators 🔑535

If persons in whose interest surety's liability is sought to be enforced did not know of fraud in obtaining administrator's bond, and if administrator's liability has been fixed by decree, defenses available in action on bond are that the bond was not made, or that decree ordering administrator to deliver property for which he was accountable was obeyed, or that decree was not made, or that decree, if made, was obtained by fraud.

2. Executors and administrators 🔑535

A surety on administrator's bond who has undertaken to pay any balance adjudged to be due by administrator to the estate, is bound by the judgment unless he can show the judgment was obtained by fraud.

3. Executors and administrators 🔑537(10)

In action on administrator's bond, instructions that if surety could not read and without negligence signed administrator's bond through fraud of administrator or cosurety, surety was not liable were erroneous.

4. Executors and administrators ⚿537(5)

An action against surety on administrator's bond was not barred by limitation where period of limitation for commencing action was at least four years from time former administrator died and action was commenced within two years after his death.

5. Executors and administrators ⚿537(5)

An administrator or surety asserting that action on administrator's bond is barred by laches or equitable estoppel must show an unreasonable and unexplained delay, and mere delay short of full period of limitation will not defeat such action.

6. Executors and administrators ⚿537(5)

A succeeding administrator's action against surety on former administrator's bond was not barred by "laches" because action was commenced some 13 months after succeeding administrator's appointment, in view of record including showing that decree settling former administrator's account was made some three months before commencement of the action.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

◆

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Action by C. Leroy Crumrine, as administrator of the estate of Charles Trotter, deceased, against Hasan Dizdar to recover on an administrator's bond on which defendant was a cosurety. From a judgment for defendant and from an order denying a new trial, plaintiff appeals.

Judgment reversed and appeal from order dismissed.

Arthur H. Blanchard, of Santa Paula, and Burton B. Crane, of Los Angeles, for appellant.

Albert A. Kidder, Jr., of Ojai, and James C. Hollingsworth, of Ventura, for respondent

PARKER WOOD, Justice.

Frank C. Arnold was appointed administrator of the estate of Charles Trotter upon condition that he furnish a $1,000 bond. Arnold presented a bond in that amount to the court, signed by himself as principal, and by William T. Fulton and defendant as sureties, which bond was approved by the court. Letters of administration were issued to Arnold on March 11, 1926. Arnold died on December 31, 1939, and at that time the administration proceedings in the Trotter estate had not been completed and no account had been rendered.

The public administrator was appointed administrator of Arnold's estate, and he rendered an account of Arnold's administration of the Trotter estate showing that Arnold was indebted to the Trotter estate in the sum of $1,285.45. The court in settling the account of Arnold as administrator adjudged there was a balance of $1,285.45 due from Arnold to the Trotter estate, and that said balance "was not on hand" by Arnold at the time of his death.

Plaintiff, who succeeded Arnold as administrator of the Trotter estate, brought this action against defendant, as surety, to recover the amount of the bond. Fulton, the other surety, died in 1936.

In his answer defendant denied generally the allegations of the complaint, and alleged fraud on the part of his cosurety and Arnold in obtaining defendant's signature as a surety. As further defenses, he alleged: (1) Laches, in that plaintiff was appointed administrator on June 19, 1940, and did not commence this action until July 24, 1941; in that plaintiff was a nephew of Trotter and should have known of the defaults of Arnold as they occurred; and in that plaintiff did not file any claim against the estates of either Arnold or Fulton, and by his failure to do so has deprived defendant of the right of contribution and is barred from invoking the aid of equity. (2) The action was barred by the statute of limitations. (3) The action was premature in that the Arnold estate had not been closed and no demand had been made upon the administrator of Arnold's estate. (4) Defendant did not make the bond. (5) Failure of consideration. (6) Arnold was granted extensions of time by plaintiff and by those whom plaintiff represents.

Defendant testified in substance as follows: He was born in Jugoslavia, came to the United States in 1906, attended night school 1½ years, could read about 15 words out of each 100, and became a citizen in 1912. Preceding 1920 he was a railroad laborer, a truck driver, and a cement worker. Since 1920 he has owned and operated a cafe in Camarillo, and has built and sold houses. At the time he signed the bond he owned said cafe, the water system in Camarillo, an old church building and a few homes. On the day he signed the bond, Arnold (the principal) and Fulton (the cosurety) came to his cafe and Fulton, in Arnold's presence, told defendant that a relative of Arnold had died leaving an old house in Fillmore which Arnold had an opportunity to sell for $1,700, and the court was going to appoint Arnold to sell it. Fulton then asked defendant if he "wanted to go with him" and "sign the bill" for Arnold, and said "Frank [Arnold] is all right," that it would be settled up "in 6 or 7 months." Defendant had worked with Arnold for several years. Defendant often went to Fulton for advice, and relied upon his statements. After defendant signed the bond he, Arnold and Fulton went to a notary public, whom defendant had known 6 or 7 years, and Fulton and defendant again signed the bond before the notary. No one read the bond to defendant.

A bookkeeper, called by defendant, testified he had known defendant 20 years, and had been employed by him 3 or 4 years; and that defendant could read some printing but no "written" matter. A justice of the peace, called by defendant, testified he had known defendant 26 years; that defendant could not read, and that he (the witness) often read and explained documents to defendant.

The evidence presented by plaintiff consisted of plaintiff's testimony concerning his appointment as administrator of the Trotter estate; the testimony of defendant under the provisions of section 2055 of the Code of Civil Procedure; and the decree showing the indebtedness of Arnold, the bond, and other documents showing the essential probate proceedings.

Judgment, based upon a verdict, was in favor of defendant. Plaintiff appeals from the judgment and the order denying a new trial. Plaintiff contends among other things, that fraud practiced by a cosurety or an administrator upon a surety whereby the surety was induced to sign the administrator's bond does not constitute a defense to an action upon the bond brought in behalf of the heirs, and therefore certain instructions of the court were prejudicially erroneous.

One of the instructions given at defendant's request was: "You are instructed that where there is fraud or misrepresentation by one person likely to cause and that does cause another person, without negligence on his part, to believe that he is assenting to a transaction entirely different from that which would be created if there was no fraud, misrepresentation or mistake as to the facts, then I instruct you that there has been no assent or meeting of the minds required by law, and if you further believe from all the facts and circumstances in this case that the said defendant Hasan Dizdar signed said bond or contract by reason of fraud or misrepresentation which was likely to cause and did cause him to sign the same, and that there was no negligence on his part in signing said bond or contract, and that in so signing it, he believed that he was signing a bond or contract entirely different from that which would have been signed if there had been no fraud, misrepresentation or mistake as to the facts, then I instruct you that your verdict must be in favor of the defendant, Hasan Dizdar, and against the plaintiff, C. LeRoy Crumrine, as Administrator of the Estate of Charles Trotter, Deceased."

Another instruction given at defendant's request was to the effect that if the jury believed defendant did not have sufficient education to read the bond, and that the terms thereof were misrepresented to defendant and the misrepresentation was relied upon by him its verdict must be in favor of defendant.

Another instruction given at defendant's request was to the effect that if the jury believed defendant did not have sufficient education to read the bond, although he was under the legal duty to have it read to him, he was justified in relying upon the statements or representations of one in whom he had confidence.

Another instruction given at defendant's request stated that if the jury believed Arnold [the principal] was present, and had reason to know of the said misrepresentations at the time the same were alleged to have been made, defendant was not liable.

Further instructions given at the request of defendant were, in substance: (1) that while one is presumed to have assented to the terms of a written contract when he signs it, it may be rebutted, and if defendant did not assent to the terms of the bond, "then in law" he is not deemed to have signed or executed said bond; (2) that a contract obtained by misrepresentation is of no legal force or effect; and (3) that the jury's verdict should take into consideration the circumstances surrounding the execution of the bond and the situation of the parties.

[1] If the persons in whose interest the surety's liability is sought to be enforced did not have knowledge of any fraud in obtaining an administrator's bond at the time it was obtained, and if the administrator's liability has been fixed by a decree, the defenses available to a surety in an action upon the bond are: that the bond was not made; or that the decree, ordering the administrator to deliver property for which he was accountable, was obeyed; or that the decree was not made; or that the decree, if made, was obtained by fraud. In the case of Irwin v. Backus, 1864, 25 Cal. 214, 85 Am.Dec. 125, the court found that Backus, the administrator, was in default, removed him from office, appointed a successor and ordered Backus to pay over the amount due the estate. Backus did not comply with the order. In holding the sureties liable on the bond, the Supreme Court said, at page 223 of 25 Cal., 85 Am.Dec. 125: "As a general rule, sureties upon official bonds are not concluded by a decree * * * against their principal * * * but administration bonds seem to form an exception to this general rule. * * * This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the Probate Court," and said further on page 224 of 25 Cal., 85 Am.Dec. 125: "* * * upon the refusal of the administrator to obey such order or decree, the liability of the sureties attaches, and they are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defense either that the bond was not made, or that the decree was not made; or, if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the Court has erred in making the decree * * *." It is to be noted that the words, "the same has been obeyed," in the last sentence above quoted referred to the decree. The word "obeyed," of course, was not used with reference to the bond, and the words "the same," therefore, referred to the decree. It is to be noted further that the words, "or that the same was obtained by fraud or collusion," also referred to the decree. The repetition of the words "the same" indicates a reference to the same subject that was referred to when those words were used in the preceding sentence. The word "collusion" is not used ordinarily in referring to the improper obtaining of a surety's signature, but is an appropriate word to use in designating connivance between a principal and a beneficiary in a court proceeding to obtain a decree against a surety. Authorities hereinafter mentioned also indicate that the words "the same," as used in Irwin v. Backus, supra, related to the decree and not to the bond. It is stated in 11b California Jurisprudence, section 1405, pages 942 and 943: "The sureties may show, by way of defense, either that the bond was not *executed* or that the decree directing delivery of property found in the hands of their principal was not *made,* or if made, that *it* [the decree] has been obeyed or was obtained by fraud or collusion; but they may not show that the court erred in making the decree * * *." (Italics added.)

"As a general rule, in the United States, when a principal obligor has induced his surety or guarantor to sign an instrument by false or fraudulent representations, such misrepresentations may not be set up by the surety or guarantor as a defense to an action on the indorsement or guaranty unless the obligee or guarantee had notice of, or participated in, such fraud." 71 A.L.R. 1278 and cases cited.

In 34 Corpus Juris Secundum, Executors and Administrators, § 944d, p. 1166, it was stated: "The liability of the sureties on an administration bond is not affected by the fact that they were induced to sign the bond through the fraud or misrepresentation of the principal, of which the beneficiaries of the estate in whose interest the liability is sought to be enforced are innocent * * *."

The court stated in the case of Simon Newman Co. v. Tully, 1939, 13 Cal.2d 134, 137, 88 P.2d 131, 132: "The rule is well settled and generally followed that fraud of the principal debtor will not relieve the guarantor or surety who acted at the request of the debtor from liability, if the creditor did not have notice of the fraud and did not participate therein."

It was stated in California Standard F. Corp. v. Cornelius Cole, Ltd., 1935, 9 Cal. App.2d 573, at page 577, 50 P.2d 1054, 1056: "'While the law requires the guarantee to act in good faith, unless he has knowledge of or participates therein, he is not responsible for any misrepresentation or deception practiced by the principal, or other third person, upon the guarantor in order to induce him to enter into the contract of guaranty.' 28 C. J. 927; Elizalde v. Murphy, 163 Cal. 681, 126 P. 978."

In the case of Scholl v. Gilman, 1928, 263 Mass. 295, at page 299, 160 N.E. 889, 891, the court said: "It is not material what induced the defendant to sign the bonds so long as the obligee was not responsible therefor."

[2] If a surety has signed an administrator's bond, and has undertaken thereby to pay any balance which shall be adjudged to be due by the administrator to the estate, he is bound by the judgment unless he can show the judgment was obtained by fraud. Easton v. Boston Investment Co., 1921, 51 Cal.App. 246, 251, 252, 196 P. 796; Kruger v. California Highway Indem. Exch., 1927, 201 Cal. 672, 678, 258 P. 602.

Plaintiff cites the case of Treweek v. Howard, 1895, 105 Cal. 434, 39 P. 20, in support of his contention that fraud by the administrator or cosurety in obtaining the signature of defendant surety was not a defense. The sureties therein were held liable. One of the defenses alleged therein was that the executor, by fraudulent statements, induced defendants to sign his bond as sureties. Defendant asserts there is no similarity between that case and the present one in that the fraud referred to therein was not the type of fraud under discussion herein. The case, however, is of assistance in determining whether the fraud which is referred to in Irwin v. Backus, supra, as a defense, is fraud in obtaining the bond or fraud in obtaining the decree. The court said in the Treweek case, 105 Cal. at page 445, 39 P. at page 23: "The decree of distribution * * * and the order * * * approving the account of the executor, were, in the absence of fraud, binding upon the * * * sureties * * *." In support of that statement the court cited the case of Irwin v. Backus, supra, and then said on the same pages: "The question remains, is there any such fraud charged * * * as entitled the defendants here to attack the *decree* of distribution * * *." (Italics added.) It therefore appears that the court eliminated, as a question in the case, the alleged fraud in obtaining the signatures of the sureties on the bond; and it further appears that the fraud referred to in the statement of the court, "in the absence of fraud," in the Treweek case was fraud in obtaining the *decree*, and that the court in that case interpreted the reference to fraud, as a defense in the Irwin v. Backus case, to mean fraud in obtaining the *decree*.

The first instruction above referred to included a statement that if there was fraud and "there was no negligence on his [defendant's] part in signing said bond" the verdict must be for defendant. Defendant contended as a part of his defense that he was not negligent in signing the bond. As to the question of negligence on the part of a surety in signing a bond, it was said in the case of Sager v. W. T. Rawleigh Co., 1929, 153 Va. 514, 529, 150 S.E. 244, 248, 66 A.L.R. 305, after referring to various cases: "These cases and the majority rule do not rest upon negligence but upon a broader base. It comes back to this: 'Where one of two innocent parties must suffer by a fraud perpetrated by another, the law imposes the loss upon the party who, by his misplaced confidence, has enabled the fraud to be committed.'" In that case the defendant, a successful business man, could not read, but could write his name, and he signed a guaranty upon the representation of the principal that it was a letter of recommendation. The court held the defendant liable, and stated further at page 526 of 153 Va., at page 247 of 150 S.E., 66 A.L.R. 305: "* * * we are of opinion that, as between plaintiff and defendant, the equities are with the plaintiff. It [Rawleigh Co.] did nothing, while the defendant [Sager] set in motion a series of causes, innocent though he may have been, which resulted in loss to another who had every reason to rely and did rely upon them. The weight of authority in this country and the juster rule hold with the plaintiff. * * * Common prudence requires that those who are unable to read should at least not sign contracts or writings without having them first read by some disinterested party."

In the case of J. R. Watkins Medicine Co. v. Hargett, 1923, 209 Ala. 165, 95 So. 811, an obligor had induced certain persons to sign a guaranty by a false representation that the instrument was a recommendation, and the court held that the fraud did not defeat the liability of the guarantors to a guarantee who did not participate in the obligor's fraud, and stated at page 166 of 209 Ala., at page 812 of 95 So.: "The real question is: Which of two innocent parties shall suffer by a fraud perpetrated by another? The answer is found in the principle of justice and morals, often followed by this court, which imposes the loss upon the party who, by his misplaced confidence, has enabled another to commit the fraud."

Defendant relies strongly upon the case of Mazuran v. Stefanich, 1928, 95 Cal.App. 327, 272 P. 772. That action was upon a note made by defendants and payable to plaintiff, an attorney at law, in consideration of plaintiff's agreement to render certain legal services. The court held that the note was obtained by fraud and was void. That case (in which a confidential relationship of attorney and client existed) is distinguishable from the present case in that plaintiff therein was guilty of fraud in obtaining the note. The note was invalid *as between the parties to the transaction.* In the present case the heirs of Trotter, for whose protection the bond herein was required by law, did not participate in or have knowledge of the alleged fraud of defendant's cosurety and the administrator in obtaining the bond. The heirs were not parties to the transaction in which the bond was obtained and did not determine the sufficiency of the sureties. The bond and the sufficiency of the sureties were approved by the court.

[3] The instructions above mentioned relative to fraud as a defense were prejudicially erroneous.

[4] The action was not barred by the statute of limitations. The period of limitation for commencing the action against the surety was at least 4 years from the time Arnold, the former administrator, died on December 31, 1939. Hewlett v. Beede, 1905, 2 Cal.App. 561, 567, 83 P. 1086. The action was commenced on July 24, 1941.

[5, 6] Plaintiff was not guilty of laches. An administrator or surety who asserts that an action against him on his bond is barred by laches or equitable estoppel must show an unreasonable and unexplained delay, and it has been held that mere delay short of the full period of limitation will not defeat an action on the bond. Tucker v. Stewart, 1910, 147 Iowa 294, 126 N.W. 183. In the case of Biggins v. Raisch, 1895, 107 Cal. 210, 40 P. 333, the executor and one of the sureties had died, and plaintiff was appointed administrator with the will annexed. He commenced an action against the remaining sureties within 8½ months after the death of the executor, and the court said, at page 213 of 107 Cal., at page 334 of 40 P.: "Surely no laches can be attributed to them * * * this being only a reasonable time within which to procure the appointment of the administrator, examine the condition of the estate, and commence the action. * * * While it is true that they [heirs] might have compelled the executor to account to the probate court long before he died, yet merely passive delay and forbearance on their part could not discharge the sureties, nor affect their obligation * * *." Approximately 19 months elapsed from the time of Arnold's death on December 31, 1939 to the time the action was commenced on July 24, 1941. Plaintiff was appointed administrator of the Trotter estate on June 19, 1940 to succeed Arnold. The decree settling Arnold's account as administrator, and fixing the amount due from Arnold to the Trotter estate was made on April 14, 1941. In view of the several legal proceedings and investigations which were necessary before commencing the action, including the appointment of an administrator to succeed Arnold, the appointment of an administrator of Arnold's estate, the preparation of an account by Arnold's administrator covering the many years of his administration of the Trotter estate, and the settlement of the account by the court, it should not be concluded there was a delay that amounted to laches.

It is not necessary to discuss other points presented by appellant.

The judgment is reversed. The order denying a motion for a new trial is not an appealable order, and the appeal therefrom is dismissed.

DESMOND, P. J., and SHINN, J., concur.

ESCOLA v. COCA COLA BOTTLING CO. OF FRESNO et al.

Civ. 12415.

District Court of Appeal, First District, Division 1, California.
Aug. 3, 1943.

Hearing Granted Sept. 30, 1943.

1. **Negligence** 🔑27

The test to be applied in determining whether negligence of bottling company was cause of injuries allegedly sustained by employee of retailer when bottle of beverage broke in her hand was whether bottling company had used reasonable care in view of degree of hazard in use of the article.

2. **Negligence** 🔑121(2)

The rule of "res ipsa loquitur" applies only where the instrumentality at time of accident was under exclusive control of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. **Negligence** 🔑121(2)

Where there is a division of responsibility in use or management of an instrument which causes injury, and such injury might in equal likelihood have resulted from the separate acts of either one of two or more persons, the "res ipsa loquitur" doctrine cannot be invoked against any one of them.

4. **Negligence** 🔑121(2)

The "res ipsa loquitur" doctrine applies only when facts proved by plaintiff admit of single inference that accident would not have happened unless defendant had been negligent, although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence.

5. **Negligence** 🔑121(1)

Where it becomes incumbent on plaintiff to establish negligence other than by application of doctrine of res ipsa loquitur because proof does not show exclusive control of defendant, plaintiff must go all the way with his evidence to prove some act or omission on part of defendant on whom he would pass the responsibility.

6. **Negligence** 🔑121(3)

In action against bottling company by employee of retailer for injuries claimed to have been suffered by reason of bottle of beverage breaking in her hand, where there was no evidence as to negligence of bottling company in manufacture of bottle, preparation of beverage, or in bottling of product, or as to careful handling by retailer following delivery by distributor, a judgment for plaintiff could not be sustained under "res ipsa loquitur" doctrine.

PETERS, P. J., dissenting.

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Action by Gladys Escola against Coca Cola Bottling Company of Fresno and others for personal injuries claimed to have been suffered by plaintiff by reason of a bottle breaking in her hand. From a judgment in favor of the plaintiff against the named defendant, the named defendant appeals.

Reversed.

H. K. Landram, of Merced, for appellant.

C. Ray Robinson, Willard B. Treadwell, Dean S. Lesher, and Loraine B. Rogers, all of Merced (Belli & Leahy and Melvin M. Belli, all of San Francisco, of counsel), for respondents.

WARD, Justice.

This action is for personal injuries claimed to have been suffered by plaintiff by reason of a bottle breaking in her hand. The defendant, Coca Cola Bottling Company of Fresno, a corporation, appeals from a judgment in her favor following a verdict by a jury. Also named as defendants were Coca Cola Company and the Pacific Coast Coca Cola Bottling Company, both corporations, but the action was dismissed as to them at the trial prior to the introduction of evidence.

The complaint alleged that defendants "were negligent and failed in their duty to the plaintiff by selling to [her] employer bottles containing said beverage [coca cola] which, on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous * * * and likely to explode."

In their opening statement counsel for plaintiff declared: "We are going to * * * rest our case completely on this doctrine we call res ipsa loquitur: The thing speaks for itself. Our theory of the case is that we have no way of showing any specific act of negligence."

Plaintiff testified that by order of the Industrial Accident Commission she had been paid for partial loss of wages.

At the time of the accident plaintiff was transferring bottles of coca cola from cases delivered at her place of employment to a refrigerator. She testified: "I picked up the case of Coke and set it on a box which contained the ice cream in the Waffle Shop, and I proceeded to take one bottle at a time from the case to put it into the refrigerator. I had put three in the refrigerator when I picked up the fourth one. I had moved about 18 inches when it exploded in my hand." An employee of defendant company answered in the affirmative the following question: "You have found broken bottles of Coca-Cola when you took the cases out of the warehouse, haven't you?" Upon testimony as to the injury sustained, and the evidence as above stated, plaintiff rested.

There was no evidence of negligence as alleged in the complaint or otherwise, and, as appears, the doctrine of res ipsa loquitur is not applicable to the facts herein. Defendant moved for a nonsuit. The court denied the motion but suggested that the matter be argued further on a motion for a directed verdict at the conclusion of the case. Such a motion, and also a motion for judgment in favor of defendant notwithstanding the verdict of the jury and also a motion for new trial, were made and denied.

In making its case the defendant introduced evidence showing the methods and the care used in the manufacture and bottling of the beverage. It appears that approved, modern means are used, and that each bottle is inspected four times. A representative of the company which manufactured the bottle involved testified as to the process of its manufacture.

Appellant does not attack the sufficiency of defendant's evidence as to the exercise of due care in the manufacture of the container, the preparation of the beverage, or in the "bottling" of the product; but suggests that the use of "so many inspectors conclusively showed the recognition of the dangerous character of the instrumentality and of the possibility of a defective bottle sneaking by." Many instrumentalities, such as automobiles, airplanes, heating contrivances, electrical supplies, drugs, inflammable liquids, beverages, etc., may be dangerous if imperfectly manufactured or improperly used; but in this age such articles are considered necessities of life. If the manufacturer, in addition to liability for breach of an express or implied warranty, is to be held financially responsible not only for inexpert preparation or manufacture, but for improper use by the general public, he then becomes an insurer. In such a situation, manufacturing as a practical business could not be successfully carried on until the process of manufacture had reached such perfection as to make the product "foolproof."

[1] Reasonable care in view of the degree of hazard in the use of the article is the rule applied. The Supreme Court of this state recently approved that rule. In Gerber v. Faber, 54 Cal.App.2d 674, 680, 129 P.2d 485, 488, the court said: "In a case involving a question of negligence in the manufacture of a chair, the court in Sheward v. Virtue, 1942, 20 Cal.2d [410, at 414], 126 P.2d 345, 347, said: 'The appropriate standard of care applicable to the facts of the present case is expressed in O'Rourke v. Day & Night Water Heater Co., Ltd., supra (31 Cal.App. 2d 364 [366], 88 P.2d 191), to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection and tests had been omitted, the defendant has been negligent. In Smith v. Peerless Glass Co., Inc., 259 N. Y. 292, 181 N.E. 576, it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article.' This rule is the one under which defendant's conduct is to be examined for negligence."

The difficulty in attempting to affirm the present judgment is that the reviewing court is not presented with any evidence of negligence on defendant's part, or even testimony tending to contradict the evidence of the defendant respecting its method of manufacture and the care used by it throughout the entire process presented under the res ipsa loquitur rule imposed upon it at the trial, or any dereliction of duty in the preparation or manufacture of the product. To hold defendant responsible it is necessary to surmise that a defective bottle "sneaked by" without proper test or inspection, and to adopt a special res ipsa loquitur rule covering carbonated beverages without applying it generally to other articles, or to hold that the breaking of bottles in a manufacturing plant, warehouse, or on way to point of delivery, prior to the time when the maker ceases to have exclusive control is notice to him of defective manufacture and resulting hazard. This reasoning is not applicable to the present case as it assumes that which is in doubt, namely, a negligent act which caused the breaking. There is no evidence in the present case that the breakage of bottles in the warehouse was caused by "explosion," and no evidence of "improper charging." The plaintiff herein referred to the breaking as an explosion, but described its sound as a "loud pop" similar to the breaking of an "electric light bulb."

There is expert testimony, based upon a description of the manner in which the bottle broke, that the breakage could have been due to some external blow and not from internal pressure or thermal change. This evidence is uncontradicted. On cross-examination the attack was rather that the witness had testified for the Coca Cola and other companies in other cases.

[2-5] The present case is quite similar factually, and in respect of the points urged by plaintiff on appeal, to that of Gerber v. Faber, supra, pages 685, 686 of 54 Cal.App.2d, page 491 of 129 P.2d, where the court said: "The definition of res ipsa loquitur as a rule of law, quoted in Hill v. Pacific Gas & Electric Co., 1913, 22 Cal.App. 788, 790, 136 P. 492, from the opinion in San Juan Light & Transit Co. v. Requena, 224 U.S. 89, 99, 32 S.Ct. 399, 56 L.Ed. 680, emphasizes that the rule applies only where the instrumentality at the time of the accident was under the exclusive control of the defendant, and that is the interpretation of the doctrine which has been applied by our courts without exception. Where there is a division of responsibility in the use or management of the instrument which causes the injury, and such injury might in equal likelihood have resulted from the separate act or acts of either one of two or more persons, the res ipsa loquitur doctrine cannot be invoked against any one of them. Speidel v. Lacer, 1934, 2 Cal.App.2d 528, 38 P.2d 477; White v. Spreckels, 1909, 10 Cal.App. 287, 101 P. 920, 923. The res ipsa loquitur doctrine applies only when the facts proved by the plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent, although it continues to apply for plaintiff's benefit as against evidence produced by defendant that it may have happened without his negligence. Lejeune v. General Petroleum Corp., 1932, 128 Cal.App. 404, 18 P.2d 429; see, also, cases collected in 19 Cal.Jur. 708 and 10-Yr. Supplement. When, therefore, it becomes incumbent upon plaintiff to establish negligence other than by application of the doctrine of res ipsa loquitur, because the proof does not show exclusive control in the defendant, he must go all the way with his evidence and prove some act or omission on the part of the defendant or defendants upon whom he would fasten responsibility. A contrary rule would upset many settled rules of evidence in negligence cases." Plaintiff claims "certain decidedly distinguishable" facts in the present case from those in the Gerber case. The only differences are that defendant herein is a bottler and distributor; in the Gerber case the court found that defendant was a manufacturer, maker, bottler, keeper, maintainer, distributor and seller. Here the bottle was delivered several days before the accident; in the Gerber case it may have been on the truck for a week. Here, again, an employee was injured; in the Gerber case, a customer. In one case the beverage was coca cola; in the other, root beer. The claimed factual discrepancies are inconsequential in determining the identical legal questions.

There are a number of decisions wherein the court held that it was proper to invoke the rule of res ipsa loquitur to the facts of those cases, but, as appears in the Gerber case, the rule there followed is not the general rule in California. In the Gerber case the court considered the conflicting authorities, and the conclusion therein is adopted as the conclusion in this case. The citations appearing the Gerber case are the same as in this, with a few exceptions, notably Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601 and Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922. These cases based upon different facts have not changed our views as to the correctness of the decision in the Gerber case.

[6] The Gerber opinion demonstrates exhaustive research and careful consideration, and the conclusion reached should not

be repudiated in the present case, based upon similar facts, and identical in that in both cases there was no testimony offered of careful handling by the "retailer" following delivery by the distributor. Respondent's suggestion to the contrary is merely surmise. The retailer did not know when the case was delivered and so testified, and respondent did not present any evidence as to such "care" and did not offer any instruction upon that theory. There is no evidence upon this subject up to the time she placed the case of coca cola upon the box which contained the ice cream and began transferring the bottles to the refrigerator. That the application of res ipsa loquitur to the facts herein "would be an unwarranted extension of that doctrine is readily apparent." Gerber v. Faber, supra, 54 Cal.App.2d page 684, 129 P.2d page 491.

The judgment is reversed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The defendant bottled and placed in circulation coco-cola, a carbonated beverage. The defendant delivered several cases of that beverage to the restaurant where plaintiff was employed. The defendant's driver placed those cases behind, and underneath, the counter of the restaurant. The cases remained in that same spot for a little over two days. While plaintiff was carefully removing the bottles from the case and placing them in the refrigerator one of the bottles exploded, causing a deep cut over five inches long and one and one-half inches deep on plaintiff's hand. The evidence shows that plaintiff handled the bottle carefully, and did not hit the bottle against any object while removing it from the case. The majority opinion holds that the doctrine of res ipsa loquitur is not applicable to such a factual situation. The exact basis of that holding is not clear. Fear is expressed that a contrary ruling would make the bottler an "insurer." The fact that no implied warranty is involved is mentioned, and some emphasis is placed upon the fact that the exploding bottle had been out of the "control" of defendant for over two days. None of these factors, in my opinion, is controlling. Logic, reason and authority compel the conclusion that such a factual situation requires the application of the res ipsa loquitur doctrine.

There is no magic in the phrase "res ipsa loquitur." It is simply one phase of the law of circumstantial evidence. 20 Minn.L.Rev. 241; 22 Cornell Law Quarterly, 39. All that is meant is that on the face of the accident there is no plausible explanation for its cause, of which plaintiff reasonably could be expected to have knowledge, except some negligent conduct on defendant's part. Therefore, it is only fair that negligence will be inferred, and that the duty of going forward with the evidence to rebut that inference should rest on defendant. The doctrine simply raises an inference of negligence on the part of defendant. Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870; Atkinson v. United Railroads of S. F., 71 Cal.App. 82, 234 P. 863; Crooks v. White, 107 Cal. App. 304, 290 P. 497; Even v. Pickwick Stages System, 109 Cal.App. 636, 293 P. 700; Hilson v. Pacific G. & E. Co., 131 Cal.App. 427, 21 P.2d 662; Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 80 P. 2d 185, 1016. The burden of proof is not shifted. Osgood v. Los Angeles, etc., Co., 137 Cal. 280, 70 P. 169, 92 Am.St.Rep. 171; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164; Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 P. 359, Ann. Cas.1913D, 908; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Seitzman v. Srere Corp., 116 Cal.App. 674, 3 P.2d 58; see collection of cases 12 Cal.L.Rev. 138.

If this fundamentally simple rule be applied to the facts of this case, what is the result? The defendant bottled the coca-cola in question and distributed it to his customers for a profit. The defendant had exclusive control of the mixing and bottling process, and had exclusive control of the particular bottle in question until it was delivered in a case furnished by defendant to the restaurant in question. The employee of defendant carefully placed the case behind, and underneath, a counter. The case remained there for a little over two days. The evidence shows that plaintiff carefully lifted the case and carefully removed the bottle. Nevertheless, the bottle exploded. After the bottle left the physical possession of defendant nothing was done to it that would cause it to explode. But it did explode. That does not occur unless someone was negligent. Either the bottle was defective, or the bottle was overcharged, or both. The bottle could not have become defective after it was delivered and before it exploded. Are these circumstances not sufficient to raise an inference that defendant must have been negligent either in supplying a defective bottle or in overcharging it, or both? The burden of going forward with the evidence to rebut the inference in fairness should rest on defendant. The sufficiency of that explanation rested with the jury.

It is no obstacle to the application of this doctrine that there was no contractual relationship between plaintiff and defendant. It is now too well settled to require discussion that a manufacturer of any product is liable to third persons for negligence in the manufacture of his product if that product is of such a nature that negligence in its manufacture may cause it to become dangerous and cause injury to third persons. § 395, Restatement of the Law of Torts; Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454, 17 A.L.R. 672; Heckel v. Ford Motor Co., 101 N.J. L. 385, 128 A. 242, 39 A.L.R. 992; 63 A.L. R. 340; Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 105 A.L.R. 1502; Chanin v. Chevrolet Motor Co., 7 Cir., 89 F.2d 889, 111 A. L.R. 1239; Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013; Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481; Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345; O'Rourke v. Day & Night W. H. Co., 31 Cal.App.2d 364, 88 P.2d 191; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440. This does not make the manufacturer an "insurer." It simply means that he is liable for negligence to third persons not in a contractual relationship to him.

An inference of negligence cannot arise unless the defendant had "control" of the instrumentality causing the injury. But that "control" does not necessarily mean physical possession. Thus, to give an elementary example, if a foreign substance in a can of beans causes injury to a third person, it could not reasonably be contended that the doctrine of res ipsa loquitur did not apply although the can of beans may have been out of the possession of the canner for an appreciable length of time. In the instant case the bottler had exclusive control until the case of coca-cola was placed under the counter. From the evidence, it is a reasonable inference that no one touched that case until plaintiff started to place the bottles in the refrigerator. Thus, we are faced with a situation where the jury reasonably could find, and impliedly did so in the present case, that after the defendant surrendered physical possession of the case of bottles, no one touched them prior to the plaintiff's careful handling in placing them in the refrigerator. This evidence of non-accessibility and careful handling after leaving defendant's possession leaves the case in the same situation as if the bottle had exploded while still in defendant's possession.

There are many cases dealing with the problem of whether the doctrine of res ipsa loquitur is applicable to the explosion of a bottle of carbonated beverage after the bottle has left the possession of the bottler. Where the only evidence is that the bottle exploded, some cases do hold that the doctrine is not applicable. See annotation 4 A.L.R. 1094. But where there is not only evidence of the fact that the bottle exploded, but also evidence that the bottle was carefully handled after it left the physical possession of the bottler, the weight of authority, quantitatively and qualitatively, seems to be that whatever the rule may be as to ordinary beverages, the doctrine applies to carbonated beverages. See cases collected 8 A.L.R. 500; 39 A.L.R. 1006; 56 A.L.R. 593. Some of the more recent cases holding that the doctrine is applicable where there is evidence of an explosion of a carbonated beverage, plus evidence of careful handling after it left the possession of the bottler, are: Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; Ortego v. Nehi Bottling Co., La.App., 6 So.2d 674, 677; Lanza v. De Ridder Coca Cola Bottling Co., La.App., 3 So.2d 217; Auzene v. Gulf Public Service Co., La.App., 188 So. 512; Stolle v. Anheuser-Busch, 307 Mo. 520, 271 S.W. 497, 39 A. L.R. 1001; Benkendorfer v. Garrett, Tex. Civ.App., 143 S.W.2d 1020; Macon Coca-Cola Bottling Co. v. Crane, 55 Ga.App. 573, 190 S.E. 879; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868; Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922; Healey v. Trodd, 124 N.J.L. 64, 11 A.2d 88, affirming 122 N.J. L. 603, 7 A.2d 640; Middlesboro Coca-Cola Bottling Works v. Campbell, 179 Va. 693, 20 S.E.2d 479; Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818; Georgia-Alabama Coca-Cola Bottling Co. v. White, 55 Ga.App. 706, 191 S.E. 265; Atlanta Coca-Cola Bottling Co. v. Danneman, 25 Ga. App. 43, 102 S.E. 542.

The theory of these cases is that the bottler has put into circulation for public consumption a beverage which, if negligently concocted, or, if negligently placed in a defective bottle, becomes an inherently dangerous substance in the nature of a potential explosive; that when such a bottle explodes someone must have been negligent; that where the direct or circumstantial evidence excludes everyone but the bottler he should have the burden of explaining the occurrence; that under such circumstances the doctrine of res ipsa loquitur is applicable.

The majority opinion places great reliance on the case of Gerber v. Faber, 54 Cal. App.2d 674, 129 P.2d 485 (no hearing asked in the Supreme Court). In that case the bottler of root beer sold the same to an independent distributor, who sold to the proprietor of a store. The plaintiff was injured when the bottle exploded while he was removing it from the refrigerator, to which all customers had access. It was held that the doctrine of res ipsa loquitur was not applicable. The exact basis of the court's decision was that the bottler had parted with possession and control of the bottle when he sold to the independent distributor; that the bottle in question may have been on the distributor's truck for a week; that there was no evidence of careful handling by the distributor or by the retailer. Under such circumstances it would be improper to infer that the bottler was negligent to the exclusion of the distributor and retailer, and, therefore, the doctrine is not applicable. These thoughts are expressed in the following language (54 Cal.App.2d at page 686, 129 P.2d at page 491): "It is clear that plaintiff's accident may have resulted from some cause other than any negligence on the part of defendant. It appeared from the testimony of the distributor Weinberger that the bottle which exploded in plaintiff's hand may have been on his truck for a week. There was no evidence that the bottle had been carefully handled during that time or during the process of its delivery to defendant Faber nor by the latter or his employees when it was placed in the cooler. In addition to all of this, there is the admitted fact that Faber's customers were allowed to help themselves from the cooler, and it does not appear how frequently that was done nor the manner in which it was done. The law does not impose liability upon one party in favor of another upon suspicion or mere supposition. Plaintiff had the opportunity and the only opportunity to prove, if it were a fact, that the glass contained a flaw and his evidence, as we have seen, failed completely in that respect. The res ipsa loquitur doctrine cannot be applied so as to raise an inference that the bottle was cracked while in defendant's possession, to the exclusion of the inference that it may have been cracked thereafter. As we have stated, it retained its pressure up to the time when it was handled by plaintiff and it is at least as reasonable to infer that it was cracked after it left defendant's warehouse as to infer that it was cracked before. If it was carefully bottled and handled by defendant and was cracked thereafter, defendant would not be guilty of negligence and the res ipsa loquitur doctrine would cease to be applicable from the time the bottle passed from defendant's exclusive control."

With this ground of the decision I agree. Such holding in no way is applicable to the facts of the instant case where the missing element of evidence of careful handling after leaving the possession of the bottler was supplied.

It must be conceded, however, that there is dicta in the opinion to the effect that in the absence of evidence of many other explosions known to the bottler and occurring at or about the same time, the doctrine of res ipsa loquitur is not applicable even if there were evidence of careful handling after the bottle left the possession of the bottler. That dicta, in my opinion, is erroneous, is contrary to the many well-reasoned cases above cited, violates logic and reason, and should not be followed.

Defendant places much emphasis on the testimony of its experts relating to the care used in the bottling process to discover defective bottles and to prevent overcharging. According to those witnesses it would be highly improbable for a defective bottle to slip by the inspectors. But this bottle did slip by, and it did explode. The weight to be given to defendant's testimony on this point was obviously for the jury.

In my opinion the judgment should be affirmed.

60 Cal.App.2d 73

PEOPLE v. D'ANGELO.

Cr. 3703.

District Court of Appeal, Second District, Division 3, California.

July 30, 1943.

1. Gaming ⚷75(1)

It is the keeping or occupancy of a room or place with paraphernalia for purpose of recording bets on horse races, among other kinds of contests, that is covered by statute denouncing as crime the keeping of place for recording of bets on horse races. Pen.Code, § 337a, subd. 2.

2. Gaming ⚷98(5)

In prosecution for occupying premises with paraphernalia for purpose of recording bets upon results of horse races, although prosecution was required to prove that place was kept or occupied for purpose set forth, it was not necessary to make that proof by direct evidence. Pen. Code, § 337a, subd. 2.

3. Gaming ⚷98(5)

In prosecution for keeping premises with paraphernalia for purpose of recording bets upon results of horse races, purpose in keeping the place could be determined from surrounding circumstances shown in evidence. Pen.Code, § 337a, subd. 2.

4. Criminal law ⚷1159(2)

A finding of guilt reasonably justified by evidence cannot be disturbed.

5. Gaming ⚷98(5)

Evidence sustained conviction of keeping and occupying premises with paraphernalia for purpose of recording bets upon results of horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Sam D'Angelo was convicted of keeping and occupying certain premises with books, papers, and paraphernalia for the purpose of recording bets upon the results of horse races and he appeals.

Affirmed.

Max M. Solomon, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of the crime of violation of section 337a, subdivision 2, of the Penal Code, in that he kept and occupied certain premises in Los Angeles with books, papers, and paraphernalia for the purpose of recording bets upon the results of horse races. It was also alleged in the information that defendant had been convicted previously in Pennsylvania of the crime of "breaking and entering with intent to commit larceny, a felony," and he had served a term of imprisonment therefor in the state prison. He pleaded not guilty, and denied the prior conviction. Trial by jury was waived. The court adjudged that defendant was guilty, and that the charge of prior conviction was true; and sentenced him to imprisonment in the county jail for 30 days. He appeals from the judgment and the order denying his motion for a new trial. His contention is that the evidence was not sufficient to support the judgment.

The case was submitted to the trial court, upon the transcript of the preliminary hearing, with a stipulation that police officer Jenkins, a witness at that hearing, was qualified as "an expert on bookmaking matters"; and upon the testimony of the defendant at the trial. That transcript showed that police officer Conly testified as follows: He went into a beer parlor in Los Angeles, known as the Village Cafe, on December 2, 1942 (the day before the arrest), about 2:45 p. m., and from a place near the entrance he observed defendant standing at the "far end" of the bar, which was 30 or 35 feet in length. Six or seven men at the other end of the bar, who were looking at scratch sheets, made notations on "a slip" of paper, called defendant over, and gave the slip of paper to him. On three occasions, during the 30 minutes the witness was there drinking two bottles of beer, he saw those men hand money to defendant, and saw defendant go into a back room and come out of that room after he had been in there about one-half of a minute. On the next day, December 3rd, about 3 p. m., he (witness) went into the same place again and saw "these men" sitting at the bar, looking at scratch sheets. He also saw one of the men, whose name was Frakes, make notations on a pad of paper on three occasions, call defendant over, talk to defendant a minute, and then give defendant a slip of paper, some currency and silver. On those occasions he saw defendant write on a pad and immediately go into the back room. Defendant came out of the back room after 7 or 8 minutes. He also saw another man make notations on a pad, call defendant over, and give money to him; and on that occasion he saw defendant "go with the slip of paper" into the back room, and come out again. In about 10 minutes thereafter, Frakes made notations on a pad, while looking at a scratch sheet, and called the defendant over after making the notations and gave him some money. On that occasion defendant took the slip of paper and went into the back room again. Then he (witness) went out and signaled to police officer Jenkins. When the witness saw the other officer coming, he returned to the cafe and went back to the place where "these men" were with the scratch sheets and where one of them was making notations on a scratch sheet. Just as the other officer entered the door the defendant looked toward the other officer, turned to Frakes and said, "Nix, nix." Frakes immediately put a pencil in his pocket, and about that time the other officer took the scratch sheet from Frakes. He saw some of the other men writing on slips also. He saw defendant serve drinks to persons in the cafe on December 3rd. He saw defendant write on the pads of paper, tear off the top sheet, put the pads back on the bar in front of the men sitting there, and then go into the back room. He did not see what defendant wrote on the pads. The way to the lavatory was through that back room.

The transcript of the preliminary hearing showed that police officer Jenkins testified in substance as follows: On December 3, 1942, officer Conly entered the place referred to approximately 25 feet ahead of him, went to the bar, and stood by Frakes who was sitting at the bar. Defendant was standing on the inside of the bar in front of Frakes. When he (witness) was about 5 feet within the place, defendant looked at the witness and then turned toward Frakes. He (witness) went to the end of the counter where the National Scratch Sheet, referred to as exhibit B, was on the counter under Frakes' hand and in front of defendant. The witness pulled the scratch sheet from under Frakes' hand and took two pads, referred to as exhibit A, which were on the counter. Officer Conly reached under the bar in front of a man who was sitting next to Frakes, "pulled out" the Metropolitan Scratch Sheet, and put it on the counter. He found a certain group of papers, referred to as a part of exhibit C, in a beer carton (the other part of exhibit C) in the back room. The cover of the carton was down and another carton was on top of it. A Metropolitan Scratch Sheet, dated December 2, 1942, and another group of small slips of paper, referred to as exhibit D, were found also in that carton. A Metropolitan Scratch Sheet, dated December 1, 1942, and another group of papers, referred to as exhibit E, were found also by him in that carton. An envelope containing certain papers, referred to as exhibit F, were found also in that carton. One of the pieces of paper found in exhibit C which had upon it the figure 6 followed by the words, "Paula's Lulu," and the figure "7" followed by the words, "Rock Hesive," and "X-1-X" in parenthesis, was a betting marker. That his opinion was that "Paula's Lulu" was the name of a horse running in the sixth race at Bay Meadows, parlayed to a horse named "Rock Hesive" running in the seventh race at Bay Meadows; that the figure "X-1-X" indicated nothing to win, one to place, and nothing to show; that the words, "Big Fred," at the bottom of the paper, was the better. He compared the letters and figures on that paper with the scratch sheet dated the day of the arrest, and found that the two names thereon appeared on the scratch sheet as names of horses in the sixth and seventh races at Bay Meadows. He checked the rest of the slips of paper in exhibit C and found that the names thereon appeared on the National and Metropolitan Scratch Sheets of December 3rd, the day of the arrest. He examined some of the slips of paper in exhibit D and found that the names thereon were on the scratch sheet for December 2nd. He examined the slips of paper in exhibit E and found that the names thereon were on the scratch sheet for December 1st. That in the business of bookmaking, papers such as exhibits A and F were called betting paraphernalia, scratch sheets, and betting markers. The radio was in operation when he was there and he heard a broadcast that gave results of a race at Bay Meadows. He asked defendant how much rent he paid at that place and defendant said $80 a month. He also asked defendant "if he phoned those bets he took in to anyone else?" Defendant said he did not, that he kept them himself and, "Give me a break—it will ruin my business." He said to defendant that it appeared that defendant had done a good business as far as bookmaking was concerned, and defendant said, "Well, that is only the proceeds for the last three days." When he asked defendant about the loose slips in the box, he said that was "the business for today." Defendant also said the place belonged to his sister and "he just managed the place." He did not see defendant put anything in the carton. Frakes was arrested also. He (witness) did not hear a telephone ring while he was there. That the way to the lavatory was through that back room.

An exemplified copy of the record of the alleged prior conviction of defendant was received in evidence. Defendant submitted that issue without presenting any evidence thereon.

Defendant did not testify at the preliminary hearing, but he testified in the superior court in substance as follows: That he was a bartender; that at the time of his arrest he was back of the bar putting beer bottles in a case; that he did not take any wagers from any people in the bar that afternoon; that the bar was not owned by him; that he was an employee there; that he was not a bookmaker; that the betting markers found in the back room were not his; that he did not have any idea who put them there; that the writing on one of those betting markers found in the back room might have been written by him; that he, himself, made several bets with a man on the corner that day and he (defendant) kept a record of those bets.

It was stipulated that some of the betting markers found in the rear room were in his handwriting.

Defendant's argument is that the elements of the crime were not proved; that it was not proved that he was occupying the premises for the purposes denounced by Section 337a, subdivision 2, of the Penal Code; that the betting markers were found in a rear room which was accessible to defendant and the patrons; that defendant was an employee; and that no betting markers were found on defendant's person or in his possession. No contention was made that the papers found in the carton in the rear room were not papers and paraphernalia for the purpose of recording bets on horse races.

Scratch sheets and pads of papers were on the counter where defendant and several of the patrons had transactions. Money and slips of paper were passed on several occasions from the men at the counter to defendant after the men had made notations on the pads of paper and called defendant to them, and defendant went immediately thereafter to the rear room with the slips of paper which had been handed to him by the men. Several scratch sheets and betting markers, some of which had defendant's handwriting upon them, were concealed in a carton in a rear room of the premises and defendant said he had no idea who had put them there. Names on the betting markers were the same as names of horses running in the races at the Bay Meadows track on the day of the arrest, and on the two preceding days. The results of the Bay Meadows races were received by radio in the bar soon after the arrest. Defendant showed consciousness of guilt when he said, "Nix, nix," to Frakes, who was writing on the scratch sheet as the officer Jenkins entered the place, and when he asked the officer for a "break." His statement, in referring to his arrest, "It will ruin my business," indicated that he was occupying the premises to conduct a business which belonged to him.

[1-4] It is the keeping or occupancy of a room or place with papers, or paraphernalia for the purpose of recording bets on horse races, among other kinds of contests, that is denounced by subdivision 2 of said section 337a. People v. Manning, 1940, 37 Cal.App.2d 41, 43, 98 P.2d 748; People v. Hinkle, 1923, 64 Cal.App. 375, 380, 221 P.693. Although it was incumbent upon the prosecution to prove that the place was kept or occupied for the purpose set forth in said subdivision 2, it was not necessary to make that proof by direct evidence. People v. Tuttle, 1938, 27 Cal. App.2d 647, 649, 81 P.2d 571. The purpose in keeping the place could be determined from the surrounding circumstances shown in evidence. People v. Tepper, 1940, 36 Cal.App.2d 525, 527, 97 P.2d 1002. If the circumstances shown in evidence reasonably justify the finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding. People v. Newland, 1940, 15 Cal.2d 678, 681, 104 P.2d 778. See, also, People v.

Vertlieb, Cal.Sup., 1943, 137 P.2d 437; and People v. Allen, Cal.Sup. 1943, 137 P.2d 439.

[5] The evidence was sufficient to support the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, Acting P. J., and SHAW, Justice pro tem., concur.

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60 Cal.App.2d 54

CITY OF OJAI v. CHAFFEE, Auditor of Ventura County.

Civ. 14088.

District Court of Appeal, Second District, Division 3, California.

July 30, 1943.

1. Mandamus 🔑164(3)

The allegations of petition for a writ of mandate would be taken as true where answer failed to comply with form of denial permitted by Code of Civil Procedure. Code Civ.Proc. § 437.

2. Counties 🔑153½

County taxes under statute relating to cancellation of taxes constituted a "thing of value" within constitutional provision prohibiting legislature from making any gift of public money or thing of value. St.1939, p. 1367, § 4986.3; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Thing of Value".

3. Counties 🔑153½

As far as mere mode of procedure is concerned, act of cancellation of county taxes would be the making of a "gift" within constitutional provision prohibiting legislature from making any gift of any public money or thing of value. St.1939, p. 1367, § 4986.3; Const. art. 4, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

4. Counties 🔑153½
Municipal corporations 🔑871

The fact that county and city are arms of the state will not necessarily prevent a transfer from one to the other from being a gift within constitutional provision prohibiting legislature from making any gift of any public money or thing of value. Const. art. 4, § 31.

5. States 🔑119

In determining whether an appropriation of public funds is a "gift" prohibited by constitution, primary subject of inquiry is as to whether money is to be used for a public or private purpose, and if it is for a public purpose, it is not, generally speaking, regarded as a "gift". Const. art. 4, § 31.

6. Counties 🔑153½

In determining whether statute authorizing cancellation of taxes charged on property acquired by a city on foreclosure proceedings under Improvement Bond Act of 1915 authorized a gift by the county to city contrary to constitution, considerable weight would be given to resolutions of city council and of county board of supervisors that cancellation was in furtherance of plan to restore delinquent properties to private ownership and would be in the public interest. St.1939, p. 1367, § 4986.3; Const. art. 4, § 31.

7. Constitutional law 🔑48

There is a strong presumption in favor of constitutionality of statute, and it may not be held invalid until presumption is overcome, either by facts appearing upon face thereof or by such others as are matters of judicial notice.

8. Constitutional law 🔑48

Where validity of statute depends on existence of a certain state of facts, it will be presumed that the legislature ascertained existence of such facts before passing the law, even though it contains no express finding thereof.

9. Evidence 🔑23(1)

The court would take judicial notice of a condition of overlapping assessments and unduly burdensome taxes and assessments, with resultant abandonment of property to sales for taxes and assessments, prevailing quite widely over the state.

10. Counties 🔑153½

The statute authorizing cancellation of taxes charged on property acquired by a city on foreclosure proceedings under Improvement Bond Act of 1915 does not violate constitutional provision prohibiting legislature from making any gift of any public money or thing of value to any individual, municipal or other corporation. St.1939, p. 1367, § 4986.3; Const. art. 4, § 31.

11. Taxation ⚷=49

The statute authorizing cancellation of taxes charged on public property acquired by a city on foreclosure proceedings under Improvement Bond Act of 1915 does not provide for a "remission of taxes" in violation of constitutional provision requiring property to be taxed in proportion to its value. St.1939, p. 1367, § 4986.3; Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Remission of Taxes".

12. Taxation ⚷=42(1)

The statute providing for cancellation of taxes charged on property acquired by a city on foreclosure proceedings under the Improvement Bond Act of 1915 is not invalid as containing discriminatory classification because limited to property subject to bonds issued under the 1915 Act. St. 1939, p. 1367, § 4986.3.

13. Taxation ⚷=552½

Under statute providing that any uncollected tax may be canceled by auditor on order of board of supervisors with consent of district attorney, discretion is vested solely in the supervisors and district attorney, and the auditor is a mere ministerial officer who is required to make the cancellation when properly ordered to do so. St.1939, pp. 1312, 1313, 1367, §§ 2622, 2623, 2625-2627, 4986.3.

Original proceeding by the City of Ojai against J. H. Chaffee, as auditor of the County of Ventura, State of California, for a writ of mandate to test the validity of Section 4986.3 of the Revenue and Taxation Code.

Writ issued.

Stacy C. Bates, of Ventura, for petitioner.

M. Arthur Waite, Dist. Atty., and Julian G. Hathaway, Deputy Dist. Atty., both of Ventura, for respondent.

SHAW, Justice pro tem.

This is an original proceeding for a writ of mandate, the object of which is to test the validity of section 4986.3 of the Revenue and Taxation Code, St.1939, p. 1367. That section, while not a part of the original code as enacted in 1939, was added to the code by Chapter 530 of the Statutes of 1939, p. 1922. It appears in the division of the code relating to general property taxation for state and county purposes and is a part of a chapter dealing with the cancellation of assessments and taxes. It reads as follows: "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, and not heretofore validly canceled, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged on property subject to assessment for the payment of bonds issued under the Improvement Bond Act of 1915 where such property was acquired after the lien date by a city on foreclosure proceedings under the Improvement Bond Act of 1915. If a city is entitled to bring foreclosure proceedings under the Improvement Bond Act of 1915 against any property and the city acquires the property in any other manner than by foreclosure and the governing body of the city by resolution, covering any number of parcels acquired, declares that such acquisition was in lieu of acquisition under foreclosure proceedings, such acquisition is, for the purposes of this section, an acquisition by foreclosure proceedings under the Improvement Bond Act of 1915. This section applies regardless of whether the property acquired by the city is impressed with a public trust or is acquired for the purpose of resale."

The Improvement Bond Act of 1915 referred to by this section is a statute (now included in the Streets and Highways Code, as division 10, by amendment in 1941, St. 1941, p. 956) authorizing the issuance of bonds to represent and be secured by assessments levied in municipalities for the cost of improvements made under any statute,—of which there are several—which authorizes the making of improvements and the assessing of the cost thereof against real property. No bond issued under this act is a charge against any particular parcel of real property, but all the bonds issued for any improvement are secured generally by all the unpaid assessments levied therefor. If, after bonds are issued, an assessment becomes delinquent, it may be foreclosed, either by proceedings taken out of court by the municipal tax collector, or by an action to foreclose brought by the city. In either case the city may buy the property at the foreclosure sale and in certain cases must do so when there is no other purchaser; and when it becomes the purchaser it must pay into the proper fund the amount of the delinquent assessment, and also of all instalments which thereafter become delinquent. The lien of assessments under this act is subject to that of state, county, and municipal taxes, as well as that of other special assessments having priority.

[1] The petition herein alleges that there is a large number of properties in the County of Ventura, both within and without the City of Ojai, which are subject to delinquent assessments under the Improvement Bond Act of 1915, and that in a large number of instances the market value of these properties is substantially less than the aggregate of taxes, assessments, penalties and costs which are a lien upon them; and that the problem here presented is not limited to the County of Ventura but is common to many municipalities in the state. Respondent has filed an answer attempting to deny these allegations, but it is not effective for that purpose, by reason of its failure to comply with the form of denial permitted by law (Code Civ. Proc. sec. 437). We therefore take these allegations as true.

Proceeding under section 4986.3 of the Revenue and Taxation Code, above quoted, the City Council of the City of Ojai passed a resolution declaring that said city was entitled to bring foreclosure proceedings under the Improvement Bond Act of 1915 against the real property involved in this proceeding, that in lieu of such foreclosure it had acquired said property in a manner other than by foreclosure; that this was done "in conformity with a general plan adopted to acquire and to return to private ownership the properties in said City subject to delinquent assessments levied under the provisions of said Act, and/or to delinquent City and/or County taxes, and that the property above described has therefore been acquired and is therefore held for the purpose of resale to accomplish such object," and that "the public interest and necessity require, and the general interest of the City of Ojai and of the County of Ventura will be served and promoted" by the cancellation of any uncollected taxes levied upon the property, and requesting the cancellation of such taxes under section 4986.3. The Board of Supervisors of the County of Ventura passed a resolution reciting the same facts as to the mode of acquisition of the property by the city, finding that the public interest and necessity and the general interest of the city and the county will be served by granting the city's request, and directing the respondent, as Auditor of the County of Ventura "to cancel any uncollected tax, penalty or costs heretofore levied, and not heretofore validly canceled" upon the property in question. The District Attorney of the County endorsed his written consent to the cancellation upon this resolution, but when it was presented to respondent he refused to make the cancellation and the writ is sought to compel him to do so.

[2-4] Respondent's only contention in support of his refusal is that section 4986.3 of the Revenue and Taxation Code is unconstitutional. His first and principal point is that it, in effect, authorizes a gift of public property of the county, that is, the unpaid taxes which are to be cancelled, to the city, contrary to section 31 of Article IV of the California Constitution. That section reads, in material part, as follows: "The legislature shall have no power to * * *; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever * * *." We see no reason to doubt that the county taxes to be cancelled under the code provision in question constitute a "thing of value" and so come within the purview of this constitutional prohibition. Nor do we doubt that, as far as mere mode of procedure is concerned, the act of cancellation would be the making of a gift. While nothing would be literally handed over by the county to the city, the latter would receive the same benefit as if the county had delivered so much money to it and the city had then used the money to pay the taxes. (County of San Bernardino v. Way, (1941) 18 Cal.2d 647, 654, 117 P.2d 354.) So, too, the fact that both the county and the city are arms of the state would not necessarily prevent a transfer from one to the other from being a gift. As the Supreme Court said, in City of Oakland v. Garrison, (1924) 194 Cal. 298,

303, 228 P. 433, this constitutional provision "would prevent the appropriation of county funds to a municipal corporation even for a public purpose, if that purpose were purely municipal and of no interest or benefit to the county as a political subdivision."

[5] We are thus brought to a consideration of the nature and purpose of the transaction authorized by the statute, in order to determine whether it constitutes a gift. In County of San Diego v. Hammond, (1936) 6 Cal.2d 709, 721, 59 P.2d 478, 105 A.L.R. 1155, the Supreme Court said: "It is well settled that in determining whether any appropriation of public funds is to be deemed a gift 'the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or private purpose. If it is for a public purpose * * * it is not, generally speaking to be regarded as a gift.' (City of Oakland v. Garrison, 194 Cal. 298, 302 [228 P. 433].)" This declaration of principle was approved and followed in County of Los Angeles v. Jones, (1936) 6 Cal.2d 695, 705, 59 P.2d 489, and County of Alameda v. Janssen, (1940) 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141, and it was quoted with approval and followed in County of San Bernardino v. Way, supra, (1941) 18 Cal.2d 647, 653, 117 P.2d 354.

In all of these cases except the Janssen case the court had under consideration a series of statutes passed in the last few years in an attempt to remedy the situation arising out of the recent depression and so well known that the court took notice of its general outlines (County of San Bernardino v. Way, supra, 18 Cal.2d at page 660, 117 P.2d 354), in which large amounts of property, especially that lying in special assessment districts, many of which overlapped, had become overburdened with taxes and assessments, and delinquent in the payment thereof, had been sold to state or city for non-payment of such taxes and assessments and had thereby been exempted from taxation and removed from the tax rolls, so that such property no longer produced any revenue for public purposes. For further descriptions of this situation see the opinions in County of San Diego v. Childs, (1932) 217 Cal. 109, 113, 114, 17 P.2d 734; County of Los Angeles v. Rockhold, (1935) 3 Cal.2d 192, 195, 196, 44 P.2d 340, 100 A.L.R. 149; County of San Diego v. Hammond, supra, 6 Cal.2d 725, 726, 59 P.2d 478, 105 A.L.R. 1155; County of Los Angeles v. Jones, supra, 6 Cal.2d 706, 59 P.2d 489. The statutes involved in County of San Diego v. Hammond, supra, and County of Los Angeles v. Jones, supra, were in the nature of refunding statutes, operating to reduce in amount and refund bonds which had previously been issued for special or local improvements, in the doing of which the county was to aid by a contribution of money from its funds. In County of San Bernardino v. Way, supra, the county's contribution to the refunding plan was to be by way of cancelling delinquent general taxes upon the land subject to the assessments which were refunded. The purpose, or at least one of the purposes, in each of the three cases last cited was to restore the property in question to the tax rolls and make it once more a source of public revenue and it was held in each case that this was a public purpose in which the county was interested (see Anglo California National Bank v. Leland, (1937) 9 Cal.2d 347, 352, 70 P.2d 937, to the same effect) and that a contribution by it to bring about that purpose was not a gift, although private persons might incidentally benefit from it by a reduction in the total amount of taxes and assessments standing against their land. The court in County of San Diego v. Hammond, supra, at 6 Cal.2d 727, 59 P.2d 487, 105 A.L.R. 1155, stated its conclusion thus: "Our conclusion upon the question under discussion is that the Act of 1935 (Stats. of 1935, chap. 10, p. 63) is not subject to the constitutional objection that it authorizes the gift of public money to an individual or to any private purpose. The express purpose of the act is to restore to the tax rolls of the county the large amount of property within said delinquent assessment districts, which now, due to said excessive assessments, have been sold to the state and are contributing absolutely nothing to the support of the county government. This purpose is one within the constitutional powers of the legislature to accomplish, and it is not rendered futile by the fact that in carrying it out certain individuals incidentally are benefited thereby."

[6-10] Section 4986.3 of the Revenue and Taxation Code appears to be another statute passed for the same general purpose as were those considered in the cases above cited and the same rules should be applied to it. It is true it contains no express

statement of its purpose and no recital of the facts moving the legislature to adopt it. The admitted allegations of the petition herein show the existence of a similar state of facts. The resolution of the City Council of the City of Ojai shows that the cancellation here will be in furtherance of a plan to restore delinquent properties to private ownership, and both that resolution and the resolution of the County Board of Supervisors state that the cancellation here will be in the public interest. Such declarations are given considerable weight. (County of San Diego v. Hammond, supra, 6 Cal.2d 726, 59 P.2d 478, 105 A.L.R. 1155; County of Los Angeles v. Jones, supra, 6 Cal.2d 705, 59 P.2d 489; County of San Bernardino v. Way, supra, 18 Cal.2d 654, 117 P.2d 354.) But it is not necessary that facts showing the validity of a statute be affirmatively shown in order to require a court to uphold it. The statute comes before the court with a strong presumption in favor of its constitutionality (Jersey Maid, etc., Co. v. Brock, (1939) 13 Cal.2d 620, 636, 91 P.2d 577; Hart v. City of Beverly Hills, (1938) 11 Cal.2d 343, 348, 79 P.2d 1080) and before it can be held invalid that presumption must be overcome, either by facts appearing upon the face of the statute or by such others as are matters of judicial notice. (5 Cal.Jur. 631; Los Angeles County F. C. Dist. v. Hamilton, (1917) 177 Cal. 119, 125, 169 P. 1028, and cases cited; Frohliger v. Richardson, (1923) 63 Cal.App. 209, 214, 218 P. 497.) If the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the legislature has investigated and ascertained the existence of that state of facts before passing the law. (5 Cal.Jur. 632; Galeener v. Honeycutt, (1916) 173 Cal. 100, 104, 159 P. 595.) This is true even though the statute contains no express finding of such facts. (Galeener v. Honeycutt, supra.) Here we find nothing in the statute itself on which to base a conclusion of unconstitutionality, for its very terms suggest, even if they do not state, the existence of such a condition as was held to justify similar statutes in the cases above cited. Nor does our judicial notice produce anything to the disadvantage of the statute, for while we may, perhaps, not take judicial notice of the condition existing in any particular assessment district, we do know judicially that a condition of overlapping assessments and unduly burdensome taxes and assessments, with resultant abandonment of property to sales for taxes and assessments, has prevailed quite widely over the state. As far as appears, an ample factual background may exist for the statute, under the rules established by the cases. We must, therefore, uphold it under those rules.

[11] Respondent also contends that section 4986.3 provides for a remission of taxes and is therefore in violation of section 1 of Article XIII of our Constitution, which provides that all property in the State, with some exceptions, shall be taxed in proportion to its value. We find no substantial difference between this point and that relating to a gift, for a remission of taxes, which implies that there is no consideration for the act constituting the remission, would at the same time be a gift of the amount thereof, as we have already held in discussing a cancellation of taxes. The same argument was presented to the Supreme Court in County of San Bernardino v. Way, supra, 18 Cal.2d 647, 117 P.2d 354, discussed at some length and rejected (see page 657 of 18 Cal.2d, 117 P.2d 354) the court deeming the statutory purpose of restoring property to the tax rolls sufficient to prevent the proceeding from constituting a "remission" of taxes. That decision is determinative of the same point here.

[12] There is also a suggestion in respondent's brief that the statute here makes an improper and discriminatory classification because it is limited to property subject to bonds issued under the Improvement Bond Act of 1915, although there are other acts by which improvement bonds may be charged against real property. A similar objection was made to the statute involved in County of San Bernardino v. Way, supra, 18 Cal.2d page 660, 117 P.2d page 362, and was there held insufficient, the court saying: "This criticism goes only to the policy of the legislation in question and the wisdom of the legislature in determining to exclude the aforementioned districts from the benefits of the tax cancellation provision, which considerations are not the concern of the courts * * *. 'If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included.'" The statute here cannot be invalidated on the ground suggested. (See also South San Joaquin Irr. Dist. v. Nuemiller, (1935) 2 Cal.2d 485, 490, 42 P.2d 64.)

[13] The amicus curiae, appearing in behalf of the respondent, argues that section 4986.3 is not mandatory and hence no enforceable duty rests on respondent, basing this contention on the use of the word "may" in the section and the definition of this word elsewhere in the Revenue and Taxation Code as being permissive. But, accepting and applying this definition, we think the discretion given thereby is vested solely in the Board of Supervisors, who may order the cancellation, and in the District Attorney, whose consent thereto is necessary. The auditor is a mere ministerial officer, in this matter, and was doubtless specified as the officer to make the cancellation because the assessment roll is in his possession after taxes have become delinquent. (Revenue and Taxation Code, secs. 2622, 2623, 2625–2627, St.1939, pp. 1312, 1313.) When such cancellation has been properly ordered and consented to, the duty to make it rests on the auditor.

It is ordered that a peremptory writ of mandate issue directing the respondent to make the cancellations prayed for in the petition here.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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60 Cal.App.2d 152

HEROND et al. v. BONSALL et al.

Civ. 14056.

District Court of Appeal, Second District,
Division 1, California.
Aug. 6, 1943.

1. Use and occupation 🔑1

An action lies to recover reasonable value of use and occupation of plaintiff's realty by another, regardless of whether such use was tortious or wrongful, as tort, if any, may be waived and action on implied assumpsit maintained to recover value of use for time of occupation, where no special damages are sought.

2. Use and occupation 🔑8

A landowner, instituting suit for reasonable value of another's use and occupation of land, need only allege plaintiff's ownership of land, defendant's occupation thereof, reasonable value of his use thereof for period of occupation, and nonpayment of such sum.

3. Use and occupation 🔑10

Where equipment left on land by occupant thereof after termination of his occupancy substantially fills premises and prevents or excludes use thereof by owner, such occupant is liable for rental value of entire premises. Civ.Code, § 3334.

4. Fixtures 🔑32

A provision of agreement for tenants' surrender of demised premises to landlords that tenants should remove from premises all trade fixtures owned by them within five days after landlords' mailing of notice to remove them gave tenants no right to allow their restaurant equipment to remain on premises until landlords gave five days notice to remove it, as obligation to give such notice referred only to tenants' surrender of premises on specified date and consequent removal of their personalty therefrom, and subsequent negotiations and re-rentals of premises did not revive or continue in force permissive provisions of agreement as to removal of such fixtures and equipment.

5. Pleading 🔑36(2)

Persons suing for damages for removal of their restaurant equipment from defendants' premises after termination of plaintiffs' lease thereof could not defeat defendants' recovery on cross-complaint for trespass in wrongfully permitting equipment to remain on premises on ground that equipment was in possession of corporation as purchaser under contract for conditional sale thereof by plaintiffs, as plaintiffs' claim of ownership of equipment was essential to their cause of action.

6. Judgment 🔑720

In action to recover damages for removal of plaintiffs' restaurant equipment from defendants' premises after termination of plaintiffs' lease thereof, finding in part of litigation which went to final judgment that plaintiffs owned such equipment was "res judicata" on such issue in subsequent proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

7. Landlord and tenant ⚷34(1)

Tenants' obligation to pay landlords specified sum on certain date under agreement, reciting parties' desire to provide for payment of judgment against tenants for accrued rentals and for reinstatement of lease canceled by such judgment, was extinguished by parties' subsequent mutual agreement cancelling lease some two years before such date.

◆

Appeal from Superior Court, Los Angeles County; H. C. Shepherd, Judge pro tem.

Action by Harold Herond and others against Samuel N. Bonsall and another to recover damages for removal of restaurant equipment owned by plaintiffs from premises of defendants, who filed a cross-complaint for the rental value of such premises after termination of a lease thereof to a conditional purchaser of the equipment and for an amount agreed to be paid defendants by plaintiffs. From a judgment for cross-complainants, cross-defendants appeal.

Modified, and affirmed as modified.

James J. McCarthy, of Los Angeles, for appellants.

George R. Schmidt, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by cross-defendants from a judgment rendered against them on the first, second and third causes of action of a cross-complaint.

By their first cause of action cross-complainants alleged that at all times therein mentioned they were the owners of certain real property located at 335 North LaBrea, in the city of Los Angeles; that on or about the 21st day of March, 1938, they leased said premises to Pacific Coast Enterprises, Inc., a California corporation; that said lease expired and terminated on or about March 31st, 1939. It was then alleged that during the term of said lease cross-defendants and the tenant in possession kept upon the premises certain restaurant and night club equipment, used in the operation of the business there conducted, prior to the expiration of the lease. That upon termination of the lease cross-complainants gave a good and sufficient notice to cross-defendants and other allegedly interested parties to remove said equipment from the premises but that cross-defendants wrongfully permitted said equipment to remain upon cross-complainants' premises from April 1st to April 21st, 1939, upon which last named date cross-complainants caused the same to be placed with a storage company subject to the order of cross-defendants. The second cause of action of the cross-complaint is a restatement, upon slightly different legal theories, of the first cause of action.

The third cause of action alleged that on the 18th day of May, 1937, pursuant to the terms of a written agreement executed by the parties, cross-defendants agreed to pay cross-complainants the sum of $310 on July 1, 1939, but failed and refused to make such payment.

The trial court found that at no time subsequent to March 31, 1939, did cross-defendants have any right, title or interest in or to the premises in question and were not entitled to any notice from cross-complainants to remove the restaurant and night club equipment from the premises of the latter; that by keeping their equipment upon cross-complainants' premises from April 1st to April 21st, 1939, cross-defendants "committed a continuing trespass upon said premises belonging to defendants and cross-complainants and thereby appropriated to themselves the benefit of storage for said equipment"; that the reasonable rental value of said premises from April 1st to April 21st, 1939, inclusive, was $210, against which there was an offset of $110, the nature and character of which is not here material. Upon the first and second causes of action judgment was accordingly entered in favor of cross-complainants for the sum of $100. As to the third cause of action the court found for cross-complainants by reason of the execution of a written agreement on May 18, 1937, by and through which cross-defendants became obligated to pay cross-complainants $310 on July 1, 1939. Judgment went in favor of cross-complainants for this last named amount, and interest, on the third cause of action.

Appellants first contend that they were entitled to a five-day written notice before they could be guilty of trespass and before respondents would be entitled to any damages by reason of the restaurant equipment remaining upon the latter's premises. It appears from the record that over a period of several years prior to 1939, appellants were the lessees of respondents under a written lease upon the North LaBrea

Street property. During August, 1937, negotiations were in progress whereby one Robert Cabaniss was to take over appellants' lease and purchase from the latter, upon a conditional sales contract, the restaurant and night club equipment with which we are here concerned. As a part of these plans, appellants and respondents on August 11, 1937, entered into a written agreement wherein they mutually released each other from any and all liability attaching to either or any of them under the lease existing between them, dated May 1, 1935, and ending October 31, 1940. A certain amendment to said lease which provided an option for extension of the lease and a previously executed assignment of the same lease to third parties were also cancelled. By this agreement of August 11, 1937, appellants, as lessees, agreed to surrender the demised premises to lessor-respondents on August 30, 1937. In said agreement there also appears, typewritten and initialed by the parties on the margin of said agreement, the following provision: "Second Party shall remove from the premises all trade fixtures owned by Second Party within five days after notice requiring the same has been deposited in the United States mail at Los Angeles, California, as registered mail, with postage prepaid, addressed to Second Party at 6021 Hollywood Blvd., Los Angeles, Cal. First Party shall not be responsible, in any way, for Second Party's trade fixtures". The restaurant equipment remained upon the premises throughout the term of the lease between respondents and Cabaniss and subsequently was sold under another conditional sales contract to Pacific Coast Enterprises, Inc., and thereafter continued to remain upon the premises until the expiration of the latter's lease of the premises March 31, 1939.

After termination of the last mentioned lease and while the equipment remained upon their premises, respondents on April 18, 1939, addressed to appellants a notice demanding that within three days thereafter the latter remove all trade fixtures belonging to them from respondents' premises. This notice was deposited in the United States mail on the day it was dated and was received by appellants on the following day, April 19th. On April 21st, respondents caused the equipment to be transferred from the premises to a storage warehouse and notified appellants of such action.

[1-4] Unless it can be held that the quoted portion of the agreement of August 11, 1937, vested appellants with a right and gave them permission to allow their equipment to remain on respondents' premises until the latter gave the former a five-day notice to remove the same therefrom, the judgment as to counts one and two of the cross-complaint must be sustained. An action will lie for recovery of the reasonable value of the use and occupation of real property irrespective of the question of whether or not the use thereof by the occupant was tortious or wrongful. In such a case the tort, if any, may be waived and an action based upon implied assumpsit is maintainable to recover the value of the use of the real property for the time of such occupation, where no special damages are sought. A landowner instituting such a suit need only allege his ownership of the land, occupation of such land by the defendant, the reasonable value of the use of the property for the period of occupation, and that such sum is unpaid. Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454, 185 P. 184; Taggart v. Shepherd, 122 Cal. App. 755, 10 P.2d 808; Samuels v. Singer, 1 Cal.App.2d 545, 552, 553, 36 P.2d 1098, 37 P.2d 1050. For a continuing trespass, section 3334 of the Civil Code prescribes the measure of damage. Where, as here, the equipment left upon real property substantially fills the premises and prevents or excludes the use thereof, a defendant is liable for the rental value of the entire premises. Lindberg v. Linder, 133 Cal.App. 213, 23 P.2d 842. We fail to see wherein the obligation of giving a five-day notice to appellants under the agreement of August 11, 1937, referred to anything other than the surrender of the premises by appellants to respondents on August 30, 1937, and the removal of appellants' personal property by reason of such surrender. Support is given to this view by the fact that on August 27, 1937, respondents did direct a notice to appellants requiring them to remove the trade fixtures within five days thereafter. We fail to perceive wherein subsequent negotiations and re-rentals of the real property revived or continued in force the permissive provisions of the agreement of August 11, 1937, with reference to the removal of appellants' trade fixtures and equipment. Furthermore, the record discloses without contradiction that appellants had notice of the default of Pacific Coast Enterprises, Inc., to whom appellants were selling the

equipment under a conditional sales contract, in the payment of rent, for a much greater period than five days prior to April 1, 1939. Appellants were served with the three-day notice directed to Pacific Coast Enterprises, Inc., setting forth the default in rent and the demand for payment thereof or surrender of the premises.

[5, 6] It is next urged by appellants that they could not be guilty of trespass when the equipment was, during the pertinent period, in the possession of Pacific Coast Enterprises, Inc., under a conditional sales contract from appellants as sellers. This claim is devoid of merit. By their own complaint which gave rise to this litigation appellants assert their ownership of the equipment. Indeed, claim of ownership was essential to their cause of action. Unless, as they alleged, they owned the equipment, its removal by respondents could not have damaged them. In another part of this litigation, which has gone to final judgment, there was a finding that appellants were the owners of the equipment. That issue is, therefore, res adjudicata.

[7] The third cause of action upon which respondents obtained judgment is predicated upon an agreement between the parties hereto, executed on May 18, 1937. By the terms of said agreement it appears that respondents had theretofore obtained a judgment against appellants in the principal sum of $1,315 for accrued rental upon the LaBrea Street property which was under lease to appellants, and which judgment further decreed the cancellation of said lease and restitution of the premises to respondents. The agreement of May 18, 1937, expresses the intentions and purposes of the parties thereto in the following language: "Whereas it is the desire of the parties hereto to provide for the payment of such Judgment and for reinstatement of said lease and for the cancellation of the said assignment thereof * * *". Then follows various and sundry provisions requiring certain payments to be made to respondents by appellants among which, with reference to the item of $310 with which we are now concerned, we find the following: "2. In further consideration of the execution of this agreement by said Lessors, said Harold Y. Herond and Mark M. Hansen agree to pay to said Lessors the sum of $310.00 on July 1, 1939 * * *". In connection with the manner and time of such payment the agreement reads "provided, however that if all the terms, covenants and conditions of said lease as amended shall be faithfully kept and performed, then the said sum of $310.00 shall be credited to the rent for the month of September, 1940 under said lease * * *".

On this appeal it is contended by appellants that certain agreements entered into between the parties hereto on August 11th and September 1st, 1937, cancelled their obligation to make payment of the $310. From a reading of the agreement of August 11, 1937, we are convinced that by the terms thereof appellants were absolved of their obligation to pay the $310. This we say because such obligation arose under the lease between the parties hereto, dated May 1, 1935, and ending October 31, 1940, and amendments thereto, which lease was cancelled by decree of court but which was reinstated by the agreement of May 18, 1937. The contract of August 11, 1937, mutually released appellants and respondents "from any and all liability which may hereafter accrue to either of them under that certain lease dated May 1, 1935 and ending October 31, 1940". This agreement also terminated and cancelled the amendment to such lease which provided for an option for extension of the term thereof, dated December 18, 1936. True, the agreement of August 11, 1937, provided that appellants should not be relieved of their obligation to pay the judgment rendered against them following a previous default in the payment of rent under the lease, but the item of $310 was not a part of such judgment. This sum was not to be paid until July 1, 1939, with the proviso that if all the terms, conditions and covenants contained in the lease, as amended by the contract of May 18, 1937, were faithfully kept and performed the $310 to be paid July 1, 1939, would be credited on the September, 1940 rental. Manifestly, when the lease which gave rise to this obligation was, by mutual agreement, cancelled on August 11, 1937, the obligation to pay the $310 thereunder, some two years after such cancellation, was extinguished as was the right of appellants to have such payment applied on the rent for September, 1940. In view of this conclusion at which we have arrived, it becomes unnecessary to consider or analyze the agreement of September 1, 1937, because when that agreement was entered into the obligation resting upon appellants to pay the $310 had been extinguished by the contract of August 11, 1937. And in any event the September 1st agreement dealt solely with the settlement of the judgment heretofore referred to.

For the foregoing reasons the judgment from which this appeal was taken is modified by deducting therefrom the sum of $310 and any interest predicated thereon. As so modified the judgment is affirmed. Each of the parties will bear their respective costs on appeal.

YORK, P. J., and DORAN, J., concur.

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59 Cal.App.2d 843

PEOPLE v. JACKSON.

Cr. 3681.

District Court of Appeal, Second District, Division 3, California.

July 23, 1943.

Criminal law ⚷1182

Where transcripts on appeal were filed but no brief had been filed by defendant and appeal was on the calendar but no argument or appearance was made in defendant's behalf, judgment and order denying new trial were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding by the People of the State of California against Eugene Jackson. From an adverse judgment and an order denying a new trial, defendant appeals.

Affirmed.

Eugene Jackson, in pro. per.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PER CURIAM.

The transcripts on appeal herein were filed January 19, 1943, but no brief has been filed by appellant. The appeal was on the calendar on May 19, 1943, but no argument or appearance was made in behalf of appellant.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are hereby affirmed.

SHINN, Acting P. J., PARKER WOOD, J., and SHAW, J. pro tem., concur.

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59 Cal.App.2d 793

CECIL, Director of Agriculture of California, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14048.

District Court of Appeal, Second District, Division 3, California.

July 23, 1943.

Hearing Denied Sept. 20, 1943.

1. Venue ⚷11

The statute providing that the county in which the cause arose is the proper county for trial of actions against a public officer for an act done by him in virtue of his office takes precedence over statute requiring the place of trial to be changed to the county of defendant's residence in certain other cases. Code Civ.Proc. §§ 393(b), 395.

2. Venue ⚷11

A mandamus proceeding against the Director of Agriculture to retry proceeding before the Department of Agriculture which proceeding resulted in order revoking milk distributor's license on condition that Los Angeles County licensee might petition the Director to modify the order on repayment of underpayments of fluid milk purchases to sellers "arose" in Los Angeles County within statute providing that the county in which the cause arose is the proper county for trial of actions against public officers as against contention that the proceeding was directed only against the Director's threatened future acts. Code Civ.Proc. § 393(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Arise".

3. Venue ⚷11

A mandamus proceeding against the Director of Agriculture to retry proceeding before the Department of Agriculture which proceeding resulted in order revoking milk distributor's license on condition that Los Angeles County licensee might petition the Director to modify the order on repayment of underpayments of fluid milk purchases to sellers "arose" in Los Angeles County within statute providing that the county in which the cause arose is the proper county for trial of actions against public officers and did not arise in Sacramento County because the Director signed the revocation order there. Code Civ.Proc. § 393(b).

4. Venue ⚷11

Where proceedings by a state agency against a citizen result in order the effect of which is to deprive him of the right to do business, the proper county for redress under statute providing that the county in which the cause arose is the proper county for trial of actions against public officers is the county in which the citizen carries on the business. Code Civ.Proc. § 393(b).

5. Process ⚷68

Process for seizure of property operates when and where it is executed.

6. Venue ⚷11

A cause of action does not "arise" in the county in which a state officer affixes his name to an order which is to become operative in another county, within statute providing that the county in which the cause arose is the proper county for trial of actions against public officers. Code Civ.Proc. § 393(b).

SHAW, J. pro tem., dissenting.

◆

Original proceeding in prohibition by W. J. Cecil, as Director of Agriculture of the State of California, against the Superior Court of the State of California, in and for the County of Los Angeles, and Joseph W. Vickers, as judge thereof, to stay further steps in a mandamus proceeding against petitioner by the Arden Farms Company.

Writ denied.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for petitioner.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

The Director of Agriculture of the State of California, who is the petitioner in this proceeding in prohibition, seeks to stay further steps in a mandamus proceeding pending against him in the Superior Court of Los Angeles County, upon the ground that his motion for change of venue to the county of his residence (Sacramento) was improperly denied.

[1] It is not questioned that petitioner did reside in the County of Sacramento at the time the proceeding was instituted in the superior court and at the time of his motion for change of venue. It is conceded that he was not entitled to the order he sought if the "cause or some part thereof" which is the basis of the mandamus proceeding arose in Los Angeles County and if that proceeding is one directed against a public officer for an act done by him in virtue of his office. Respondent contends that the mandamus proceeding is such a proceeding and that the cause arose in Los Angeles County. We are obliged to agree with these contentions and to hold that that proceeding is triable in Los Angeles County under section 393(b) of the Code of Civil Procedure, for this section, if it applies, takes precedence over section 395, Code of Civil Procedure, which requires that the place of trial be changed to the county of defendant's residence in certain other cases.

Arden Farms Company, a corporation, operates a milk plant at 1900 West Slauson Avenue, Los Angeles, and holds a milk distributor's license issued by petitioner as Director of Agriculture of the State of California. The auditor of the Bureau of Marketing Enforcement of the department filed a complaint with the department accusing Arden of purchasing and receiving in Los Angeles County certain quantities of fluid milk, using the same in the manufacture of ice cream and paying the producers therefor lower prices than those which had been established under and in accordance with the provisions of the Agricultural Code, St.1933, p. 60, by which complaint and proceedings to be had thereunder it was sought to have revoked the license of Arden as a distributor of fluid milk and to require Arden to do any and all other things which the Director of Agriculture might deem fitting and proper in accordance with his powers and the provisions of law applicable thereto. After notice to Arden a hearing on the complaint was held in Los Angeles County, evidence was taken before a representative of the Department, the matter was submitted, and the Director of Agriculture made an order at his office in Sacramento revoking the license of Arden as a milk distributor, as of a date four weeks after the date of the order.

A further provision of the order was that if Arden should, before the effective date of the revocation, pay to Central Milk Sales Agency, an association of producers from which Arden had made the purchases in question, some $16,000, which represented the total amount of the alleged underpayments as found by the director, Arden would have the right to petition the director to modify or set aside the order. Arden declined to pay the sum and five days before the date when the revocation would have become absolute brought the proceeding in mandate for a retrial of the issues involved in the proceeding before the department and seeking revocation of the order which conditionally revoked its license and an injunction against interference with its business by reason of said order. The grounds upon which the relief was sought are not material to a decision of the question of petitioner's right to a change of venue.

The question before us has not been passed upon by our courts in any of the reported cases. There have been decisions construing the applicable provisions of section 393 of the Code of Civil Procedure, but these tend more strongly toward the contention of respondent than that of appellant.

It is not contended by petitioner that the act of the director in revoking the permit was not an act done by him in virtue of his office. The Attorney General does contend, however, that the proceeding in mandamus is not directed against that act but only against threatened future acts, and it is also urged that the cause which Arden is prosecuting in the superior court arose in Sacramento County because the director signed the order there. We regard these positions as untenable.

McMillan v. Richards, 1858, 9 Cal. 365, 70 Am.Dec. 655, was in mandate to compel the sheriff to issue a deed. In Bonestell, Richardson & Co. v. Curry, 1908, 153 Cal. 418, 95 P. 887, it was sought to enjoin the Secretary of State and certain other state officers from entering into and carrying out a contract to purchase paper for the state printer's office, which had been awarded by the state officers to a paper company. State Commission in Lunacy v. Welch, 1908, 154 Cal. 775, 99 P. 181, was a proceeding in mandamus against the treasurer of San Benito County to compel him to pay moneys into the state treasury. Bloom v. Oroville-Wyandotte Irr. Dist., 1939, 34 Cal.App.2d 102, 93 P.2d 164, was in mandamus to require the respondents to pay money on bond obligations of an irrigation district and to levy an assessment in order to raise the money. In the McMillan case the court emphasized that the statute related to "affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty." None of the cases has done more than hold that acts which the officer has failed to do or which he will do unless enjoined therefrom are not acts done within the meaning of the section and which provide the substance of the cause of action. The Bonestell case, supra, 153 Cal. 418, 95 P. 887, upon which petitioner places his principal reliance, did not decide the questions which are before us. In referring to the decision in the McMillan case it was said (153 Cal. at page 420, 95 P. at page 888): "This construction contemplates only such affirmative acts of an officer as directly interfere with the personal rights or property of the person complaining, such as wrongful arrest, trespass, conversion, etc. The complaint in the case at bar shows no such case." Most assuredly Arden is prosecuting a cause for redress against interference with its personal rights and property. The Director of Agriculture has gone into the County of Los Angeles, has inquired into alleged violations of law by Arden, and has issued an order which will put an end to Arden's business as a distributor of milk by revoking its license, unless such revocation is avoided by the payment of an additional sum for milk produced, as fixed by the findings of the department. Or we may say that Arden has been assessed some $16,000 because of the manner in which it has conducted its business in the County of Los Angeles, and if it fails to pay that amount, the right to carry on its business in and from the County of Los Angeles will be ended by the revocation of its license. We are not considering a mere general order issued by the Director of Agriculture applicable alike to all milk distributors in the state or to those engaged in certain branches of the industry, but an adjudication relating to particular practices and transactions of a single milk distributor engaged in business in Los Angeles County and which directly affects its property located in its principal place of business. We think that the act of the director which will thus operate to Arden's detriment is essentially of the type of acts which the courts have had in mind and which they have described as affirmative acts and those which interfere with the property or rights of third persons. Certainly it is the act which has brought Arden to court for redress.

[2] The Bonestell case was not one seeking protection from the effects of an official act directed against the property or rights of the plaintiff. On this point the court said (153 Cal. at page 420, 95 P. at page 888): "Moreover, the action is not one against public officers for an act done by them, but is an action against them and certain other persons *solely* to prevent the doing of certain acts by such officers and by the other defendants in the future." (Emphasis added.) The complaint in the Bonestell case, which we have examined, alleged that the defendants had passed a resolution awarding a contract to defendant paper company and were about to enter into a contract and to purchase quantities of paper thereunder. It was these proposed acts which were sought to be enjoined; the mere decision that the contract should go to the successful bidder was not an official act which gave rise to the cause of action and the opinion of the court shows that the attack was considered to be one directed against acts about to be done by the defendants. That is not our case. Here the act of the director is complete and it is self-executing. The proceeding in mandamus is directed against this order and its necessary consequences and not against future threatened acts. Arden's license has been revoked, although conditionally. If the order is annulled, that will end the matter; if it is not annulled, Arden will pay the sum of $16,000 or lose its license. The action is directed against an act that has been done by the director, not against those which he threatens; the director's work has been completed, so far as official action is concerned. If Arden has any redress, it is by action to annul the order. And if the order is for any reason illegal, the illegality is the basis of the cause of action and it is immaterial in what form of action the right is asserted. The cause of action is essentially for the protection of Arden's property, which can only be accomplished by annulment of the order.

[3] It is equally clear that the cause of the action arose in Los Angeles County and not in Sacramento County. The affidavit filed in the Bonestell case in support of the motion alleged that the cause of action arose in Sacramento County where the official action had been taken, but there was no decision on that point. It is immaterial in our case where the order was signed or that it was filed in the office of the director in Sacramento County. The cause of action arose in Los Angeles County, where it was to be enforced upon the business and property of Arden located therein, that is to say, by the collection there of $16,000 or by closing up Arden's business by revoking its license. Upon this proposition the well-reasoned case of Montana-Dakota Utilities Co. v. Public Service Comm., 1940, 111 Mont. 78, 107 P.2d 533, is directly in point. The statute under consideration was identical in material respects with our own. An order of the Public Service Commission reduced the gas rates charged by plaintiff in Valley and Phillips counties; the order was made in Lewis and Clark County, where the office of the commission was located. Defendant commission moved to transfer the action from Lewis and Clark County to Valley County, upon the ground that the cause or some part thereof arose in that county and that no part of it arose in Lewis and Clark County. In holding that the action should have been transferred, the court said (107 P.2d at page 534): "It is the operation of the order that the action seeks to enjoin. True, the complaint also seeks to set aside the order, but only because its operation allegedly would injure plaintiff by confiscating its property. The operation of the order will be accomplished, if at all, in Valley and Phillips counties where the order is made applicable. It is our view that the cause of action arose in Valley and Phillips counties and not in Lewis and Clark county." The same question was involved under an identical statute in State Appeal Board v. District Court of Pottawattamie County, 1938, 225 Iowa 296, 280 N.W. 525, cited in the Montana case. It was held that where an order had been made by the State Appeal Board reducing a budget and levy in Pottawattamie County, the cause of action to annul the order arose in the county where it was to be given

effect and not at all in the county where the order was made, namely, at the state capitol, where the members of the board resided and were required by law to reside. In State ex rel. Florida Dry Cleaning and Laundry Board v. Atkinson, 1938, 136 Fla. 528, 188 So. 834, it was held that the venue of an action brought to restrain the enforcement of orders of a state agency was in the county where the order was threatened to be enforced and that plaintiffs had the right to institute their suit in the jurisdiction where the orders were alleged to be operating.

[4-6] The reasoning of these cases is sound and the conclusion is acceptable, in view of the fact that there has been no contrary holding in California. There is no escape from the conclusion that where a citizen is singled out by a state agency and proceedings are instituted against him and result in an order, the effect of which is to deprive him absolutely or conditionally of the right to do business, the proper county for redress under section 393, subd. (b), of the Code of Civil Procedure is the county in which he carries on the business and in which he will be hurt by enforcement of the order. It is where the shaft strikes him, not where it is drawn, that counts. Process for the seizure of property operates when and where it is executed. Surely a cause of action does not arise in the county in which a state officer happens to affix his name to an order which is to become operative in another county.

The order refusing to change the place of trial was correct. The alternative writ of prohibition heretofore issued is discharged and a peremptory writ is denied.

PARKER WOOD, J., concurs.

SHAW, Justice pro tem.

I dissent. It is contended, in behalf of the respondent court, that the case is ruled by this provision of section 393 of the Code of Civil Procedure: "* * * the county in which the cause, or some part thereof, arose, is the proper county for the trial of the following actions: * * * (b) * * * Against a public officer * * * for an act done by him in virtue of his office * * *." The petitioner contends, on the other hand, that the following part of section 395 of the same code is the governing provision: "In all other cases, * * * the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action." All of these provisions are made applicable to mandamus proceedings by section 1109, Code of Civil Procedure. There is no dispute about the fact that petitioner's legal and actual residence is in the County of Sacramento. The answer to our problem depends, therefore, on the nature of the mandamus proceeding. If it was a proceeding against petitioner "for an act done by him in virtue of his office," and if "the cause, or some part thereof" arose in the County of Los Angeles, that was the proper county; but, failing either of these conditions, the change of venue under the provision of section 395, Code of Civil Procedure, above quoted, should have been granted and a writ of prohibition should issue here.

The petition of Arden for a writ of mandate was doubtless framed with the decisions of the Supreme Court in Drummey v. State Bd. of Funeral Directors, (1939), 13 Cal.2d 75, 82, 87 P.2d 848, Bodinson Mfg Co. v. California Employment Comm., (1941) 17 Cal.2d 321, 329, 109 P.2d 935, and Laisne v. California State Bd. of Optometry, (1942) 19 Cal.2d 831, 123 P.2d 457, in view, and its purpose was, as a reading of it discloses, to take advantage of the ruling of those cases that mandamus may be used to obtain a review of decisions of administrative boards and officers revoking licenses, and other similar acts, and to compel a reversal of those decisions. In so far as this purpose is concerned, the proceeding initiated by the petition is one against a public officer for an act done by him in virtue of his office. Bonestell, Richardson & Co. v. Curry, (1908) 153 Cal. 418, 420, 95 P. 887. But so viewing it the cause of action is founded on the act of the officer which is attacked and which the attacking party seeks to have reversed; that is, in this case, the order revoking Arden's license. This act was not done in the County of Los Angeles, but in the County of Sacramento, and hence the cause of action against it arose in the latter, not the former, county.

The Arden petition also asks for relief in the nature of an injunction to prevent the Director from interfering with its continuing its business. It is said that in this aspect the proceeding is one against him for an act done by virtue of his office, that is, the act of making his order operative and enforcing it in the County of Los

Angeles. But the petition was filed before the revocation of Arden's license became effective, and hence this phase of it is prospective only, an effort to prevent future action by the Director, and comes in the same category as the effort to enjoin future performance by public officers of a contract illegally awarded by them, which was the subject of decision in Bonestell, Richardson & Co. v. Curry, supra, (1908) 153 Cal. 418, 420, 95 P. 887. Of it the court said "the action is not one against public officers for an act done by them, but is an action * * * solely to prevent the doing of certain acts by such officers * * * in the future." On this point Montana-Dakota Utilities Co. v. Public Service Commission, (1940), 111 Mont. 78, 107 P.2d 533, and some other out of state cases cited by respondent may express contrary views; but the California case last cited appears to be as a direct holding that the provision of section 393, Code of Civil Procedure, now under consideration does not apply to actions to restrain future acts, though they be but the sequel to acts already done, and it should be followed, in preference to authority elsewhere.

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59 Cal.App.2d 771

VAUGHN v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 14035.

District Court of Appeal, Second District, Division 2, California.

July 23, 1943.

Hearing Denied Sept. 20, 1943.

As Corrected Nov. 4, 1943.

1. Licenses 🔑38

The revocation by city Board of Police Commissioners of used automobile dealer's license is a proper exercise of the "police power". Const. art. 11, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

2. Municipal Corporations 🔑594(2)

A city ordinance authorizing Board of Police Commissioners to revoke used automobile dealer's license if dealer shall violate any ordinance or law or shall conduct such business unlawfully is not void for indefiniteness. Const. art. 11, § 11.

3. Licenses 🔑7(1)

Boards and commissioners charged with supervision of certain classes of business may be authorized to investigate a licensee upon complaint that he has violated regulatory ordinances or statutes in transactions with complainant, since no permit may be revoked until facts have been found to support an order.

4. Licenses 🔑38

A complaint in proceeding to revoke used automobile dealer's license on ground that dealer had unlawfully altered signed purchase orders and had made misrepresentations as to terms under which vehicles were taken out for trial was not insufficient for failure to notify dealer of nature of charges so as to enable him to formulate a defense.

5. Licenses 🔑38

A licensee when accused of violating municipal regulations governing his conduct does not stand in same position as one accused of crime, since he is only under discipline of the authority to whom he is subject.

6. Licenses 🔑38

A used automobile dealer making no exception to form of complaint in proceeding for revocation of dealer's license "waived" any defect in complaint.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

7. Licenses 🔑38

The charge of having committed a felony in transaction with his accuser is itself sufficient "notice" to licensee of the subject of inquiry at hearing to follow.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

8. Licenses 🔑38

The findings of city Board of Police Commissioners which revoked used automobile dealer's license went to the Superior Court with a strong presumption of their correctness.

9. Licenses 🔑38

An order revoking used automobile dealer's license on ground that dealer had unlawfully altered signed purchase orders and had made misrepresentations as to terms under which vehicles were taken out for trial should be sustained in absence of showing that board acted capriciously or fraudulently.

10. Licenses 🔑38

A used automobile dealer whose license was revoked by Board of Police Commissioners had burden of showing wherein board acted contrary to weight of evidence.

11. Licenses 🔑38

In determining right to revoke used automobile dealer's license for unlawful acts, dealer could not avoid responsibility by pleading that abuses were committed by his employees, especially in view of provision of ordinance that licensee should be held strictly responsible for conduct of his employees.

12. Principal and agent 🔑159(1)

A principal is liable for torts of his agent committed within scope of his authority under doctrine of "respondeat superior".

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

13. Alteration of Instruments 🔑12

An instrument cannot be altered by any person after signature of promisor unless person be specifically directed to make the alteration.

14. Licenses 🔑38

In proceeding for revocation of used automobile dealer's license, board was neither obliged to appoint experts to determine that alteration of signed purchase orders had been made by the hand of dealer, nor to be bound by their testimony if appointed.

15. Officers 🔑103

In reviewing decision of local administrative board court must determine merely whether there is substantial evidence in record to support board's findings.

16. Licenses 🔑38

Evidence warranted revocation of used automobile dealer's license on ground that dealer had unlawfully altered signed purchase orders and had made misrepresentations as to terms on which vehicles were taken out for trial.

17. Officers 🔑103

While decisions of administrative boards are reviewable by courts, boards' judgments have constitutional support, and when boards perform their function without prejudicial error, their judgments are "final" and it is only when record discloses arbitrary conduct that courts will intervene.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

18. Licenses 🔑38
Mandamus 🔑173

If upon showing made by petition for mandate or review of order revoking license it appears that trial was capriciously conducted, superior court will retry the case, and if ends of justice will be served, court may in exercise of discretion receive additional evidence upon showing that in exercise of reasonable diligence it could not have been presented before the board.

19. Constitutional law 🔑318

Where proceeding for revocation of used automobile dealer's license included service of complaint and notice of hearing, right to representation by counsel, a full hearing of all evidence, and privilege of cross examination, "due process of law" was not violated by sustaining demurrer without leave to amend dealer's petition for mandate or certiorari.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

20. Licenses 🔑38

A trial de novo of revocation of license following issuance of alternative writ contemplates a consideration of evidence taken before board whose function is important in supervising activities of licensed businesses, investigating and disciplining them, and in conducting hearings, determining facts and making orders.

21. Licenses 🔑38

A used automobile dealer whose license was revoked by Board of Police Commissioners was not entitled to trial de novo in superior court since if dealer presented all of its evidence before board, it was considered by court, and if dealer did not present it, he could not have a trial de novo merely to gain the chance of court's reaching a contrary conclusion.

22. Equity 🔑43

The law looks with disfavor upon a litigant who, having been cited before an administrative board, withholds his evidence for only judicial ears.

23. Licenses 🔑38
Mandamus 🔑163

Sustaining demurrer without leave to amend petition for writ of mandate or certiorari to compel Board of Police Commissioners to annul an order which revoked used automobile dealer's license, was not an abuse of discretion in absence of showing that dealer was not guilty of acts charged.

24. Certiorari 🔑9, 42(9)
Mandamus 🔑7, 154(10)

The superior court may exercise a wide discretion in granting or denying writ of mandate or certiorari and may conclude that further efforts to state a cause of action would be idle in view of weak showing made by petitioner as against testimony adduced against him.

25. Licenses 🔑38

Intelligent inquiries or observations by a board member during course of trial on proceeding for revocation of a license are not alone proof that issue has been prejudged.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Richard Vaughn, doing business as Vaughn's Used Cars, against the Board of Police Commissioners of the City of Los Angeles, and the members thereof for a writ of mandate or certiorari to compel the board to annul its order revoking petitioner's permits or for a review of the judgment of such board by the superior court. From an adverse judgment petitioner appeals.

Affirmed.

Albert G. Bergman, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Edwin F. Shinn, Deputy City Atty., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the petition for a writ of mandate or certiorari stated a cause of action to compel respondent board to annul its order revoking appellant's permits or for a review of the judgment of such board by the superior court and whether the court abused its discretion in sustaining the demurrer without leave to amend.

Prior to the events recited herein appellant had procured from the respondent board licenses to engage in the business of buying and selling used motor vehicles at three separate locations within the city. On May 11, 1942, a complaint was filed with the board of police commissioners, charging that appellant had violated the provisions (§ 24.03) of the Los Angeles Municipal Code in that he did willfully and unlawfully "alter or permit to be altered, signed contracts or purchase orders covering sales of automobiles; make, or permit to be made, misrepresentations as to cash deals and terms under which cars were taken out for trial." Citation having issued to appellant the trial was held before the respondent board on and after May 27, 1942. At that time appellant appeared with his counsel. Witnesses on behalf of the complainant as well as of appellant appeared and testified. Following the hearing an order was made revoking the licenses theretofore granted by the board to appellant effective June 21, 1942.

A demurrer having been sustained to his original petition "for mandate or certiorari," appellant filed his amended petition demanding that the order of respondent board be annulled and that appellant be allowed a trial de novo before the superior court. A transcript of the trial before respondent board was attached to the amended petition which alleged that appellant had been deprived of a full and complete hearing before the board; that he had been deprived of his right to do business without due process of law. Upon the filing of the petition the court below issued its alternative writ of mandate ordering the board to restore his licenses to appellant or to show cause why such restoration had not been effected. Following a hearing on the general demurrer to the amended petition, it was sustained without leave to amend, the alternative writ was discharged and the writs prayed for were denied. Judgment for defendants ensued.

Appellant attacks the judgment on the following grounds: (1) Section 24.03 of the Los Angeles Municipal Code is void for indefiniteness and uncertainty; (2) the complaint is insufficient to give the board jurisdiction; (3) there was no legal evidence to justify the revocation of the licenses; (4) appellant was deprived of due process of law; (5) he was entitled to a trial de novo in the superior court; (6) the court abused its discretion in sustaining the demurrer without leave to amend.

[1, 2] (1) The cited Code section is a part of a valid ordinance and is itself valid. Under the city's Charter the council may authorize the board of police commissioners to revoke permits granted by it in the exercise of police powers. § 2, subd. 11 E and 11 P, § 203; Constitution, Article XI, § 11. The revocation of such permits is a proper exercise of the police power. In re Higgins, 50 Cal.App. 533, 537, 195 P. 740; Vincent Petroleum Corporation v. Culver City, 43 Cal.App.2d 511, 517, 111 P.2d 433. Appellant cites many authorities to show that the ordinance is invalid but they are not apropos. They refer to statutes or ordinances where the administrative board was without guiding rules by which to determine the vice charged against the accused licensee. For instance a physician was accused of unethical conduct in advertising his medical business. The court held that in the absence of a statutory declaration of what statements in the advertisements should be deemed "grossly improbable" the medical examiners were left to their own particular views as to what might be grossly improbable statements and the statute was therefore held void. Hewitt v. Board of Medical Examiners, 148 Cal. 590, 591, 84 P. 39, 3 L.R.A., N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750. In the case of subdivision "L" of section 24.03, the board is authorized to revoke a permit which it has issued in the event that the permittee as a dealer in used automobiles "shall violate any of the provisions of this section or any provisions of any other ordinance, or of any law relating to, or regulating, such automobile business, or shall conduct or carry on such business in an unlawful manner." Such a dealer in obtaining his permit from the city agrees to be governed by ordinances designed to regulate his business. Section 22.02 of the same code authorized the board to revoke permits granted by it and prescribes the procedure by which such revocation may be accomplished. The procedure is that ordinarily followed by administrative boards throughout the Union. A verified complaint must be filed and served upon the accused permittee and he must be notified of the time and place of the hearing upon the complaint, and the permit cannot be revoked until facts establishing the complaint have been determined. It is a vain criticism of the section that it requires no more than a charge that the permittee has violated the provisions of the section (24.03) or of any other "ordinance or law relating to or regulating such used automobile business." Appellant ignores thereby the significance of the procedure prescribed for a trial and the right of the permittee to cross-examine the accusing witnesses. In order to inquire into the conduct of a permittee, no more should be necessary than to recite in the complaint his violations of such law in his transactions with the accuser.

Moreover, it is not uncommon for ordinances and statutes to confer upon boards and commissions authority to regulate by the use of language that implies the exercise of discretion. A city electrician might discontinue the use of electrical wiring when he found it "dangerous to life or property." Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348, 349. The statute directing the corporation commissioner to issue a license to a broker if he finds that the character of the applicant is such as to warrant belief that the proposed business will be conducted honestly, fairly and efficiently. In re Halck, 215 Cal. 500, 503, 11 P.2d 389. See, also, Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; Blue v. Division of Corporations, 8 Cal.App.2d 485, 48 P.2d 80; Smulson v. Board of Dental Examiners, 47 Cal.App.2d 584, 118 P.2d 483; Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A. 1917F, 514, Ann.Cas.1917C, 643. The criticised clause of the ordinance is so universally understood that no one could misunderstand it.

[3] By the cited authorities and many others it is established that boards and commissioners charged with the supervision of certain classes of business may be authorized to investigate a licensee upon a complaint that he has violated the regulatory ordinances or statutes in transactions with the complainant. If the accusation is brief it cannot effect a disastrous result for the reason that no permit may be revoked until facts have been found to support an order.

The argument is advanced that there is no security in the possession of a permit in the absence of rules for the guidance of the board at a trial of the permittee because after a person might have become established in business the board could set up its own rules as to what is unlawful and then arbitrarily thereby determine the conduct of the permittee to be unlawful. Such argument loses sight of the language which condemns only "unlawful" conduct. Also it assumes that a board will ignore the law and be activated by caprice. It will be presumed that officials will do their duties. § 1963 Code of Civil Procedure. Men may differ upon ethical concepts but once the unlawful acts of a permittee are averred no permittee can fail to understand that he is charged with having violated criminal or civil statutes or ordinances, contrary to his contract with the municipality.

[4-7] (2) Appellant contends that the complaint gave him no such notice of the nature of the charges as would enable him to formulate a defense. The averments were ample to advise of the grounds upon which the board intended to inquire into appellant's conduct with a view to revoking his license: in the course of his business he had unlawfully altered purchase orders that had been signed and had made misrepresentations as to terms under which cars were taken out for trial. Such a complaint follows the ordinance and is sufficient. Smulson v. Board of Dental Examiners, supra. A licensee of a municipality when accused of violating the regulations governing his conduct does not stand in the same position as one accused of crime. He is only under discipline of the authorities to whom he as licensee is subject. But the argument of appellant denouncing the insufficiency of the complaint is answered by the fact that he made no exception to the form of the complaint at the time of his trial. His silence there was an effectual waiver, as to any defects which it might contain. Casey v. Leggett, 125 Cal. 664, 58 P. 264; Cushing v. Pires, 124 Cal. 663, 57 P. 572; Munson v. Kirby, 105 Cal.App. 213, 215, 287 P. 133; Donovan v. Board of Police Commissioners, 32 Cal.App. 392, 403, 163 P. 69. He was represented by capable counsel with a stream of objections but none as to the form or content of the complaint. The charge of having committed a felony in a transaction with his accuser is itself sufficient notice to a licensee of the subject of inquiry at the hearing to follow.

[8-10] (3) There was no abuse of discretion in holding that the evidence presented to the board was sufficient to justify the revocation of appellant's license. The findings of the board went to the superior court with a strong presumption of their correctness. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 85, 87 P.2d 848. No showing is made that the board acted capriciously or fraudulently in revoking the permit in which event the order of revocation should be sustained. Hogan v. Retirement Board, 13 Cal.App.2d 676, 57 P.2d 520. The burden is on appellant to show wherein the board acted contrary to the weight of the evidence. Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457.

The testimony of three witnesses was received to show the scheme or design of appellant. In addition thereto the testimony of Grady Wilcox and Albert World both severally gave in detail the facts of their having been required to sign in blank about 27 papers for the exchange of automobiles by the payment of an agreed sum of money by the witness as a consideration for the exchange. To each witness later was forwarded a contract bearing his signature showing a large balance due in excess of that which was to be paid. In both cases the forms which had been signed in blank by the purchaser had been altered to suit the wishes of appellant. The witness, Rutkowski, testified that at the Broadway office of appellant, a salesman agreed to sell him a 1940 Ford Coupe for $500 cash. He paid $50 and a few days later returned to pay the balance of $450. At that time demand was made of him for information concerning the manner of his obtaining the $500 and he then signed a number of papers. He read none of them, made no payment but when he later returned he was told that he must sign more papers, one of which was marked "cash deal." Later he received a copy of the contract showing that he had paid $500 in cash as a down payment and there was a balance of $300 yet to be paid. While officer Sheets was under cross examination by appellant's counsel, he testified that 17 complaints had been made against appellant since the first of January, 1942. While most of the conferences had by the witnesses at the place of business were with employees of appellant, yet when demand was made for a modification of the contract appellant personally refused the modification and finally yielded only after complaint had been filed with respondent board.

[11-13] It is urged that the transactions proved were conducted by the employees

of appellant and that he took no part therein. But appellant was responsible for the conduct of his employees in the purchases or sales of used automobiles. He cannot avoid his own responsibility by pleading that the abuses of his permit were committed by those he trusted. In such transactions, section 24.03 provides that every person operating under this section "shall be held strictly responsible for the conduct of his employees insofar as the sales or purchases of used automobiles or motor vehicles are concerned." Moreover, it is the general rule that a principal is liable for the torts of his agent committed within the scope of his authority under the doctrine of respondeat superior. 1 Cal.Jur. 837. It has been held that for a sale of liquor by a clerk with a knowledge of his employer the latter is criminally liable. In re Souza, 65 Cal.App. 9, 11, 222 P. 869. In the prosecution of a merchant for violating the pure foods act by selling adulterated foods, the proprietor could not avoid responsibility for what was sold if he had such food in his stock and had a clerk authorized to make sales therefrom. Such sale was held to be a sale by the employer. People v. Schwartz, 28 Cal. App.2d Supp. 775, 781, 70 P.2d 1017. See 43 L.R.A.,N.S., 2, where the author of the note states that it is well settled that a principal may under certain circumstances be held liable criminally for an action by the hand of his servant acting either under his direct authority or with his consent or even in disobedience of orders. Appellant's answer to the testimony, that the blanks in the written documents were filled in by appellant after signature by the purchasers, is that it was authorized by section 3095 of the Civil Code. Neither that statute nor any other authority authorizes the alteration of an instrument by any person after signature of the promisor unless he be specifically directed to make the insert or other alteration. 1 Cal.Jur. 1073, 1087; C. I. T. Corporation v. Glennan, 137 Cal.App. 636, 639, 31 P.2d 430.

[14] There is nothing in the record of the trial before respondent board to show that any prejudicial evidence was received. On the contrary, all testimony that was hearsay or irrelevant was excluded. Appellant had full opportunity to present all of his evidence. His offer to stipulate to the revocation of appellant's license in the event that expert witnesses which the board might appoint should determine that the alteration complained of had been made by the hand of appellant is not an approved method of ascertaining facts in controversy. The board was neither obliged to appoint such experts nor to be bound by their testimony if appointed.

[15, 16] In reviewing the decision of a local administrative board, the court has to determine merely whether there is substantial evidence in the record to support the findings of the board. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513. The Dierssen case held that in order to make a successful attack upon the decision of an administrative commission it must be alleged and proved that the tribunal acted fraudulently, capriciously, or arbitrarily, and that the findings will not be disturbed if the board had any substantial evidence to sustain the decision. There is neither allegation nor proof in the record to support such attack upon the order of respondent board.

[17-19] (4) There was no want of due process of law. All of the requirements of due process were complied with, including service of the complaint and notice of hearing, right of representation by counsel, a full and complete hearing of all the evidence offered, and the privilege of cross-examination. While the decisions of administrative boards are subject to a review by the courts, their judgments have constitutional support. The conduct of the multitudinous affairs of a complex society requires the establishment of boards and commissions to ascertain and determine facts. When they perform that function without prejudicial error in the proceedings their findings are determinative and their judgments are final. It is only when the record discloses the allowance of incompetent evidence, the rejection of valuable proof at the trial, or other arbitrary conduct on the part of the administrative tribunal that courts will intervene in controversies between such boards and their licensees. If upon the showing made by the petition for mandate or review it appears that the trial was capriciously conducted the superior court will retry the case. If the ends of justice would be served by hearing additional evidence proposed by the petitioner the court may in the exercise of a sound discretion receive such evidence upon a showing that in the exercise of reasonable diligence it could not have been presented

at the trial before the board. Dare v. Board of Medical Examiners, Cal.Sup., 136 P.2d 304. Inasmuch as the record of the trial of this case before respondent board showed no abuse of the rights of petitioner before the police commissioners, no further trial of fact was required of the court below and the right of due process was not violated by sustaining the demurrer without leave to amend.

[20-22] (5) There was no occasion for a trial de novo, if appellant means thereby a rehearsal of all the testimony heard by the board. If a trial anew were a matter of right there would be no place in the scheme of government for administrative tribunals. Such a trial following the issuance of an alternative writ contemplates a consideration of the evidence taken before the board whose function is important in supervising the activities of licensed businesses, investigating and disciplining them, and in conducting hearings, determining facts and making orders. Whitten v. State Board of Optometry, 8 Cal.2d 444, 446, 65 P.2d 1296, 115 A.L.R. 1; Dare v. Board, supra, 136 P.2d page 310. If appellant presented all of his evidence before the board it was considered by the court below. If he did not present it he may not have a trial de novo merely to gain the chance of a court's reaching a conclusion contrary to that of the board. The law looks with disfavor upon a litigant who, having been cited before an administrative board, withholds his evidence for only judicial ears. Dare v. Board, supra.

[23, 24] (6) Finally, there was no abuse of discretion in sustaining the demurrer without leave to amend. From the recitals in this discussion it must appear that the phonographic record discloses a fair trial upon the complaint. No proposal was made in the petition that any designated evidence would overcome the testimony before the board. No witness was named. No document was suggested that would tend to establish that appellant had not approved of the alteration of signed instruments and of fraudulent misrepresentations, or that he had not disobeyed any law relating to the conduct of used car dealers. If he had such proof it was incumbent upon appellant to allege its availability and his reason for not offering it at the hearing. Failing thus to enliven his amended pleading it was proper to deny him further opportunity to amend. He was not entitled to a writ merely for the asking. He was required to plead such facts as would show that his rights had been abridged by the police commissioners. He failed to do so although he attached the reporter's transcript of the hearing. Just as the superior court may exercise a wise discretion in granting or denying either the alternative or the peremptory writ (Dare v. Board, supra; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674), by the same process it may conclude that further efforts to state a cause of action would be idle in view of the insipid showing made by appellant as against the testimony adduced against him.

[25] The further attack on the ground that the Board had prejudged the guilt of appellant is answered by the foregoing. Intelligent inquiries or observations by a board member during the course of the trial of a permittee are not alone proof that the issue has been prejudged.

Judgment affirmed.

McCOMB, J., concurs.

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60 Cal.App.2d 125

POE et al. v. LAWRENCE.

Civ. 14034.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1943.

1. Appeal and error 🔑931(1)

On appeal, the facts must be considered in the light most favorable to findings and judgment of trial court.

2. Automobiles 🔑244(11)

Though negligence cannot be predicated on driver's inexperience or type of license in absence of causal connection between such facts and happening of accident, court was entitled to consider such facts in determining probability of testimony that driver traveling on through highway attempted to beat automobile approaching from the right through intersection. Vehicle Code, § 253, St.1939, p. 1434.

3. Automobiles ⚷244(31)

Court was entitled to draw from proof of driver's inexperience and limited type of license such deductions as were warranted by a consideration of the usual propensities of people, as well as the course of nature and to ground thereon such inferences as reason would direct. Vehicle Code, § 253, St.1939, p. 1434; Code Civ. Proc. §§ 1958, 1960.

4. Appeal and error ⚷204(2)

Motorist could not complain for the first time on appeal of admission of testimony concerning his inexperience and the limited type of driver's license possessed by him. Vehicle Code, § 253, St.1939, p. 1434.

5. Automobiles ⚷244(11, 35)

Experienced that inexperienced holder of limited driver's license, while driving at night on through highway at speed of 40 to 45 miles per hour in 25-mile zone, was struck by automobile approaching from right which he attempted to beat through intersection after he should have seen that it did not intend to make required stop and consequently collided head on with plaintiffs' automobile sustained judgment holding inexperienced driver liable for plaintiffs' damages. Vehicle Code, § 253, St.1939, p. 1434; Code Civ.Proc. §§ 1958, 1960.

6. Appeal and error 989

Where judgment is attacked on ground that it is unsupported by the evidence, reviewing court's jurisdiction is limited to determining whether there is any substantial evidence, contradicted or uncontradicted, that will support judgment.

7. Appeal and error ⚷931(1)

On appeal from judgment for plaintiffs in action for damages for negligence, all conflicts in the evidence must be resolved in favor of prevailing party.

8. Appeal and error ⚷996

Since all intendments are in favor of judgment arrived at upon conflicting evidence, fact that contradictory inferences can reasonably be drawn from facts in evidence does not authorize appellate tribunal to substitute other inferences for those drawn by trier of the facts.

9. Appeal and error ⚷995

Evidence that is inherently improbable may be disregarded by reviewing court, but, to warrant such action, there must exist a physical impossibility that such evidence is true or its falsity must be apparent without any resort to inferences or deductions.

10. Automobiles ⚷171(13)

Motorist, traveling at night on through highway at excessive speed and entering intersection without slackening speed after he should have seen that automobile approaching from right would not make required stop, was not entitled to assume that driver of such automobile would exercise due care and not violate traffic laws.

11. Negligence ⚷1

One relying on assumption that another will exercise reasonable care and obey the law may be guilty of negligence, unless there is nothing in the situation to warn him of impending danger.

12. Negligence ⚷136(14)

The reasonableness of conduct of a person relying upon the assumption that another will obey the law is ordinarily a question for determination by the trier of facts.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Robert W. Poe and Beverly Poe against Talmadge O. Lawrence for injuries sustained by Beverly Poe in an automobile accident and consequential damages sustained by her husband, Robert W. Poe. Judgment for plaintiffs, and defendant appeals.

Judgment affirmed.

Crider, Runkle & Tilson, of Los Angeles, for appellant.

Gordon M. Snyder and Francis A. Cochran, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs instituted this action to recover damages for personal injuries sustained by plaintiff Beverly Poe and consequential damages sustained by her husband, plaintiff Robert W. Poe, while riding in their automobile, operated by the latter and which was struck by another automobile operated by defendant Talmadge O. Lawrence. Plaintiffs' complaint alleged that the injuries and damage sustained by them proximately resulted from the careless and negligent manner in which defendant operated his motor vehicle. By his answer the defendant denied all of the material allegations contained in plaintiffs' complaint, and by way of a further and separate defense alleged that if plaintiffs did suffer any damages the whole thereof were the direct and proximate result of circumstances beyond defendant's control and which occurred without any negligence or fault whatsoever upon his part. The cause was tried before the court sitting without a jury, resulting in a judgment for plaintiffs in the sum of $11,759.72. From such judgment defendant prosecutes this appeal.

[1] Stating the facts in a light most favorable to the findings and judgment, as we are required to do, the record discloses testimony that the accident occurred about 11 o'clock on the night of September 5, 1941, in the city of South Gate, Los Angeles County, a few feet west of the intersection of San Vincente Avenue and Tweedy Boulevard. San Vincente Avenue is a level, paved highway thirty feet wide, extending in a northerly and southerly direction; intersecting Tweedy Boulevard at right angles. The last named boulevard is a level, paved, through highway, extending approximately in an easterly and westerly direction. It is a through highway protected in that entire area by boulevard stop signs at all intersecting north and south streets. At the time the accident here in question occurred, the boulevard stop sign located at the northwest corner of this intersection, and facing toward the north, to apprise anyone driving an automobile in a southerly direction on San Vincente Avenue of the requirements to stop at that point, was not standing erect and apparently was down on the ground. By stipulation of the parties, Tweedy Boulevard, at the point of this accident, was conceded to be a 25-mile zone, correctly posted as such for a distance of ten blocks west and seven blocks east of the intersection of San Vincente Avenue. On the northeast corner of the intersection there was a vacant lot which extended east from San Vincente Avenue for a distance of 70 feet to a duplex residence (referred to throughout the trial as the "double house"). On the night of the accident there was nothing on the vacant lot to obstruct one's vision.

Just prior to the accident plaintiffs were traveling east on Tweedy Boulevard in their Chevrolet coupe with a woman companion, while defendant was traveling west in his Plymouth sedan.

Plaintiff Robert W. Poe testified he first saw the defendant when the latter was some distance east of the double house, at which time defendant was traveling on his own right side of the highway at a speed ranging from 40 to 45 miles per hour. At about the time appellant reached the double house, where concededly he had an unobstructed view north on San Vincente for 135 feet, he commenced to turn his vehicle gradually toward the center line of Tweedy Boulevard. Mr. Poe believed, when he first saw defendant start to move toward the center, that the latter was getting into a position to make a left turn south on San Vincente. However, observing that as defendant came closer to the intersection he did not slacken his speed, Mr. Poe concluded that defendant was traveling too fast to attempt to make such a turn. As defendant's automobile entered the east boundary of the intersection, he crossed the center line of Tweedy Boulevard on to the south half, upon which Mr. Poe was lawfully traveling eastward. At this time, according to plaintiff Mr. Poe, the defendant's speed continued at from 40 to 45 miles per hour. Defendant continued to travel on Mr. Poe's side of the road toward the latter until the former was about two-thirds through the intersection where he collided with a Pontiac automobile driven by one William Leon Cook and which vehicle had entered the intersection going in a southerly direction and without making the boulevard stop. The Cook car collided with the right side of defendant's car and damaged the right running board toward the rear and the right rear fender as well as the right rear wheel of defendant's vehicle. After the collision with Cook's car, defendant continued on through the intersection, and a few feet west of the intersection he struck plaintiffs' vehicle head on, i.e., the right front of defendant's car struck the left front of plaintiffs' automobile. According to plaintiff Mr. Poe, defendant was still traveling 40 to 45 miles per hour at the time he collided with the plaintiffs' automobile. Plaintiff Mr. Poe testified that immediately before the collision he was on the south half of Tweedy Boulevard traveling at a speed of 20 to 25 miles per hour. When he observed defendant cross over on to the wrong side of the road, Mr. Poe applied his brakes and had skidded some 5 feet when struck by defendant's car. There were skid marks from no automobiles except that of plaintiffs.

In general defendant testified that he was traveling along Tweedy Boulevard at a rate of speed averaging 25 to 30 miles an hour on his own right side of the boulevard; that he was looking straight ahead; that he observed the Pontiac car just as it entered the intersection from the north. To quote his testimony: "I was looking straight ahead and the traffic was light and I knew that Tweedy was a boulevard stop street, and of course I was not expecting a car to come flying out of there at that speed." Defendant testified that the Pontiac car collided with him, causing his automobile to deviate from its course of travel and to collide with plaintiffs' automobile.

Throughout the trial it was the claim of appellant that he was free from negligence because, as he contended, he was traveling on a through highway protected by boulevard stop signs, at a proper rate of speed on the right-hand side of the road, and that he had a right to rely on the presumption that Mr. Cook, driving the Pontiac car, would obey the law and make the boulevard stop. Defendant further contended that he did not see the Pontiac until it entered the intersection. It was further urged by defendant that the Pontiac struck his car thereby forcing him to change his course of travel and to collide with plaintiffs' vehicle.

On the other hand, it was plaintiffs' theory that defendant was negligent because after he passed the double house he had a clear view across the vacant lot of the Pontiac car approaching from the north on San Vincente; that defendant concluded that the driver of the Pontiac was not going to make a boulevard stop and the defendant decided to "Beat Mr. Cook through the intersection"; and in pursuance of such plan he started to change his course of travel as well as position on the highway by driving toward the center line of the boulevard at about the time he passed the double house and approximately 70 feet before he entered the intersection. That defendant was traveling at a speed of 40 to 45 miles an hour in a 25-mile zone, and did not at any time apply his brakes or attempt to slacken his speed. It was plaintiffs' contention that defendant was unsuccessful in his attempt to "Beat Mr. Cook through the intersection"; collided with him and then with plaintiffs' car. Plaintiffs contended that the collision could have been avoided had defendant not deviated from his original course of travel along the right-hand side of Tweedy Boulevard and had he confined his speed within the 25-mile speed limit or, as plaintiff expresses it, "he could have avoided the collision, even at his excessive speed, by merely applying his brakes and slackening his speed, without the necessity of coming to a stop". It might here be noted that defendant's testimony was corroborated to some extent by testimony of Mr. Cook who was driving the Pontiac, but the record reveals that the trial court was not impressed with the verity of Mr. Cook's testimony because of the fact that the latter had stolen the Pontiac car which he was driving, and in rejecting Cook's testimony the trial judge said: "A man who would steal, certainly won't hesitate about lying, and this young man, from his own statement, has a very deplorable record. He has been incarcerated in institutions at least four times and is an admitted thief".

[2-4] It might also be noted that defendant Lawrence's experience in driving motor vehicles was limited to some five or six months; that he possessed a restricted type of operator's license which he characterized as a "permit license" or a license "whereby you were allowed to drive if you had someone with you". Section 253, Vehicle Code, St.1935, p. 129 as amended by St.1939, p. 1434. At the time of the accident here in question defendant was not accompanied by a licensed driver. Appellant complains that the trial court gave "considerable thought" to the fact that defendant was an inexperienced driver and possessed only a limited type of driver's license. It is true that in the absence of some causal connection between the inexperience of, and form of driver's license possessed by, a party involved in an accident, and the happening of such accident, no negligence can be predicated on either the driver's inexperience or his type of license. Nevertheless the court was entitled to take those factors into consideration in determining the probability or improbability that defendant, as plaintiff contended, attempted to "beat Mr. Cook through the intersection" when he could have avoided the collision by slackening his speed and continuing along on the right-hand side of Tweedy Boulevard. When the fact of inexperience and restricted license was legally proven, the court was entitled to draw therefrom such deductions as were warranted by a consideration of the usual propensities of people, as well as the course of nature,

and to ground thereon such inferences as reason would dictate. Sections 1958, 1960, Code of Civil Procedure. In any event, no objection was made to this line of testimony at the trial and objection thereto cannot be urged for the first time on appeal. Hurd v. Walker, 9 Cal.App.2d 525, 527, 50 P.2d 1074.

[5-9] A review of the record herein generates the conclusion that there was substantial oral testimony which, if believed by the court, coupled with physical facts, amply supports the findings made and the judgment entered thereon. True, there was a conflict in the evidence and had a judgment been rendered for defendant it would be sustained. But that is not the test on appeal. Legion of authority supports the statement that when an attack is made upon a judgment on the ground that it is unsupported by the evidence, the power of reviewing courts is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered. Therefore, on appeal from a judgment for plaintiffs in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the prevailing party. Because it is the rule that all intendments are in favor of the judgment arrived at upon conflicting evidence, the fact that contradictory inferences can reasonably be drawn from the facts in evidence does not authorize an appellate tribunal to substitute other inferences for those drawn by the constitutional and statutory arbiter of the facts. Of course, if the evidence is inherently improbable it may be disregarded, but before such action is warranted there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without any resort to inferences or deductions. Whitsett v. Morton, 138 Cal.App. 628, 629, 630, 33 P.2d 54; Arundel v. Turk, 16 Cal.App.2d 293, 295, 296, 297, 60 P.2d 486. Since the record herein discloses substantial testimony to warrant the trial court in finding defendant guilty of negligence in driving upon the wrong side of the road (Temple v. De Mirjian, 51 Cal.App.2d 559, 561, 125 P.2d 544), the court not being bound to accept defendant's version of the reason for such action, and being entitled to infer under all the circumstances and the testimony of plaintiff Robert W. Poe that defendant's presence on the wrong side of the boulevard was attributable to his unsuccessful and ill-advised attempt to "beat Cook through the intersection", we cannot disturb the conclusion arrived at by the trial court. Further evidence of defendant's negligence, if believed by the trial court, is supplied by the unreasonable rate of speed at which it was testified he was driving, in violation of law and in disregard of the safety of other users of such highway. Matsuda v. Luond, 52 Cal.App.2d 453, 458, 126 P.2d 359. There was also evidence justifying a finding of negligence upon the part of defendant due to his failure to apply his brakes, and thereby slacken his speed, when he saw, as he clearly could have seen, had he looked, that Cook, driving the Pontiac automobile, was not going to make the boulevard stop. Boccalero v. Wadleigh, 113 Cal.App. 376, 379, 298 P. 526.

[10-12] Appellant's contention that he had a right to rely upon the fact that he had no reason to believe Cook or anyone else would unlawfully proceed into Tweedy Boulevard from San Vincente Avenue in violation of the boulevard stop law cannot aid him for as we have pointed out there was substantial evidence to support the finding that appellant himself was not exercising due care as he approached the intersection of San Vincente Avenue. He was not entitled, under such circumstances, to assume that Cook would exercise due care. Doyle v. Loyd, 45 Cal.App.2d 493, 496, 114 P.2d 398. One may not close his eyes to threatening danger and blindly rely upon the assumption that the other party will use reasonable care and prudence and obey the traffic laws. Only when there is nothing in the situation to warn him of impending danger is he not guilty of negligence in relying upon such assumption. Simonsen v. L. J. Christopher Co., 186 Cal. 786, 788, 200 P. 615; Edlund v. Los Angeles R. Co., 14 Cal.App.2d 673, 675, 58 P.2d 928. Finally, the reasonableness of the conduct and actions of a person relying upon the assumption that another will obey the law is primarily a question for determination by the trier of fact. White v. Davis, 103 Cal.App. 531, 284 P. 1086.

We find no error in the record. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

60 Cal.App.2d 218

FAY v. NORQUIST.

Civ. 12471.

District Court of Appeal, First District, Division 1, California.

Aug. 12, 1943.

1. Appeal and error ⚿110

An order denying new trial is not "appealable". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Quieting title ⚿34(1)

In quiet title proceeding, direct prayer to cancel or set aside deed from plaintiff to defendant is not necessary. Code Civ.Proc. § 738; Civ.Code, § 3412.

3. Deeds ⚿54

A deed not delivered to grantee by grantor is void.

4. Quieting title ⚿39

In quiet title proceeding, defendant's cross-complaint, containing usual broad allegations, to quiet title, was sufficient, though it did not set up deed, on which defendant relied, from plaintiff to defendant.

5. Appeal and error ⚿1042(2)

In quiet title proceeding, where defendant filed cross-complaint to quiet title, without setting up deed from plaintiff to defendant, and evidence and findings were pertinent to pleadings without reference to allegation on information and belief in answer to cross-complaint that defendant would rely on such deed, which such answer attacked as not delivered to defendant, order denying motion to strike such allegation was not prejudicial to defendant.

6. Deeds ⚿208(1)

In quiet title proceeding, where defendant filed cross-complaint to quiet title in her, evidence *held* substantially sufficient to sustain trial court's finding that deed from plaintiff to defendant, who relied thereon, was manually transferred to defendant by plaintiff without intent to pass title to realty and hence not delivered.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action to quiet title by Rena Fay against Rose Norquist, who filed a cross-complaint to quiet title. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Harry F. Sullivan, of San Francisco, for appellant.

Keyes & Erskine, Leslie L. Roos, and W. B. Ryder, all of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

WARD, Justice.

[1] This is an appeal by defendant and cross-complainant from a judgment and order denying a new trial in an action to quiet title. The order is not appealable, Code Civ.Proc. sec. 963, and the appeal therefrom will therefore be dismissed.

The complaint is in the ordinary form to quiet title to certain real property, with the usual allegations and prayer. Defendant answered, alleging that prior to September 26, 1928, plaintiff was the owner of the property, but that since that date she, the defendant, is the true owner thereof, and in a cross-complaint prayed that her title be quieted. In an amended answer to the cross-complaint plaintiff denied generally the claims thus set up and pleaded that the alleged cause of action is barred by section 318 of the Code of Civil Procedure. She also set forth that: "Plaintiff and cross-defendant is informed and believes and therefore alleges that the alleged cause of action set forth in said cross-complaint is based upon a certain deed of gift from plaintiff and cross-defendant to defendant and cross-complainant dated September 26, 1928, and recorded January 3, 1941, in Liber 3715 of the Official Records of the City and County of San Francisco, at page 19. That there was never any delivery of the said deed, but in any event defendant and cross-complainant is barred by her laches in failing to assert any claim to the ownership and/or possession of the real property herein involved from the date of said deed until June, 1941, for the reason that during said interval of approximately thirteen years, plaintiff and cross-defendant was in possession of said real property at all times, paid all taxes assessed against said real property and/or improvements thereon, improved said real property and contracted for and paid for various and sundry repairs to the improvements of said real property. That defendant and cross-complainant at all times during said period had full and complete knowledge of all of said acts of plaintiff and cross-defendant, but took no action with regard thereto."

The evidence on each side was addressed primarily to the circumstances surrounding the transaction, whereby the defendant, Mrs. Norquist, came into possession of the deed. Called as a witness by plaintiff, she testified that the parties were close friends, but are not related; that prior to September 26, 1928, while at a doctor's office, plaintiff, who was "not feeling very well," said: "'Well,' * * * I think she says, 'I will deed that little bungalow, the first little bungalow.' She has two bungalows, she built that one first, and the second one afterwards. She said, 'I want to give you that bungalow. I want to make a gift to you.' So she said 'Get in touch with your lawyer.'" Defendant further testified that at her suggestion the parties went to her lawyer the next day and he drew the deed, which was signed and acknowledged, plaintiff requesting her not to record it until after the death of Mrs. Fay's husband. There is other evidence that the deed was not to be recorded until after the death of Mrs. Fay. Defendant admitted that during the years that followed she made no effort to collect rents from the tenants of the property in question; that in fact she paid Mrs. Fay rental for the place while she lived there for a short period; that she never paid taxes, nor the cost of improvements, repairs or insurance. Mr. Fay died in 1932 and while, according to defendant's statement, she might then have filed the deed and received the benefits of the property, she applied to the Relief Administration in 1934 for aid, stating in her application therefor that she owned no real property. As stated, the deed was not recorded until 1941.

Plaintiff testified that defendant agreed never to ask for the property during the lifetime of the grantor; that the grantee understood the deed was not to be recorded, and that the property "was still mine." The deed was signed, acknowledged and left upon the desk of defendant's attorney. From the plaintiff's testimony it appears that there was no intent to pass a present title.

Plaintiff's physician testified that she told him she had signed a deed to the property but that it was not to be recorded until after her death.

The attorney for the defendant testified that there was a statement made in his office that the deed was not to be recorded until the death of Mr. Fay; that he advised plaintiff that she would have to hand the deed personally to defendant and tell her she was making an absolute delivery, which instruction was followed; that plaintiff's reason for not wishing the deed to be recorded until the death of Mr. Fay was "because the income of the property was necessary to take care of him during his lifetime."

The trial court in effect found that plaintiff's claim to the property was good and valid; that although there had been a manual delivery of the deed there was no intent to pass title; that defendant's claim was barred by reason of laches, and that plaintiff had been in adverse possession of the property for over five years. Judgment for plaintiff was rendered based upon such findings.

Appellant, Mrs. Norquist, contends that there is no prayer nor request by respondent, Mrs. Fay, in the pleadings for a cancellation of the deed or to set it aside; that the allegations relative to non-delivery were made on information and belief and that the deed having been recorded several months prior to the filing of the complaint and answer to the cross-complaint respondent was deemed to have notice of the public record; that therefore the pleading upon information and belief precluded findings thereon.

[2, 3] In a quiet title proceeding under the provisions of Code of Civil Procedure, sec. 738, it is not necessary that there be a direct prayer to cancel or set aside a deed, as is usual under the provisions of Civil Code, sec. 3412. If, as the court found, the deed was not delivered, it is void, and an order of cancellation would be superfluous. Cutler v. Fitzgibbons, 148 Cal. 562, 88 P. 1075; Nelson v. Thomas, 36 Cal.App. 433, 172 P. 398; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703. In the present case there is no contention that the deed was obtained by fraud.

[4, 5] Appellant of necessity was forced to rely on the deed if title was to be established in her favor. Instead of setting up the deed in the answer, she entered a general denial, and the cross-complaint contains the usual broad allegations, and is sufficient. Bertelsen v. Bertelsen, 49 Cal.App.2d 479, 122 P.2d 130. From the allegations of the cross-complaint respondent could not be sure what claims appellant would present. As a matter of precaution in her amended answer to the cross-complaint respondent proceeded to allege on information and belief that appellant would rely on a certain deed, and then proceeded to attack such deed. Respondent should not be penalized for her effort to inform the court of the possible evidentiary issues. There was a motion to strike the allegation based on information and belief, which was denied. Assuming that the motion should have been granted, appellant was not prejudiced by the order denying it. The evidence adduced and the findings are pertinent to the pleadings without reference to the matters stated on information and belief. The answer to the complaint alleged appellant's title as of September 26, 1928, which is the date of the purported deed.

[6] The vital question in this case is the validity of the delivery of the deed. Appellant Norquist contends that the evidence shows a valid delivery to have been made. The trial court found there was no delivery, but that the deed was manually transferred, thereby reducing the issue to the question of intent to create a present estate in appellant. This puts Mrs. Norquist to the necessity on appeal of demonstrating that the evidence does not support the finding that the manual transfer was "with no intent to pass title." This she is unable to do as a matter of law, as the evidence heretofore referred to is substantially sufficient to sustain the finding under the recent decision in Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323. In that case it was held that the handing of a signed and acknowledged deed establishes a prima facie case of execution and intent to make a delivery and transfer of title, but that the presumption of legal delivery is not conclusive. The court there said (57 Cal. App.2d at page 204, 134 P.2d at page 325):

"The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561; Baker v. Baker, 9 Cal.App. 737, 100 P. 892. The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. (See cases collected 9 Cal. Jur., p. 153, § 52.) The rule applies not only where possession of the deed is given to a third person, but also where such possession is given to the grantee directly. Marple v. Jackson, 184 Cal. 411, 193 P. 940; Stone v. Daily, 181 Cal. 571, 185 P. 665; Hefner v. Sealey, 175 Cal. 18, 164 P. 898; Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Bias v. Reed, 169 Cal. 33, 145 P. 516; Kenney v. Parks, 137 Cal. 527, 70 P. 556. Intention to part with title is indispensable—that is the factor that gives vitality to the delivery. Ruiz v. Dow, 113 Cal. 490, 45 P. 867; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703, and see cases cited 9 Cal.Jur., § 52 at p. 155, fns. 19 and 20.

"It is also clear that where a valid delivery is established subsequent acts and declarations of the grantor in disparagement of his deed, outside the presence of the grantee, are not admissible. Such declarations or acts are hearsay and self-serving. See cases cited infra. But when the very question presented is whether or not the alleged grantor intended a valid delivery—that is, intended to divest himself of title—his declarations and acts made and done outside the presence of the grantee after physically delivering possession of the deed to the grantee or to a third person, are admissible as bearing upon the vital question of intent."

In Whitlow v. Durst, 20 Cal.2d 523, 524, 525, 127 P.2d 530, 531, the court said: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them."

In view of the finding, based upon substantial evidence, that there was no delivery of the deed, it is not necessary to consider additional contentions that if there was a valid delivery appellant's claim is nevertheless barred by laches and that respondent acquired the title by adverse possession.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 211

WILSON et al. v. SMITH et al. (WILSON, Intervener).

Civ. 14121.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1943.

1. Appeal and error ⚷773(3)

The former policy of considering filing of belated opening brief after notice of motion to dismiss a sufficient answer to the motion, where no appreciable delay had been occasioned in the hearing, must be abandoned in view of Supreme Court's decision that Rules of Court have effect of law and must be followed. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4.

2. Appeal and error ⚷773(3)

Motion to dismiss appeal because of failure to file opening brief within time prescribed by Rules, and motion to be relieved from default on ground of excusable delay and neglect, are addressed to the sound discretion of the court. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4.

3. Appeal and error ⚷773(3)

In view of short time intervening between Supreme Court decision effectuating a change of policy and motion to dismiss appeal for failure to file brief within time and facts that hearing would not be appreciably postponed, and that brief had been proffered for filing before hearing of motion to dismiss, and showing made by appellant, motion to dismiss would be denied. Rules of Supreme Court and District Courts of Appeal, rule 1, § 4.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Action by Edward N. Wilson, sometimes known as E. N. Wilson, a judicially declared incompetent person, by Mary Ellen Wilson, guardian of his person and estate (Donald P. Lane, in the capacity of and as special administrator of the estate of Edward N. Wilson, deceased, substituted party plaintiff), against Laurel Edward Smith, the estate of Emma Wilson Smith, deceased, Laurel Edward Smith, as executor of the last will and testament of Emma Wilson Smith, deceased, Security-First National Bank of Los Angeles, as trustee, Security-First National Bank of Los Angeles, wherein Mary Ellen Wilson, intervened. From the judgment rendered, the intervener appeals. On respondents' motion to dismiss appeal.

Order in accordance with opinion.

A. Brigham Rose, of Los Angeles, for appellant.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for respondents.

WHITE, Justice.

Respondents have moved to dismiss this appeal as appellant's opening brief was not filed within the time prescribed by Rule 1, Section 4, of the Rules of the Supreme Court and District Courts of Appeal, in effect at the time this motion was filed and heard. Appellant has moved to be relieved from default for the claimed reason that her delay and neglect were excusable.

The clerk's and reporter's transcripts on appeal were filed April 13, 1943, and the notice of motion to dismiss was filed June 4, 1943, at which time appellant's brief was 22 days overdue. Two days prior to the hearing on said motion, appellant served upon respondents and offered for filing in this court her opening brief, a reading of which impresses us that it presents for determination substantial questions.

The affidavit filed by appellant in her effort to secure a relaxation of the pertinent rule, while not too definite or altogether satisfactory, does nevertheless give as reasons for the delay in filing the brief that "Affiant anticipated that out of monies in possession of the estate and which were allowed to appellant, she would be able to pay for the costs, but, notwithstanding that there are funds in the estate, no payments have been made to her"; that counsel for appellant "has been engaged in a multitude of legal proceedings engaging his time"; that counsel was preparing the brief when he was advised by the clerk of this court that the appeal herein was improperly taken to the District Court of Appeal and had been transferred to the Supreme Court; that "affiant being mindful of the fact that the Supreme Court has consistently transferred appeals taken thereto in other than capital cases to the District Court, naturally awaited advices respecting the re-transfer of the case to the District Court of Appeal, but received no such advices". To the foregoing might be added the fact, heretofore noted, that prior to the hearing of the motion to dismiss, appellant proffered her brief for filing in this court.

[1, 2] It is true that since the decision by our Supreme Court in the case of Murphy v. Krumm, 136 P.2d 8, we must abandon the former policy prevailing in this Division of considering the filing of the delinquent opening brief after the notice of motion to dismiss was given and before the same was made in open court, a sufficient answer to the motion, where no appreciable delay had been occasioned in the hearing of the case, because in the cited case it was held that the applicable rules of court have the effect of law and must be followed. Nevertheless, motions of the nature here presented are addressed to the sound discretion of the court before which the motion is made, and the action of courts on such motions, upon pleas to be relieved from default is not governed or controlled by any hard and fast rules. Were we to apply with absolute strictness the pertinent rules, grave injustice might ensue and a litigant acting in good faith might be deprived of his day in court, notwithstanding the merits of his case, because forsooth he relied upon the representation of competency upon the part of his attorney, which competency, to a degree at least, must be implied from the licensing of the latter to practice his profession. Insofar as our policy in connection with the disposition of motions of the character here presented is concerned, we find ourselves in accord with the views presented with such clarity by Mr. Justice Marks, speaking for the Fourth District Court of Appeal in the case of Strong v. Mack, 137 P.2d 748. Furthermore, it is noteworthy that with reference to dismissal of appeals for failure to file an opening brief within the prescribed time, the new rules on appeal, adopted by the Judicial Council and effective July 1, 1943, provide as follows: "Rule 17. Failure to file brief. (a) (Opening brief) If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of Rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 30 days after the date of mailing of the notification, the appeal will be dismissed, unless good cause is shown for relief. If a sufficient written showing of excuse is made within such 30-day period, the Chief Justice or Presiding Justice may grant additional time to file the brief subject to such conditions as he may deem proper to impose; otherwise the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal." In other words, under the new rules now in effect, this appellant would have been entitled to a notice from the clerk of this court when the allotted 30 days to file her brief had expired. That unless the document was served and filed within another 30 days, the appeal would, in the absence of a showing for relief, be dismissed, and in the instant case some 8 days would have remained after the date when the notice of motion to dismiss was filed herein within which appellant could have presented her opening brief for filing.

[3] In view of the change required in our former policy and ruling upon motions of this kind under the rules prevailing prior to July 1, 1943, and the short time intervening between the rendition of the Supreme Court decision in Murphy v. Krumm, supra (April 12, 1943), and the filing of the motion to dismiss the appeal herein (June 4, 1943), we feel that some liberality in ruling upon such motions is warranted because of the short time afforded members of the bar to inform themselves of the required change in our former liberal policy. Furthermore, in the instant case were we to relax the rule and relieve the delinquent appellant from default, the hearing of the appeal upon its merits will not be appreciably postponed. Chapman v. Bank of California, 88 Cal. 419, 421, 26 P. 608.

For the foregoing reasons the motion to dismiss the appeal herein is denied; the clerk of this court is directed to file the opening brief served upon respondent and presented for filing; respondents to have 30 days from and after the filing of this decision within which to serve and file their brief, and appellant to have 20 days from and after the service upon them and filing of respondents' brief in which to serve and file her reply brief.

YORK, P. J., and DORAN, J., concur.

60 Cal.App.2d 63

PEOPLE v. GARNER.

Cr. 3690.

District Court of Appeal, Second District, Division 3, California.

July 30, 1943.

Rehearing Denied Aug. 9, 1943.

Hearing Denied Aug. 26, 1943.

1. Abortion ⚷11

Defendant could not be convicted of using an instrument to bring about a miscarriage in violation of statute upon testimony of woman upon or with whom offense was allegedly committed, unless she was corroborated by other evidence, but defendant himself could be source of the necessary corroboration Pen.Code, §§ 274, 1108.

2. Abortion ⚷11

Defendant's statement as to his examination of complaining witness, together with his subsequent actions, was sufficient "corroboration" of testimony of complaining witness and friend who took her to keep appointment with defendant to support conviction of employing an instrument to procure a miscarriage. Pen.Code, §§ 274, 1108.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

3. Criminal law ⚷1036(6), 1044

Defendant was in no position to complain of error, if any, in admission of physician's opinion that an abortion had been induced, where no objection was made to any of questions which elicited opinion, although opportunity for an objection existed, and there was no motion to strike opinion when given.

4. Criminal law ⚷1069(6)

Where appeal was taken orally at time of pronouncing sentence, over a month after defendant's motion for new trial had been denied, attempted appeal from order denying new trial was too late, and such appeal was dismissed. Pen.Code, § 1239.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Juno N. Garner was convicted of violating section 274 of the Penal Code, in that he employed an instrument to procure a miscarriage, and he appeals from the judgment of conviction and from order denying motion for new trial.

Appeal from order dismissed, and judgment affirmed.

James O. Warner, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

The defendant was found guilty of violating section 274, Penal Code, in that he employed an instrument to procure a miscarriage, and was sentenced to state prison. On his appeal from the final judgment of conviction, the defendant makes but two points: First, that the testimony of the accomplices was not corroborated; and, second, that error was committed in permitting Dr. Wright to testify that the abortion had been induced. We find neither ground sufficient to sustain a reversal of the judgment.

[1, 2] The testimony of the woman upon whom the crime was committed, to whom we shall hereafter refer as the complaining witness, was ample to support the conclusions which the trial court's judgment indicates was reached, that is, that she was pregnant and that the defendant used an instrument to bring about the miscarriage which followed shortly after her visit to him. By the provisions of section 1108, Penal Code, in a case such as this "the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence." The defendant himself may, however, be the source of the necessary corroboration (People v. Collins, 1935, 4 Cal.App.2d 86, 87, 40 P.2d 542; People v. Pritchard, 1943, 58 Cal.App.2d 791, 137 P.2d 697), and that was so in this case. His story closely paralleled that of the complaining witness except, of course, the operation of which she spoke was, in his version, only an examination. His subsequent actions, however, were such that the trial judge was warranted in viewing them as admissions of guilt. Although the complaining witness had paid him $70, he told the police officers who questioned him that she had not. Some time after June 30, the day of the

"examination," he made an attempt to obtain the signature of the complaining witness to this letter: "June 30, 1942. This is to certify that, believing myself to be pregnant I have attempted to abort myself and find myself in much difficulty due to vaginal bleeding and passage of material from the vagina. I hereby authorize Dr. J. N. Garner to do anything necessary to relieve my condition and will not in any way hold him responsible for any further complications that may arise." The complaining witness refused to sign this statement, so a second letter, also dated June 30, was then presented to her by the defendant. Because she needed the $70 that was to be returned if she signed the second letter, she did so. It reads: "This is to certify that I, Mrs. Ollie V. Beggs am suffering from nausea and vomiting, vaginal bleeding and pain and that I hereby authorize Dr. J. N. Garner to carry out any procedures that he may deem necessary. Further, I hereby relinquish any claim of any sort whatsoever upon Dr. J. N. Garner for any complications which may develop. signed: Mrs. Ollie V. Beggs Mr. O. V. Beggs 257 W. Beach Inglewood." For the sufficiency as corroborative evidence of the acts of a defendant which reveal consciousness of guilt, see People v. Collins, cited above, and People v. Hoyt, 1942, 20 Cal.2d 306, 313, 125 P.2d 29.

Further corroboration of the testimony of the complaining witness came from the friend who took her to keep her evening appointment with the defendant. This friend described the complaining witness as in very good spirits on the way to the appointment, in great agony as she returned from it three quarters of an hour later.

[3] The defendant is in no position to complain of the error, if it was an error, in the admission of Dr. Wright's opinion that an abortion had been induced, as no objection was made to any of the questions which elicited the opinion, although the opportunity for an objection existed, nor was there a motion to strike the opinion when given. People v. Rucker, 1936, 11 Cal.App.2d 609, 612, 54 P.2d 508.

[4] The appeal in this case was taken orally, at the time of pronouncing sentence, over a month after defendant's motion for a new trial had been denied. The attempted appeal from the order denying a new trial was thus taken too late, Pen.Code, sec. 1239, and that appeal is dismissed. The final judgment of conviction is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

STOCKTON v. DEPARTMENT OF EMPLOYMENT et al.

Civ. 6871.

District Court of Appeal, Third District, Sacramento, California.
July 31, 1943.

Rehearing Denied Aug. 30, 1943.
Hearing Granted Sept. 27, 1943.

1. Officers 🔑4

The right to retain an office or employment of indefinite term depends upon existence of department or agency to which the services belong, and where agency is lawfully terminated in good faith, office or employment ceases to exist when agency is abolished.

2. States 🔑67

The California Employment Commission had sole right to abolish Division of State Employment Agencies and to transfer duties of Chief of Division to another officer provided change was lawfully made. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

3. Officers 🔑69

The purpose of Civil Service System is not to perpetuate offices, but to preserve status of state employees as a reward for faithful services and for welfare of government, and hence a state agency may be abolished in interest of economy or efficiency, regardless of whether there are sufficient funds to run the agency. St.1939, p. 2510, § 172.

4. Mandamus 🔑81

The statutory discretion conferred upon California Employment Commission to abolish Division of State Employment Agencies, and to consolidate its functions with Department of Employment cannot be interfered with by the courts in absence of proof of bad faith, fraud or violation of statute. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

5. Officers 🔑69

The California Employment Commission could abolish Division of State Employment Agencies and transfer duties of chief of division to Director of Department of Employment notwithstanding that Director might not have enjoyed a civil service status, provided transfer of duties was lawfully accomplished. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

6. Mandamus 🔑77(4)

Mandamus directing reinstatement of Chief of Division of State Employment Agencies which division had been abolished by California Employment Commission which transferred chief's duties to Director of Department of Employment was improperly granted in absence of proof of fraud, bad faith or violation of statute by Commission. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

7. Officers 🔑76
States 🔑44

Where Division of State Employment Agencies was legally abolished by California Employment Commission, office of Chief of Division ceased to exist, notwithstanding chief's duties were transferred to Director of Department of Employment, and hence in absence of proof of fraud, bad faith or violation of statute, Personnel Board had no jurisdiction to direct chief's reinstatement. St.1937, p. 187, § 56; St. 1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

8. Mandamus 🔑179

A writ of mandamus directing Director of Department of Employment to reinstate deposed Chief of Division of State Employment Agencies which Division had been lawfully abolished by California Employment Commission was void where neither the commission nor its members were parties to the proceeding. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

9. Mandamus 🔑187(9)

On appeal from order granting peremptory writ of mandamus, appellate court may examine record of proceedings for purpose of determining whether trial court acted arbitrarily.

10. Mandamus 🔑187(9)

On appeal from judgment directing reinstatement of Chief of Division of State Employment Agencies which Division had been abolished by California Employment Commission, appellate court would review record to ascertain whether there was evidence to support charge that commission acted in bad faith. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

11. Evidence 🔑83(1)

In absence of evidence to the contrary, court must presume that California Employment Commission acted lawfully in abolishing Division of State Employment Agencies and transferring duties of Chief of Division to Director of Department of Employment. St.1937, p. 187, § 56; St. 1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

12. Mandamus 🔑168(4)

Evidence failed to show fraud, bad faith or violation of statute by California Employment Commission in abolishing Division of State Employment Agencies and transferring duties of Chief of Division to Director of Department of Employment, so as to authorize order directing reinstatement of the Chief. St.1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 93.

13. Mandamus 🔑151(2)

A petition against Department of Employment, executive director thereof, State Controller, State Treasurer and an employee for mandamus to require reinstatement of Chief of Division of State Employment Agencies which Division had been abolished by California Employment Commission was demurrable for misjoinder of parties, since the commission, or its members, were "necessary parties." St. 1937, p. 187, § 56; St.1939, p. 2510, § 172; St.1935, pp. 1241–1243, §§ 75, 88, 90, 91, 93; Code Civ.Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

14. Officers 🔑94

A civil service employee wrongfully deprived of his position may recover amount of his accrued salary during period he is prevented from performing his duties, less the sum he receives from private or public employment during that period.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Mandamus proceeding by Roy S. Stockton against the Department of Employment of the State of California and others to require the reinstatement of the petitioner to his former position of Chief of the Division of State Employment Agencies, and requiring the payment of his salary from the date at which the Division was abolished and his office as chief was terminated, wherein the respondents filed a demurrer. From a judgment for petitioner, the respondents appeal.

Reversed with directions.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for appellants.

A. J. Kennedy, Albert E. Sheets, and Carl Kuchman, all of Sacramento, for respondent.

THOMPSON, Justice.

The respondents named in the petition will be referred to as defendants, pursuant to Section 1063 of the Code of Civil Procedure.

They have appealed from a judgment granting a peremptory writ of mandamus directing the reinstatement of the petitioner, Roy S. Stockton, to his former position of Chief of the Division of State Employment Agencies, and requiring the payment of his salary at the rate of $440 per month from July 20, 1940, at which time the Division was abolished and his office as Chief was terminated. The defendants demurred to the petition on the ground of misjoinder of parties and for failure to allege facts sufficient to constitute a cause of action. It was asserted the California Employment Commission (formerly the Unemployment Reserves Commission) or its members are necessary parties defendant in this proceeding, since Section 75 of the Unemployment Insurance Act constituted the Commission the sole governing agent of the Department of Employment. (Stats.1935, ch. 352, p. 1226, and amendments thereto, Deering's Supp. to Calif. Laws of 1935, p. 2039, Act 8780d.) The demurrer was overruled. The defendants filed their return and answer to the petition, setting up the same issues of alleged misjoinder of parties and failure to state facts sufficient to constitute a cause of action. At the hearing, when the petitioner's evidence was completed, the defendants moved for a nonsuit, which was denied. The defendants then adduced evidence of the regularity of the proceedings of the Commission in abolishing the Division of State Employment Agencies, and the cause was argued and submitted. Findings were adopted by the trial court favorable to the petitioner. The peremptory writ of mandamus was issued directing the reinstatement of the petitioner and the payment of his salary as prayed for.

The Department of Industrial Relations was divided into five divisions (Sec. 56, Labor Code, St.1937, p. 187, former Pol.Code Sec. 364a), one of which was the Division of State Employment Agencies. From and after December 13, 1934, the petitioner, Roy S. Stockton, was employed and served as Chief of the Division of State Employment Agencies, in the Department of Industrial Relations. On July 1, 1936, this Division was transferred to the Department of Employment, with Stockton as its Chief. He served in that capacity until July 23, 1940, at a salary of $440 a month. On that date, in the interest of economy and efficiency, the Division was abolished by resolution of the Commission and its functions were combined with those of the Department of Employment, over which R. G. Wagenet presided as Director of the Department. Stockton was then placed on the lay-off list as provided by Section 172 of the Civil Service Act St.1939, p. 2510. (Stats.1937, p. 2085, and amendments, 1 Deering's Gen.Laws of 1937, p. 742, and Supp.1939, Act 1404.)

The California Unemployment Insurance Act was adopted and became effective September 15, 1935. Section 75 of that Act provides: "This act shall be administered by the Unemployment Reserves Commission of this State, to be appointed by the Governor, by and through the State Department of Employment which is hereby created and of which such commission shall be the governing body."

Section 88 of that Act provides: "The commission may appoint and employ an executive officer, who shall act as the secretary of the commission, and shall be Director of the Department of Employment. The commission may employ such assistance as seems to it necessary for the administration of this act, subject to the provisions of the Civil Service laws."

Section 93 of that act provides in part: "On July 1, 1936, the Division of State Employment Agencies of the Department of Industrial Relations shall become and remain the Division of State Employment Agencies in the Department of Employment. All persons employed in such division and the records and property thereof shall, upon such change, become the employees, records and property of the Department of Employment. All persons employed in any capacity in such division shall continue and remain in such capacity in such division after the change, *subject to the power of the commission as the governing body of the department to abolish such division, change old divisions or create new divisions, change duties and powers of such division, or impose upon it new and additional powers and duties.*

"The State of California hereby accepts the provisions of the Wagner-Peyser Act, approved June 6, 1933, passed by the Congress of the United States, and entitled 'An act to provide for the establishment of a National employment system and for cooperation with the States in the promotion of such system, and for other purposes,' in conformity with section 4 thereof, and will observe and comply with the requirements of said act of Congress.

"The Division of State Employment Agencies in the Department of Employment shall be the agency of this State for the purposes of said act." (Italics added.)

Pursuant to Section 93 of that Act, the Commission, as the governing body of the Department of Employment, for the avowed purpose of economy and efficiency, adopted a resolution on June 14, 1940, as previously stated, abolishing the Division of State Employment Agencies, over which the petitioner presided as Chief officer, and transferred his duties to R. G. Wagenet, the Director of the Department of Employment. All civil service employees of the abolished division, except Stockton and his assistant, were transferred to positions in the Department of Employment having duties comparable with those which they previously performed. Mr. Stockton was then placed on the list of lay-off employees as provided by Section 172 of the State Civil Service Act. (Stats.1937, p. 2085, 1 Deering's Gen.Laws of 1937, p. 742, and Supp.1939, Act 1404.) That resolution provides in part:

"Resolved, that the California Employment Commission, pursuant to the authority conferred upon it by law, and for the purpose of achieving economy, efficiency of operations, and for the purpose of simplifying the operating functions of the Department of Employment, does hereby order the reorganization of the Department of Employment as follows:

"1. The existing position or office of the Executive Director is hereby abolished and in lieu thereof is hereby created the position or office of Director of the Department of Employment, said position or office to be held by the present incumbent of the former position or office, Mr. R. G. Wagenet.

"2. The existing Division of State Employment Agencies, as such, (otherwise known as Division of Employment Service) of the Department of Employment is hereby abolished; and it is hereby ordered that lay-offs shall be made forthwith from the positions or offices of Chief and Associate Chief of said division. The aforementioned lay-offs are hereby expressly declared to be for the purpose of economy and increased efficiency of operations. All other personnel in said division are hereby assigned, under the direction of the Director of the Department, to positions of similar class and responsibilities in the Department of Employment. All duties and responsibilities heretofore performed in the positions of Chief and Associate Chief of said division are hereby transferred to said Director of the Department of Employment and shall be performed by said Director in addition to his existing duties and responsibilities. * * *"

The foregoing Resolution was duly served on the petitioner. No further duties were thereafter performed by him. He was prevented from doing so by the Director of the Department of Employment, who assumed the duties and performed them as directed by the Commission, in addition to his own obligations. On July 21, 1940, the petitioner appealed under Section 172(k) of the Civil Service Act, St.1939, p. 2510, to the Personnel Board from the order abolishing the Division and transferring the duties of the Chief to the Director of the Department of Employment. That appeal to the Personnel Board was taken on the ground that the abolition of the Division and the transfer of the duties of Chief thereof to the Director of the Department of Employment were illegal and void for the reason that those acts were performed in bad faith by the Commission for the purpose of depriving the petitioner of his civil service status. It was also asserted the change in that service was not made on account of a lack of either work or funds in that Division. The petitioner asked the State Personnel Board to reinstate him as Chief of the Division and to direct the payment of his salary of $440 per month from July 20, 1940. Several hearings of the Board were held on that appeal, which was submitted September 4, 1940. Counsel for the petitioner and for the Department of Employment were present and participated in the hearings. Oral and documentary evidence was adduced in behalf of both parties. October 17, 1940, the Personnel Board rendered its decision which contained the following language:

"Decision

"It Is Hereby Ordered, Adjudged and Decreed that the Department did not comply with Section 172 of the State Civil Service Act of 1937, as amended, and said layoff was improper.

"It Is Further Ordered that the petition of said Roy S. Stockton be granted and petitioner be reinstated to his position as Chief, Division of State Employment Agencies, as of July 20, 1940, and that he be granted his salary from and after said date."

A petition for rehearing before the State Personnel Board was denied. The Department of Employment, however, refused to comply with that order to reinstate the petitioner or to pay his salary, as directed by the Board. This petition for a writ of mandamus was then filed in the Superior Court of Sacramento County. The defendants demurred to the petition on the grounds previously stated. The demurrer was overruled. The answer and return of the defendants was then filed denying the material allegations of the petition. The trial of the mandamus proceeding began January 12, 1942, and was concluded on January 15th. On April 8, 1942, the court adopted findings favorable to the petitioner. Finding "X" determines: "That it is true said lay-off of petitioner was made in bad faith and for the purpose of depriving petitioner of his civil service rights; that it is true said lay-off was not made because of lack of work or lack of funds; that it is true no interests of economy were served by reason of said lay-off."

The court further found that the petitioner, since December 13, 1934, has been and now is the holder of the permanent civil service position of Chief of the Division of State Employment Agencies, at a salary of $440 per month. A peremptory writ of mandamus was issued, directing the reinstatement of Roy S. Stockton to the position of Chief of the Division of State Employment Agencies, and ordering the payment of his salary at the rate of $440 per month from July 20, 1940. From that judgment this appeal was perfected.

On January 1, 1942, while this proceeding was pending in the trial court, the Division of Employment Agencies was transferred to Federal control and all of its employees were inducted into the service of that department of the United States government, with Federal civil service status. The Director of the State Department of Employment, however, failed and refused to certify the petitioner Stockton as an employee of the Federal government.

The petitioner concedes that the appellants correctly state in their opening brief the question to be determined on this appeal, which reads: "Did the State Personnel Board have authority to reinstate petitioner after the Employment Commission abolished the Division of Employment Agencies?"

The petitioner states the issue in his own language as follows: "The question thus propounded by appellants is the sole issue on this appeal; it has been the only issue in the case since its inception. The solution of the question involves a determination of the essential *jurisdiction* of the State Personnel Board over layoffs in the State civil service. In short, the basic question is: What is the jurisdiction of the State Personnel Board?"

A consideration of this question prompts the further inquiry: How could the Personnel Board or the trial court act within its jurisdiction in assuming to direct the reinstatement of the petitioner, Stockton, to a position which was eliminated as the result of abolishing the Division of State Employment Agencies, as permitted by statute, in the absence of proof of fraud, bad faith or violation of the statute on the part of the Commission?

Another preliminary question is involved regarding the failure of the trial court to require the Commission or its members, as indispensable parties, to be joined as defendants in this proceeding. It is contended that since the Commission and its members are indispensable parties, the peremptory writ is ineffectual.

[1] The petitioner suggests that the position formerly occupied by him consists of the particular duties which he performed rather than the office of Chief of Division, and that so long as the service remains and there is ample work and funds with which to maintain it, the office may not be dispensed with. The right to retain an office or employment of indefinite term depends upon the existence of the department or agency to which the services belong. Where the statute authorizes the abolishing of the agency, and it is lawfully terminated in good faith, the office or employment ceases to exist when the agency is abolished. In the case of Tanner v. Edwards, 31 Utah 80, 86 P. 765, 766, 120 Am. St.Rep. 919, 10 Ann.Cas. 1091, it is said: "The term 'office' is defined as 'a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging.' * * * It embraces the ideas of tenure, duration, emoluments, and duties, and these ideas or elements cannot be separated, and each considered abstractly. All, taken together, constitute the office * * *." See 29 Words and Phrases, Perm. Ed., p. 248.

[2, 3] In the present case the Chief of Division had no fixed term of office. His duties were those which were prescribed by the Commission. It had the sole right to abolish the agency under which the office existed, and to transfer those duties to another officer, provided the change was made pursuant to statute for the purpose of economy or efficiency. The purpose of the Civil Service system is not to perpetuate offices but rather to preserve the status of state employees as a reward for faithful and efficient services and for the welfare of government. We know of no statute which prohibits the abolishing of a division of state service, when that change is made in the interest of economy or efficiency, regardless of whether there are sufficient funds in the particular department with which to pay for its maintenance or its officers. A department of state may exercise economy by conservative and prudent expenditures of money even when it has access to an inexhaustible fund for that purpose. It should be the policy of the legislature to encourage public officers and commissions to exercise economy. If a state agency, such as the Department of Employment, may be just as efficiently and more economically operated by abolishing a division thereof pursuant to law and uniting its functions with another similar agency, we know of no reason why that may not be done, even though that procedure leaves one of the principal officers without a job. Indeed, we think that was the very purpose of the adoption of Section 93 of the Unemployment Insurance Act. When separate branches of similar state agencies in effect are united for convenience, efficiency or economy, and the duties of the chief officer of the abolished division are transferred to and imposed upon the principal officer of the department, it reasonably follows that the impelling object of that transfer of obligations would be to save the unnecessary expense of paying two high-salaried officers when one can just as well perform the duties of both.

[4, 5] In the present case it was the province of the Commission, as the governing body of the employment agencies, to determine whether Wagenet, as Director of the Department of Employment, was qualified to efficiently perform the duties of both offices. The Commission determined that Wagenet could efficiently and more economically perform those services. We assume the Commission concluded it was unnecessary to retain and pay both officers. Since a discretion was conferred by statute upon the Commission to abolish the Division and to consolidate the functions with the Department of Employment, we may not interfere with that discretion in the absence of proof of bad faith, fraud, or violation of the statute. Stockton was then placed on the lay-off list of employees pursuant to the provisions of the Civil Service Act. We are not informed as to whether Wagenet possessed civil service status or not. As Director of the Department of Employment and Secretary of the Commission he occupied a confidential relationship toward the Commission, and it was not necessary that he should possess civil service status. We think it is immaterial whether or not he held civil service standing. We know of no law which forbids the imposing of duties formerly performed by a civil service employee upon the executive head of another branch of the same service, even though the latter officer may not enjoy civil service status, provided the transfer of duties is lawfully accomplished in the interest of economy or efficiency, and not for ulterior purposes.

[6] We are persuaded the record is devoid of proof of fraud, bad faith or viola-

tion of the statute on the part of the Commission in abolishing the Division and transferring the duties of the petitioner, Stockton, to the Director of the Department of Employment. Without that evidence, the trial court exceeded its jurisdiction in issuing the writ.

In the case of Bank of Italy v. Johnson, 200 Cal. 1, at page 34, 251 P. 784, 797, which was a petition for a writ of mandamus to compel the Superintendent of Banks to issue a certificate authorizing the establishing of a branch bank in Los Angeles, the court said with respect to the lack of proof of fraud or bad faith on the part of a commissioner having discretionary powers in that regard, quoting with approval from the case of Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140, that: "'When subordinate boards or commissioners were by statute invested with discretion with respect to the exercise of their powers, courts would not interfere with such discretion, in the absence of grave reasons tending to show that fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law had entered into or characterized the determination of such body; and that, in the absence of such showing of an abuse of discretion, the determination of such board or commission would not be interfered with or overthrown.'" For discussion of that principle see Stewart v. Stockburger, Cal.App., 62 P.2d 758, 762.

We therefore conclude that the Commission was authorized by law to abolish the Division and to transfer the duties of the Chief thereof to the Director of the Department of Employment in addition to his former responsibilities, notwithstanding the fact that he may not have enjoyed a civil service status.

[7] It is conceded the Personnel Board, on appeal, would have had the right to determine from competent evidence adduced, that the petitioner, Stockton, had been illegally deposed from office by means of fraud, the exercise of bad faith or in violation of the statute with relation thereto, and to reinstate him under such circumstances, on the theory that the abolishing of the Division and the transfer of his duties would therefore have been void. But clearly, if the Division in which he held the office of Chief was *legally abolished,* that office ceased to exist, even though the duties were transferred to another duly qualified officer and, in the absence of proof of fraud, bad faith or violation of the statute, neither the Personnel Board nor the trial court had jurisdiction to direct his reinstatement to an office which did not exist.

In the present proceeding the trial court, upon the petition for a writ of mandamus, heard the case on its merits and issued the writ, commanding Wagenet, "as Director of the Department of Employment," to "forthwith reinstate petitioner Roy S. Stockton in the position of Chief, Division of State Employment Agencies," and to certify his name, as such Chief, to the State Personnel Board, with allowance of his salary at the rate of $440 per month from July 20, 1940, to be approved and certified by the Board to the State Controller. The writ also commanded Wagenet, as such Director, to "transfer and induct petitioner Roy S. Stockton into the civil service and pay of the United States Government with his civil service title of Chief, Division of State Employment Agencies, at his salary therefor of $440.00 per month, as of January 1, 1942." The writ then directed the State Controller to allow petitioner's claim for $440 per month from July 20, 1940 to January 1, 1942, and to draw his warrant for that amount. Finally the writ directed the State Treasurer to pay that warrant.

[8] It will be observed the writ orders Wagenet, as Director, to perform all acts necessary to reinstate the petitioner as Chief of the Division which was abolished by the Commission, independently of the necessary approval and affirmative action of the Commission, which is the sole governing body of that agency. Neither the Commission nor its members are parties to this proceeding. We assume Wagenet, as Director, could not usurp the powers of the Commission and therefore had no ability or authority to comply with the writ or to perform any of the mandates of that order. It follows that the writ is ineffectual and void on account of an excess of jurisdiction of the trial court.

Conceding that the trial court had a right to review the proceedings of the Personnel Board to determine whether it acted arbitrarily or contrary to law and therefore without jurisdiction in directing the reinstatement of the petitioner without proof of bad faith or illegal action in abolishing the Division and transferring petitioner's duties to the Director of the Department of Employment, it appears that the trial court also exceeded its jurisdiction in adopting findings and directing the issuance of the peremptory writ of mandamus without proof of bad faith or violation of the statute on the part of the Commission. The trial court's judgment would therefore be void for the same reason. It exceeded its jurisdiction.

The Personnel Board did not find that the Commission acted in bad faith. It merely determined that the proceedings of the Commission "did not comply with section 172 of the State Civil Service Act of 1937, as amended, and said layoff was improper." But the trial court did find, "That * * * said lay-off of petitioner was made in bad faith and for the purpose of depriving petitioner of his civil service rights"; that the lay-off was not in the interest of economy, or on account of a lack of work or funds in that Division.

[9, 10] This court, on appeal from the order granting the peremptory writ of mandamus, may examine the record of proceedings in the trial court for the purpose of determining whether it acted arbitrarily, without or in excess of its jurisdiction, or contrary to law. For that purpose this court may review that record to ascertain whether there is any evidence to support the charge that the Commission acted in bad faith and contrary to law in abolishing the Division and in transferring the duties of the petitioner to the Director of the Department of Employment. Drummey v. State Board of Funeral Directors and Embalmers, 13 Cal.2d 75, 87 P.2d 848; Cullinan v. Superior Court, 24 Cal.App.2d 468, 472, 75 P.2d 518, 77 P.2d 471; Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874; 16 Cal.Jur. 815, sec. 31. In the Cullinan case, supra, in which the petitioner sought by means of a writ of prohibition to prevent the trial court from reviewing in a mandamus proceeding the evidence adduced before the State Personnel Board, which resulted in the reinstatement of petitioner to the office from which he had been discharged, this court said [24 Cal.App.2d 468, 75 P.2d 520]:

"If that board was without jurisdiction to make the order for the reason that there was no evidence or lawful proceedings upon which to base it, the order would be void and the superior court would lack authority to direct his reinstatement. Upon the petition for a writ of mandamus the court has a right to review the proceedings before the state personnel board to determine whether it had jurisdiction to reinstate the petitioner. For the purpose of determining whether the inferior tribunal had jurisdiction a court may examine a record or even receive evidence upon a petition for a writ of mandamus. It is said in 16 California Jurisprudence, p. 815, § 31, in that regard:

" 'The question whether a board, * * * is acting without jurisdiction or in excess of jurisdiction cannot be finally settled and determined *by the board itself beyond the power of review* of such determination by a court.'

"The preceding declaration is supported by California authorities. The superior court, therefore, has a right to review the proceedings of the board which resulted in reinstating the petitioner for the purpose of ascertaining whether it had jurisdiction to make the order. In 38 Corpus Juris, page 703, § 287, it is said:

" 'But even where mandamus is considered a proper remedy for the enforcement of the provisions of these (civil service) statutes, the discretion of the officers or board in passing on the qualifications of applicants *is not subject to review or control* by the courts, *except in cases where it clearly appears that there has been an abuse of this discretion, or that the officer has acted in bad faith and with intent to evade the law.*' "

[11] Assuming from the foregoing authorities that the trial court had power to review the proceedings before the Personnel Board and to admit evidence to prove the alleged bad faith of the Commission or the illegality of its proceedings in abolishing the Division of which the petitioner Stockton was Chief, to transfer his duties to the Director of the Department of Employment, and to authorize the placing of his name on the lay-off list, it was not the province of that court to direct the reinstatement of the petitioner without evidence tending to prove bad faith or illegality of procedure on the part of the Commission. With that issue in view, we have carefully read the entire record. The Attorney General challenges the petitioner to point to any evidence in the record which even tends to show bad faith or fraudulent intent on the part of the Commission in abolishing the Division or in transferring the duties of the Chief to the Director of the Department of Employment. We think the petitioner has failed to meet that challenge. We are directed to no evidence which shows a violation of the statute in any particular with respect to the proceedings of the Commission. The Commission was au-

thorized, by Section 93 of the Unemployment Insurance Act, to abolish the Division and to reorganize the service by transferring the duties thereof to appropriate officers of the Department of Employment. Its action was lawful in that regard. We find no evidence in the record to support the findings of the trial court to the effect that the Commission acted in bad faith or for the purpose of depriving petitioner of his civil service rights. In the absence of evidence to the contrary, we must presume that the Commission performed its duty in a lawful and proper manner and that it was guilty of neither bad faith nor fraud in so doing. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047; Nilsson v. State Personnel Board, 25 Cal. App.2d 699, 78 P.2d 467.

[12] We therefore conclude the Division of State Employment Agencies was lawfully abolished in good faith by the Commission, and that the duties of that service which were formerly performed by the petitioner Stockton were properly transferred to the Director of the Department of Employment. It follows that the findings and judgment of the trial court with respect to the alleged bad faith of the Commission are not supported by the evidence.

[13] We are of the opinion the appellants' demurrer to the petition for a writ of mandamus, on the ground of misjoinder of parties defendant, should have been sustained. The suit was commenced against the "Department of Employment", the "Executive Director" thereof, the State Controller, the State Treasurer, and one Raphael M. Dorman, an employee. Neither the California Employment Commission nor its duly appointed members are parties to the action. The Commission, by the provisions of the statute, has sole supervision and control of the administration of the Act in question. It was that Commission that abolished the Division. It would appear that neither R. G. Wagenet as Director of the Department of Employment nor any other officer or individual has power to reinstate Stockton, the former Chief of the Division of State Employment Agencies. His reinstatement may be accomplished only by action of the Commission. It may not be done by the Director of the Department of Employment independently of the approval or action of the Commission. We are therefore persuaded the writ of mandamus is ineffectual to reinstate the petitioner under any circumstances since the Commission appears to be an indispensable party to the action, and the mandate runs only against the Department of Employment and certain specified officers and individuals, who apparently have no authority to perform the acts required until the Commission has first authorized them. Sec. 389, C.C.P.; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445; 20 Cal.Jur. 531, secs. 32 and 33. On page 533 of the authority last cited it is said: "Where it appears that there can be no binding adjudication without the joinder of other parties, it is the imperative duty of the court to require the pleadings to be so amended as to bring them in."

Section 75 of the Unemployment Insurance Act declares that the Commission shall be the governing body in the administration of the Department of Employment. The Department is administered by the authority of five commissioners who are appointed by the Governor (Sec. 78). Section 88 of the Act provides: *"The commission* may appoint and employ an executive officer, who shall act *as the secretary of the commission,* and shall be Director of the Department of Employment. *The commission* may employ such assistance as seems to it necessary for the administration of this act, subject to the provisions of the Civil Service laws." (Italics added.)

The powers of the Commission are enumerated in Sections 90 and 91 of the Act. Complete power is conferred on the Commission to administer the statute (Sec. 75). That Commission or its members therefore appear to be necessary parties to carry out the mandate of the court. We are of the opinion they are indispensable parties to the proceeding and should have been joined as defendants. The demurrer was erroneously overruled.

[14] The trial court directed the allowance of petitioner's full salary of $440 per month from July 20, 1940, without deducting remuneration from any gainful employment, which he may have subsequently received. The rule is well established that a civil service employee who has been wrongfully deprived of his position is entitled to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the sum he receives from private or public employment during that period. State Board of Equalization v. Superior Court, 20 Cal.2d 467, 474, 127 P.2d 4; Rexstrew v. City of Huntington Park, 20 Cal.2d 630, 634, 128 P.2d 23; Wiles v.

State Personnel Board, 19 Cal.2d 344, 352, 121 P.2d 673. A different rule prevails with respect to public officers with fixed salaries, as distinguished from mere employees. 43 Am.Jur. 164, sec. 382; 53 A. L.R. 924 note.

The judgment is reversed and the trial court is directed to enter judgment denying the prayer of the petitioner.

PEEK, J., and ADAMS, P. J., concur.

60 Cal.App.2d 42

EDDY et ux. v. HOME FEDERAL SAVINGS & LOAN ASS'N.

Civ. 2890.

District Court of Appeal, Fourth District, California.

July 28, 1943.

Hearing Denied Sept. 23, 1943.

1. Building and loan associations 🔑1, 24

Rule that powers granted to national banks exclude and withhold those powers not expressly granted is not applicable to a "building and loan association" organized under the Home Owners' Loan Act, since such association is not a "national bank" and the powers and duties of the two differ materially. Home Owners' Loan Act of 1933, § 5 et seq., as amended, 12 U.S.C.A. § 1464 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Building and Loan Association" and "National Bank".

2. Building and loan associations 🔑38(2)

Provisions in application to federal savings and loan association for a loan and in trust deed securing such loan requiring borrowers to pay fire insurance premiums, were not void as an attempt to exact an illegal fee, consideration, or award for making the loan contrary to Home Owners' Loan Act. Home Owners' Loan Act of 1933, § 8(e), as amended, 12 U.S.C.A. § 1467(e).

3. Building and loan associations 🔑38(2)

That president and general manager of federal savings and loan association as insurance agent received a commission on fire policy covering premises mortgaged to secure loan from association did not constitute receipt of a fee or "compensation for making the loan" prohibited by regulation governing such associations. Home Owners' Loan Act of 1933, § 5, as amended, 12 U.S.C.A. § 1464.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation for Making Loan".

4. United States 🔑53

Congress in adopting Home Owners' Loan Act of 1933 was entitled not only to prevent misapplication of public funds and protect officials concerned, from being misled, but also to protect borrowers from being imposed upon. Home Owners' Loan Act of 1933, § 5 et seq., as amended, 12 U.S.C.A. § 1464 et seq.

5. Building and loan associations 🔑38(2)

Where premium on fire insurance covering premises mortgaged to secure loan from federal savings and loan association was not an improper charge against mortgagors and placed no added burden on mortgagors, collection of premium through president and general manager of association, who as insurance agent received a commission on such premium, did not violate spirit of Home Owners' Loan Act or of regulations adopted thereunder governing savings and loan associations. Home Owners' Loan Act of 1933, § 5 et seq., as amended, 12 U.S.C.A. § 1464 et seq.

6. Contracts 🔑123(1)

Provision of trust deed authorizing federal savings and loan association to place all insurance on mortgaged premises was not prohibited by statute or by regulations governing such associations and was not wrong in itself or against "public policy", though president and general manager of association as insurance agent received a commission on premiums paid by mortgagors, and hence right to place insurance was a matter of private contract and binding upon mortgagors. Home Owners' Loan Act of 1933, §§ 5 et seq., 8(e), as amended, 12 U.S.C.A. §§ 1464 et seq., 1467(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

7. Building and loan associations 🔑38(2)

Where mortgagors executed trust deed securing loan from federal savings and loan association knowing that it contained an ultra vires provision from which they suffered no detriment and received the benefits of transaction, while retaining such benefits, they were "estopped" from asserting invalidity of such provision. Home Owners' Loan Act of 1933, § 5 et seq. as amended, 12 U.S.C.A. § 1464 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by James D. Eddy and Emily Eddy, husband and wife, against Home Federal Savings and Loan Association for a declaratory judgment as to defendant's right under trust deed to place the insurance on building subject to deed. From a judgment for defendant, plaintiffs appeal.

Judgment affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellants.

Higgs, Fletcher & Glen, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment rendered in an action for declaratory relief which upheld the validity of a clause in a deed of trust executed by plaintiffs to secure their promissory note, dated July 15, 1938, in the sum of $1,968, payable to defendant.

Defendant is a Federal Savings and Loan Association organized under the Home Owners' Loan Act, 1933, as amended. Title 12, U.S.C.A. § 1464 et seq. Charles K. Fletcher was president and general manager of defendant. He was also agent of a fire insurance company authorized to issue fire insurance policies. He received a thirty per cent commission on the premiums of such policies written on houses within the city of San Diego.

At the time of the loan to plaintiffs, their building was covered by a fire insurance policy in the sum of $2,000 which was accepted by defendant. This policy expired on August 23, 1941, and prior to the expiration date plaintiffs obtained and tendered to defendant a policy of fire insurance issued by the New York Underwriters Insurance Company in the sum of $2,000. Defendant refused to accept this policy and obtained one in the same amount in the National American Fire Insurance Company through the agency of Charles K. Fletcher who admitted that he received a commission of thirty per cent of the premium. Defendant charged the premium on this policy to plaintiffs and added that amount to the principal of the loan. Plaintiffs objected to this procedure and brought this action to determine their right to obtain an insurance policy themselves under their contract with defendant. The trial court held that defendant could place the insurance and this appeal followed.

The premium on each policy was $18. The policies did not differ in legal effect and it is admitted that both of the insurance companies were perfectly responsible financially. Because of the insignificant amount involved it would seem that this action was instituted to determine a legal right rather than to settle a financial responsibility.

The application for the loan, which was signed by James D. Eddy, contained the following: "It is understood that the Association shall have the right to place all fire insurance policies covering said premises, including the fallen building clause waiver, during the life of this loan, the premiums to be paid by the trustor." This clause in the application was underscored and it is admitted that it was discussed with plaintiffs prior to the time Eddy signed the application.

The deed of trust securing the note evidencing the loan, which was signed and acknowledged by both plaintiffs, contained the following: "It is understood that the beneficiary shall have the right to place all fire insurance policies on said premises, including the fallen building clause waiver, during the life of this loan, the premiums to be paid by the trustor." This clause was initialed by both plaintiffs and it is admitted that they had actual notice of this provision before they executed the deed of trust.

Deceit, oppression or fraud on the part of defendant are entirely lacking in this case, and the only question presented is the legal right of defendant to insert the quoted clauses in the application for the loan and in the deed of trust and to insist on their enforcement.

Plaintiffs urge, first, that as the insertion of the quoted paragraphs in the application and deed of trust was not authorized by law, the provisions were void, and, second, that because an officer of defendant profited by the transaction it was contrary to law and void. We are cited to no express language of the Home Owners Loan Act which prohibits the transaction involved here. We are cited to no authority directly in point.

[1] Plaintiffs argue that since the powers granted to national banks, generally, are held to exclude and withhold those powers not expressly granted, we should apply the same rule to building and loan associations organized under the Home Owners' Loan Act. They rely on the case of Standard Livestock Co. v. Bank of California, 67 Cal.App. 381, 227 P. 962, where unauthorized and ultra vires acts of a national bank were involved. The effect of the holding in that case is considerably weakened because in denying a hearing the Supreme Court expressly withheld approval of the portion of the opinion which plaintiffs quote and upon which they rely. Further, a building and loan association organized under the Home Owners Loan Act is not a national bank and the powers and duties of the two materially differ. In the entire absence of any authority on the question we will not extend the rule, contended for by plaintiffs, to such associations.

It is also argued that the clauses under consideration here are contrary to the provisions governing these associations as set forth in section 1467, Title 12, U.S.C.A. Subdivisions (a to d), inclusive, of that section, have no bearing on this case. Subdivision (e) provides in part as follows: "No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge, or receive, or attempt to solicit, contract for, charge, or receive, from any person applying to the Corporation for a loan, (1) any fee, charge, or other consideration, whether bond or cash, except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services, * * *."

[2] We fail to understand how those provisions of the section can be applicable here. Common business prudence would require any person or corporation making a loan on the security of a mortgage or deed of trust on improved real property to require fire insurance on the improvements. It is also universal practice to require the borrower to bear the cost of the insurance. This practice is so universal in California that it should be regarded as contemplated and understood by all parties to such a loan. Requiring the borrowers to pay the fire insurance premiums cannot be regarded as an attempt to exact an illegal fee, consideration or reward for making the loan.

Section 1464 of Title 12, U.S.C.A., authorizes the adoption of rules and regulations for the operation and regulation of Federal Savings and Loan Associations. Pursuant to that authority, regulation number 203.10 was adopted, which contains the following: "(c) Initial Loan Charges. No director, officer, or employee of a Federal association shall receive any fee or other compensation of any kind in connection with the procuring of any loan made by such association. Borrowers may be required to pay the necessary initial charges in connection with the making of a loan, * * *."

[3] Plaintiffs argue that this regulation prohibited defendant from placing the fire insurance with its president and general manager because he received a commission of $5.40 for writing the policy. This argument is not supported by the regulation which very properly prohibits any charge not directly authorized to be paid in connection with making the loan. The insurance was not written in connection with making the loan but to provide insurance coverage which commenced over three years after the loan was made. Had the policy been written at the same time the deed of trust was given, the fact that the agent would receive a portion of the premium could hardly be classified as a fee or compensation for making the loan and thus prohibited by the regulation. The premium was the standard sum charged for similar insurance and because an officer of defendant received a commission for writing the policy placed no added burden on the plaintiffs.

[4, 5] One of the purposes of these restrictions which were placed in the act is thus stated in Kay v. United States, 303 U.S. 1, 58 S.Ct. 468, 472, 82 L.Ed. 607: "Congress was entitled not only to prevent misapplication of the public funds and to protect the officials concerned from being misled, but also to protect those who sought loans from being imposed upon by extravagant or improper charges for services in connection with their applications. This would be in the interest 'not only of themselves and their families but of the public.' See Yeiser v. Dysart, 267 U.S. 540, 541, 45 S.Ct. 399, 400, 69 L.Ed. 775; Nebbia v. NewYork, 291 U.S. 502, 535, 536, 54 S.Ct. 505, 515, 78 L.Ed. 940, 89 A.L.R.

1469." As the insurance premium was neither an extravagant nor an improper charge and placed no added burden on plaintiffs, the collection of the premium through an officer of defendant should not be held to be a violation of the spirit of the act of Congress or of the regulations adopted under its provisions.

[6] Since the clause in question in the deed of trust was not prohibited by statute nor by the rules and regulations adopted for the government of defendant, and since it was not wrong in itself nor against public policy, we regard the right given to defendant to place the fire insurance on the premises as a matter of private contract between plaintiffs and defendant and thus binding upon them. Mortgage Guarantee Co. v. Patch, 116 Cal.App. 584, 3 P.2d 35; Feldman v. Costa, Tex.Civ.App., 171 S.W. 2d 200; Biggs v. Carbondale Building, Loan & Homestead Ass'n, 194 Ill.App. 171.

[7] If it be assumed that the provision allowing defendant to place the fire insurance was ultra vires, still plaintiffs knew that it was in the deed of trust when they executed it. They received the benefits of the transaction and still retain the same. While retaining those benefits they should be estopped from asserting the invalidity of this portion of the contract from which they suffered no detriment. California C. P. Growers v. Harkey, 11 Cal.2d 188, 78 P.2d 1137.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

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59 Cal.App.2d 764

O'BRIEN v. SCHELLBERG et al.

Civ. 14008.

District Court of Appeal, Second District, Division 2, California.

July 23, 1943.

Hearing Denied Sept. 20, 1943.

1. Automobiles 🔑217(2)

A pedestrian was not necessarily free from negligence because he was in a marked cross-walk when struck by automobile at street intersection, since a pedestrian must exercise reasonable care at all times within marked cross-walk. Vehicle Code, § 560, St.1935, p. 188.

2. Automobiles 🔑217(1)

A pedestrian must exercise reasonable care while crossing a street of heavy traffic and such duty continues through his passage.

3. Automobiles 🔑245(6, 46, 72)

In action for death of pedestrian struck on marked cross-walk by automobile proceeding at 25 miles per hour at night on eight-lane highway, pedestrian's contributory negligence and motorist's negligence were for jury. Vehicle Code, § 560, St. 1935, p. 188.

4. Appeal and error 🔑996

If jury was justified in drawing inferences to overcome presumption of decedent's freedom from negligence, finding that decedent was contributorily negligent was "final".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Finding".

5. Automobiles 🔑244(50)

A finding whether pedestrian was contributorily negligent when struck by automobile was to be derived from consideration of all the circumstances including conduct of parties just prior to the impact.

6. Appeal and error 🔑1001(1)

The appellate court may not interfere if record shows any substantial evidence in support of verdict.

7. Appeal and error 🔑996

Where two sets of inferences can be reasonably drawn from same facts, appellate court cannot substitute conclusion derived from one group of inferences for that arising from contrary inferences.

8. Trial 🔑260(1)

A requested instruction covered by instruction given was properly refused.

9. Trial 🔑260(8)

An instruction that motorists' failure on highway to keep a vigilant lookout ahead to see the visible so as to avoid collisions is negligence as matter of law was properly rejected, in view of given instruction that person who does not see a clearly visible object is negligently inattentive.

10. Trial ⚷260(8)

An instruction that deceased pedestrian who was struck by automobile was presumed to have been taking care of his own concerns and obeying the law which presumption should prevail as evidence unless overcome was properly rejected in view of instruction that each party was entitled to presumption that every person takes ordinary care of his own concerns and obeys the law.

11. Appeal and error ⚷882(12)

An appellant could not claim error in instruction given at appellant's request.

12. Trial ⚷260(8)

An instruction requiring a greater amount of care of motorist because of dangerous instrumentality under his control was properly rejected in view of instruction given that careful motorist will be alertly conscious of fact that he is in charge of a machine capable of "projecting into serious consequences any negligence of his own".

13. Automobiles ⚷243(5)

In action for death of pedestrian struck by motorist at street intersection, testimony regarding motorist's prior observation of pedestrians at intersection was properly excluded as irrelevant.

◆

Appeal from Superior Court, Los Angeles County, Caryl M. Sheldon, Judge.

Action by Marie Theresa O'Brien, as administratrix with the will annexed of the estate of John L. O'Brien, deceased, against Clyde Schellberg and John F. Schellberg to recover for the death of plaintiff's decedent who was struck by named defendant's automobile which was driven by last named defendant. From a judgment for defendants, plaintiff appeals.

Affirmed.

A. F. Mack, Jr., of Los Angeles, for appellant.

Paul Nourse and Pat. A. McCormick, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

Two questions are presented by this appeal, viz.: (1) Does the uncontradicted testimony entitle plaintiff to a judgment as a matter of law? (2) Did the refusal of certain offered instructions constitute prejudicial error?

The action was brought by the administratrix with will annexed of the estate of decedent on behalf of the widow and three adult children against John Schellberg, owner of the Chevrolet and Clyde Schellberg, his agent who collided with plaintiff's decedent. Plaintiff alleged that the death of her husband was caused solely by the negligent operation of the car, causing his heirs general and special damages. There is no contradictory testimony. Whether the story told by the single witness, Clyde Schellberg, compels a judgment for plaintiff or whether from it inferences may fairly be drawn that overcome the presumption of Clyde's negligence must be resolved by a scrutiny of the facts, of the inferences flowing therefrom and by the application of legal presumptions.

On the evening of November 29, 1940, while Clyde was driving westerly on Riverside Drive in Los Angeles, he approached Pirtle Street at a speed of 25 miles per hour. His own headlights illuminated the roadway so that he could see about 100 feet in advance of his car. At the intersection of Pirtle Street Riverside Drive is 70 feet wide, with four lanes of travel on each side of the center stripe. The Chevrolet was in the fifth lane, that is, the first lane north of the center stripe. To Clyde's right and almost abreast of his automobile, two other cars in lanes six and seven were traveling in the same direction. A pedestrian crosswalk, seventeen feet wide, running across Riverside Drive was marked on the west side of Pirtle. As Clyde approached the intersection, two cars coming in lanes three and four next to the stripe added their illumination to that of the cars on the north side of the center line. He was looking straight ahead prior to the accident except for a momentary glance to his right as he entered Pirtle Street. He had no knowledge of the presence of decedent until within eight or ten feet of him when he discovered Mr. O'Brien directly in front of the left front fender of his Chevrolet and in the crosswalk. He was unable to tell whether decedent was walking, running, or standing. He did not determine in which direction he was facing. He saw him only in a fleeting glance before the impact. At the time of the collision, decedent was about three feet north of the center line. His body was thrown about 20 feet and came to rest about two feet south of the center stripe. An unnamed automobile preceded the Chevrolet by about sixty feet in the same lane just before the accident. It was clearly visible to Clyde as he proceeded along the highway.

Proof was made of the family relations of the deceased showing that he was separated from his wife from 1920 until 1937 during which time he supported her with the sum of $75 per month until 1929 and thereafter with $60 per month. Also, he supported her during the three years they lived together preceding his death. Decedent was 68 years of age with a life expectancy of 9.4 years. Mrs. O'Brien was 67 years old with a life expectancy of 10 years. At the time of his decease Mr O'Brien had retired for three years on a life pension of $103.54 per month. Funeral expenses paid by Mrs. O'Brien totaled $558.78. By a vote of 9 to 3 the jury returned a verdict in favor of defendants.

[1-4] Appellant contends that because decedent was, at the instant of the impact, in a marked crosswalk, the driver of the Chevrolet was required by Section 560 Vehicle Code, St.1935, p. 188, to yield the right of way; that therefore defendant driver was negligent per se; that decedent was entitled to presume that the driver of the Chevrolet would exercise due care under the circumstances (Torrey v. Nelson, 51 Cal.App.2d 191, 124 P.2d 336); that the presumption that a person takes ordinary care of his own concerns was itself proof of Mr. O'Brien's caution. But freedom from negligence (Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16) does not necessarily follow from the fact that deceased was in a marked crosswalk. It is the duty of every pedestrian before entering a highway to make reasonably careful observations to ascertain traffic conditions to be encountered. It is his duty to look in the direction from which an approaching motorist might endanger his safety, to exercise reasonable care at all times within the marked crosswalk, and to continue to be alert to safeguard against injury. Lavin v. Fereria, 10 Cal.App.2d 710, 52 P.2d 518; Gibb v. Cleave, 12 Cal.App.2d 468, 55 P.2d 938. It is the duty of a pedestrian to exercise reasonable care while crossing a street of heavy traffic and such duty continues throughout his passage. Sheldon v. James, 175 Cal. 474, 479, 166 P. 8, 2 A.L.R. 1493. Whether he did so and whether the motorist who struck him exercised the proper amount of vigilance are questions for the jury's determination. Notwithstanding the presumption of the freedom from negligence on the part of decedent, the physical facts presented by the evidence may reasonably have justified the jury in drawing rational inferences to overcome such presumption. If such inferences were so justified the finding is final.

In view of the fact that an automobile preceded the Chevrolet by only 60 feet, it may fairly have been inferred that Mr. O'Brien stepped from the center stripe into the path of the approaching Chevrolet. In support of this inference the testimony of Clyde Schellberg is that he did not see the form of the decedent at any place on the right hand side of the Chevrolet in front of either of the cars to his right. The north half of the highway was illuminated by the headlights from the three cars proceeding westerly in lanes five, six, and seven. Had decedent been crossing the roadway from north to south the car ahead of the Chevrolet would in all probability have struck down the deceased before the arrival of the Schellberg car. Although there was no fog visibility was poor. It was dark and all of the automobiles approaching the scene from either direction had their headlights aflame. The deceased was in a position from which he could, by the exercise of ordinary care, have observed the number of vehicles approaching the crosswalks from both directions and could have observed that the Chevrolet was approaching at a distance of 50 or 60 feet away and that its speed would endanger his safety should he step into its path. Under such circumstances it was negligence on the part of decedent to step into the lane of the oncoming Chevrolet. If he looked to the right he necessarily saw the headlights of the Chevrolet. If he saw them coming at a short distance, it was negligence for him to step in front of them. If on the other hand, he did not look to his right, he was negligent in not looking. Whichever was his negligence it necessarily contributed to his injuries and his death.

[5-7] We are not holding that deceased was negligent as a matter of law, but rather that it was a question of fact for the determination of the jury and of the trial court whether deceased was guilty of contributory negligence in entering the lane of the oncoming Chevrolet. A finding was to be derived from a consideration of all the circumstances, including the conduct of the parties just prior to the impact.

After such determination by the trial court, the appellate court may not interfere if the record shows any substantial evidence in support of the verdict. Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693. In a case where two sets of inferences can be reasonably drawn from the same facts we cannot substitute the conclusion derived from one group of inferences for that arising from the contrary inferences. (Ibid.) Otherwise, the constitutional right to have a jury decide the facts would be effectually abolished or the power of the trial judge to supervise the proceedings to determine the facts would as a result of such stealthy intervention pass into limbo.

[8, 9] The second contention made by appellant is likewise unavailing. She presented four instructions which she insists were erroneously rejected to her prejudice because they were necessary to a proper presentation of the law in view of the facts proved. The first was to the effect that conduct of a motorist contrary to section 560 Vehicle Code is negligence per se. The identical sentiment and words are contained in an instruction given. The second instruction rejected is to the effect that the failure of motorists on a public highway to keep a vigilant lookout ahead to see the visible so as to avoid collisions is negligence as a matter of law. The benefit of such doctrine was embodied in the instruction that when a person looks toward a clearly visible object, he sees it and if he does not see it he is negligently inattentive.

[10, 11] The third refused instruction was to the effect that "every man obeys the law"; that John L. O'Brien is presumed to have been "taking care of his own concerns and obeying the law"; and that this presumption as evidence shall prevail unless overcome by satisfactory evidence. This thought was likewise included in a given instruction which declared that "each party was entitled to the presumption that every person takes ordinary care of his own concerns and obeys the law." Appellant makes a special attack upon this instruction because of the last quoted clause. This she says is contrary to the language of Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16, 18, wherein it is said that the presumption that a person takes ordinary care of his own concerns "should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. * * *" However, unfortunately for appellant, the criticized instruction was given at her request. She is therefore not entitled to benefit by the court's error induced by her request. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163; Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 89 P.2d 453.

[12] Finally, appellant complains that her proposed instruction requiring a greater amount of ordinary care was required of defendant driver because of the dangerous instrumentality under his control with which he could inflict serious injuries should not have been rejected. The same principle was contained in an instruction read to the jury declaring that "the driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own." The instruction quoted from covered fully the point advanced by the rejected instruction and to no more was he entitled. Hicks v. Ocean Shore Railway, Inc., 18 Cal.2d 773, 117 P.2d 850.

[13] The final assignment is the order sustaining an objection by defendant to the following question addressed to Clyde Schellberg: "Before the day of the accident had you ever seen any pedestrians crossing Riverside Drive at that particular intersection?" The "cue" for such question says appellant is the rule that prior knowledge of a condition has a direct bearing on the degree of care with which a person may be charged. She analogizes the circumstances confronting the witness to those in which a motorist is required to have observed children of tender years at play in the vicinity of the scene where such motorist has caused injuries to an infant. Citing Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6; Moore v. Bishop, 113 Cal.App. 25, 297 P. 580. The question was irrelevant. The authorities cited relate to those situations in which children were known by the tort feasor to be actually present at the time of the accident or in which children in great numbers thronged the avenue where the careless motorist drove. Schellberg owed the duty to yield the right of way to Mr. O'Brien, whether he had seen none or a thousand cross Riverside Drive in the crosswalk at Pirtle.

The judgment is affirmed.

McCOMB, J., concurs.

59 Cal.App.2d 812

In re KEIG'S ESTATE.

Civ. 12416.

District Court of Appeal, First District, Division 1, California.

July 26, 1943.

Rehearing Denied Aug. 25, 1943.

Hearing Denied Sept. 23, 1943.

1. Marriage ⇨3

The law of the place of a marriage normally controls question of its validity. Civ.Code, § 63.

2. Marriage ⇨48

In determining existence of common-law marriage, evidence of cohabitation is admissible as proof tending to show mutual consent.

3. Marriage ⇨50(1)

In order to establish existence of "common-law marriage" under Nevada law, mutual consent of parties must be shown and there must be evidence of cohabitation or proof of a holding out that the parties are married. Comp.Laws Nev. § 4050.

See Words and Phrases, Permanent Edition, for all other definitions of "Common-Law Marriage".

4. Marriage ⇨52

In proceeding on claim of petitioner who sought to establish right in decedent's estate as his surviving common-law wife, wherein basis of claim was that agreement of marriage was made while decedent and petitioner were traveling from point in California to point in Nevada, the court did not err in instructing jury regarding law of California which did not permit common-law marriages. Comp.Laws Nev. § 4050; Civ.Code, § 63.

5. Marriage ⇨20(1)

Consent to marriage is not "mutual" as required for valid common-law marriage under Nevada law, unless each party agrees in the same sense on terms of agreement. Comp.Laws Nev. § 4050.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual Consent".

6. Marriage ⇨50(1)

Evidence was insufficient to establish mutual consent of decedent and petitioner to enter into common-law marriage and a holding out of the parties as man and wife, necessary to establish "common-law marriage" under Nevada law, so as to entitle petitioner to share in decedent's estate. Comp.Laws Nev. § 4050; Civ. Code § 63.

7. Marriage ⇨20(2)

Under Nevada law a "common-law marriage" must be by words of present assent. Comp.Laws Nev. § 4050.

8. Evidence ⇨52, 517

Taking of judicial notice of laws of Nevada and of their interpretation in Nevada was sufficient proof of such laws and permitting expert witness to testify concerning proper construction of Nevada statutes as applied to hypothetical facts was not commendable. Code Civ.Proc. § 1875.

9. Appeal and error ⇨854(2)

Appellant could not complain that in accepting proof of law of another state trial court adopted wrong method of reaching right conclusion.

10. Appeal and error ⇨1050(1)

Any error in proving Nevada law regarding common-law marriages through testimony of expert witness concerning proper construction of Nevada statutes as applied to hypothetical facts was not prejudicial where under the evidence no common-law marriage was established. Comp.Laws Nev. § 4050; Civ.Code, § 63; Code Civ.Proc. §§ 1875, 1902.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Proceeding in the matter of the estate of Daniel T. Keig, deceased, wherein Edith Keig filed a petition opposed by R. E. Keig and others, wherein the petitioner claimed an interest in the estate of the deceased as his surviving common-law wife. From an adverse judgment, petitioner appeals.

Affirmed.

O'Gara & O'Gara and John O'Gara, all of San Francisco, for appellant.

Palmer & York, of Napa, for respondents.

WARD, Justice.

Petitioner Edith Keig, claiming to be the common-law spouse of Daniel T. Keig, deceased, appeals from a judgment and decree, following a verdict by a jury, determining that she was never married to him, is not his surviving wife and is not entitled to any interest in his estate. The respondents are the brother, sisters, and the children of a predeceased brother.

The petitioner was the daughter of the housekeeper and cook for Mr. and Mrs. Keig and was in the habit of visiting her mother at their home in the year 1927 while she was a first year high school student. The Keigs, who were childless, became interested in her and, although at that time her mother no longer worked for them, they took her into their home at the commencement of her second year in high school, and for the next three years she lived with them. During this period the Keigs also had in their home a young niece of Mrs. Keig and both girls were treated as members of the family. In 1931 petitioner went to work at one of the business enterprises of Mr. Keig in Napa and continued to work in businesses in which he was interested until the time of his death. After she started to work, and prior to the death of Mrs. Keig in 1940, she was in the habit of taking lunch at the Keig home; she accompanied Mr. and Mrs. Keig to the theatre and on trips, remained in their home while they were abroad and was on terms of friendship with them both. She testified that during this period, as time went on she and Mr. Keig became very much in love, and frequently kissed and embraced each other; that the affair, however, never went any further; that she knew she was not doing the right thing and so told Mr. Keig; that he and she discussed his obtaining a divorce in order to marry her, but decided that it would not be the fair and just thing to do. She further testified that in November 1940, following his wife's death in July, Mr. Keig asked her to marry him, and that she consented, although no time was set for their marriage partly because she realized that it would cause talk, and, since her sister was to be married very soon, she preferred to do nothing at that time which would mar the latter's happiness. She testified that on different occasions she and Mr. Keig spoke of places where they could be married, Mr. Keig desiring to keep the marriage secret because of the opposition of his family. On March 14, 1941, prior to a contemplated trip to Nevada the next day for the purpose, as petitioner testified, of being married, Mr. Keig purchased an engagement and a wedding ring for her. She accepted the engagement ring but declined to keep the wedding ring in her possession "because I—I think it is bad luck to have a wedding ring in your possession before it is given to you." The parties left Napa for Nevada in Mr. Keig's automobile on Saturday evening, intending to remain for the week end. They took turns driving, and, petitioner testified, had some little disagreement en route as to when drivers should change, Mr. Keig saying at the time "My little wife is not going to be cross with me, is she?" This remark, petitioner stated, was made after they had crossed the Nevada state line. Petitioner said she realized the childishness of arguing about so trivial a matter, said she was sorry, and they kissed, made up and continued their trip. They registered at a hotel in Reno as Mr. and Mrs. Thomas of Vallejo at about 1:45 a. m., petitioner testifying in this regard that Mr. Keig went into the hotel first and registered; then came out for her, saying "All right, Mrs. Thomas, will you come in?" They were desirous of obtaining some coffee—something warm—but the coffee shop was closed, so, on the way to their room, at the suggestion of the bell boy, they ordered buttered rum from the bar. This was brought to their room, where they had partially disrobed, and, petitioner testified, they drank a toast to their new life together. Shortly after being shown to their room, Mr. Keig suffered a stroke of paralysis from which he did not recover. There is testimony that petitioner told the doctor who was summoned, also a nurse at the hospital to which he was taken, that she was not the wife of Mr. Keig, but his friend; that they had come to Reno to be married. She testified, also, that in consenting to occupy a room with him she had insisted that there be twin beds, and that she had never had carnal knowledge of any man, including Mr. Keig.

It is petitioner's contention that the evidence supports a "common-law" marriage between herself and Mr. Keig by mutual consent or agreement, valid under the Nevada statute and entitled to recognition in California.

Petitioner testified that she did not know anything about common-law marriages; that she and Mr. Keig had planned for a ceremonial marriage, but that the details thereof had not been decided upon; that at the time of Mr. Keig's stroke, and even after his death, her impression was that they had not been married; that prior to leaving Napa, Mr. Keig gave her about half the money he planned taking on the trip "in case either of us lost it, why we would always have sufficient money. That was his habit." She later asked Mr. Keig's sister whether it was proper for her to keep the money since she and Mr. Keig had "not married." For a period of six months petitioner used her maiden name, and during this period she did not in any way hold herself out, or claim to be the widow of Keig.

Respondents contend that the evidence would not support a finding of common-law marriage by mutual consent, and that, in addition, in order to constitute a valid marriage in Nevada, there must have been an open assumption of marital rights, duties and obligations.

[1] The least that is necessary to establish a valid common-law marriage in any jurisdiction is mutual consent of the parties. The weight of authority, however, seems to be that there must be some evidence of consummation or a holding out that the parties are married by their living together, or in some way showing that the marriage relationship exists. The law of the place of marriage normally controls the question of its validity. Civil Code, sec. 63; Restatement, Conflicts, sec. 121; 5 Cal.Jur. 441; 18 R.C.L. 388; 39 A.L.R. 559.

Section 4050 of the Nevada Compiled Laws of 1929 provides: "That marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting, is essential."

Both parties to the appeal cite and rely upon the following four Nevada cases, placing their respective favorable constructions thereon: State v. Zichfeld, 23 Nev. 304, 46 P. 802, 34 L.R.A. 784, 62 Am.St. Rep. 800; Parker v. De Bernardi, 40 Nev. 361, 164 P. 645; Clark v. Clark, 44 Nev. 44, 189 P. 676, 194 P. 96, and Dahlquist v. Nevada Industrial Commission, 46 Nev. 107, 206 P. 197, 207 P. 1104. The facts of all these cases differ from those herein. In all four there was a mutual agreement, followed by some action of general repute or otherwise showing the relation of a marriage. The opinions in the first three cases could be construed to mean that the Nevada statute required only consent, but in the Dahlquist case the question is set at rest. The court there said (page 199 of 206 P.):

> "A marriage, whether of common-law or ceremonial character, is the consequence of a contractual relationship. In the one case it is the result of present assent, between parties capable of contracting marriage, *followed by subsequent cohabitation as husband and wife, and the holding out to the world of each other as such.* Such a marriage has all the binding force of a ceremonial marriage; and one who enters into such a marriage without being divorced, may, during the lifetime of such a common-law spouse, be guilty of bigamy, as was held by this court in State v. Zichfeld, 23 Nev. 304, 46 P. 802, 34 L.R.A. 784, 62 Am. St.Rep. 800. [Italics added.]
>
> "We think the rights, obligations and liabilities of those entering into a common-law marriage have been clearly established by this court in the following cases: Parker v. De Bernardi, 40 Nev. 361, 164 P. 645; Clark v. Clark, 44 Nev. 44, 189 P. 676, 194 P. 96."

If there is any conflict in the opinions, the latest should be given preference. 7 Cal.Jur., p. 630, sec. 38. The opinion in the Dahlquist case is in harmony with the modern and reasonable trend of thought that there must be a consummation of the contract which results in honest wedlock for the purpose of establishing a home.

[2, 3] In common-law marriages in which the contract is admitted, proof of "holding out" is less essential though such fact may appear as a matter of evidence. Consent is the primary essential in proof of the claim of a marriage contract. The seeming conflict in decisions arises merely as the result of statements in opinions dealing with specified facts, secret contracts or illicit relations. 35 Am.Jur. 198; In re Peters' Estate, 73 Colo. 271, 215 P. 128, 33 A.L.R. 27; Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687, 133 A.L.R. 758. In some jurisdictions proof of cohabitation is not necessary, but under any circumstances evidence of cohabitation is always admissible as proof tending to show mutual consent. The holding in the Dahlquist case places Nevada definitely in the list of states requiring subsequent cohabitation or proof of repute as essential in establishing a valid marriage from the outset. For this reason the giving of certain instructions claimed by petitioner to be erroneous was proper. The instructions were directed to the general theory that there must

be repute among intimates and associates that the parties are husband and wife.

[4] It was not error to instruct the jury relative to the law of California. It was necessary to impress upon the members thereof that the law of Nevada was controlling and that they were not bound by the California law which does not permit common-law marriages. The instruction was proper because the basis of petitioner's claim is that the agreement of marriage was made while traveling from Napa to Reno. There is evidence that the statement of decedent "My little wife is not going to be cross with me, is she?" was made after the parties had crossed the Nevada boundary line, but the jury was not bound by that testimony. Impliedly the jury found that such statement did not constitute mutual consent to marriage. Petitioner's reply was in effect that she was sorry she had been cross. The above question claimed to have been made by decedent is the only one in which he referred to petitioner as his wife. After deliberating the jury returned to the court room and requested further instructions. It was made plain that the subject of confusion arose from the following instruction:

"The Court: * * * I will read you this further instruction which I gave before. (reading) 'The consent to the marriage must be mutual—that is to say, each must have been in agreement with the other to take the other as his or her spouse forthwith or presently. They must have agreed that they were married by their agreement and the consent must be to enter into the matrimonial union. Thus, if you find that Daniel T. Keig entered into an agreement to marry the petitioner at a future time, that alone would not amount to a common law marriage. It is necessary, that there be a consent by both parties that by mutual agreement they enter into the matrimonial union permanent and exclusive of all others and at the time of the agreement.' Is that the one you have in mind?

"A Juror: * * * Yes, that answers my question."

Thereafter the jury returned a unanimous verdict against petitioner.

The conversation referring to petitioner as "my little wife" was made, and may have been received, in jocular vein, having reference to the marriage ceremony the parties expected to have performed in Reno. If decedent at the time considered petitioner his wife, there was no purpose in registering at the hotel under an assumed name and giving a false place of residence upon the theory that "if someone from Napa * * * sees the hotel register, they will know that we are married."

Assuming that decedent intended a contract of marriage, it still appears that there was no mutual agreement unless petitioner knew and understood the purport of his question. It appears that petitioner also expected a marriage ceremony to be performed and refused to wear the wedding ring until such time; that she did not know anything about common-law marriages; that she did not claim while in Reno to be decedent's wife, nor, upon her return to Napa, his widow, until six months later.

[5-7] Consent is not mutual unless each party agrees in the same sense on the terms of the agreement. There is evidence in this case that the parties intended to enter into a contract of marriage in the near future, but, as stated, there is no evidence of any change in the situation by anything that occurred on the road to Reno or thereafter. Terry v. White, 58 Minn. 268, 59 N.W. 1013. Following the death of Mr. Keig, and until approximately six months later, whenever the occasion arose, petitioner denied that she was the wife of Mr. Keig and did not do the one act that might be considered in her favor—she did not wear the wedding ring. In Nevada to constitute a common-law marriage, it is necessary that it be "by words of present assent." Parker v. De Bernardi, supra, 164 P. page 646; Dahlquist v. Nevada Industrial Commission, supra.

Some comment is made by petitioner with reference to reading a decision from Nevada during the trial. The record discloses that counsel for petitioner agreed that the whole case should be read if it was deemed advisable. Code Civ.Proc. sec. 1902.

[8-10] Each side introduced a witness skilled in the laws of the state of Nevada (Code Civ.Proc. sec. 1902), and the trial court took judicial notice of such laws, and their interpretation in Nevada as demonstrated by the instructions to the jury, which was sufficient. Code Civ.Proc. sec. 1875. An expert witness, introduced by respondents, testified as to the proper construction of the Nevada statutes as applied to certain hypothetical facts. This method of approach in proving the Nevada law is not to be commended, but appellant may not complain if, in accepting proof of the law of another state or territory, "the

court adopted a wrong method of reaching a right conclusion." Duluz v. Alaska Packers' Ass'n, 177 Cal. 465, 470, 170 P. 1133, 1135. The scope of section 1902 seems to have been considered rather broadly and leniently. In Re Estate of Faber, 168 Cal. 491, 495, 143 P. 737, 739, it was held that one skilled in the law need not be "a lawyer, or a professor of law." Assuming that there was error in the questions propounded, and in the answers thereto, it may not he held prejudicial in view of the admitted fact that there was no cohabitation, and impliedly, by the verdict, no assent to a common-law marriage.

In view of the conclusion reached, it is not necessary to pass upon the additional contentions of respondents.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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60 Cal.App.2d 32

RISLEY et al. v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 13883.

District Court of Appeal, Second District, Division 3, California.

July 28, 1943.

Hearing Denied Sept. 23, 1943.

1. Municipal corporations 🔑123

Civil service employees of city of Los Angeles fill positions created by and under city charter which do not rise to the dignity of "offices" because not clothed with a part of the sovereignty of the state, but which do partake of the other attributes of office and lack those arising out of contract. St.1925, p. 1062, § 100 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Office".

2. Municipal corporations 🔑123

References in Los Angeles City Charter to "positions" and "appointments" of civil service employees and transfer from one position to another connote a place that exists independently of presence of person in it because created by and under the charter and not by virtue of an agreement of the parties and hence is a "position" or "office" and not a "contractual relationship". St.1925, p. 1062, § 100 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Appointment", "Contractual Relationship" and "Position".

3. Constitutional law 🔑140(1), 277(2)

Civil service employees of city of Los Angeles have rights which courts will protect against infringement, but such rights are not "vested contractual rights" protected by the state and federal constitutional provisions forbidding "impairment of contracts" and taking of property without "due process of law" so as to prevent city from changing such rights. St.1925, p. 1062, § 100 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law", "Impairment of Contracts", and "Vested Contractual Right".

4. Municipal corporations 🔑215

Rights of civil service employees of city of Los Angeles under city charter may be lost by repeal of the provisions or modified by an amendment of such provisions at the will of those who determine what the charter's terms shall be. St.1925, p. 1062, § 100 et seq.

5. Constitutional law 🔑205(2)
Municipal corporations 🔑215

The statute enlarging class of civil service employees of city of Los Angeles is not unconstitutional as granting "special privileges or immunities". St.1941, p. 3501, § 126; Const. art. 1, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Privileges or Immunities".

6. Statutes 🔑79(1)

The statute enlarging class of civil service employees of city of Los Angeles is not unconstitutional as a "local or special law" granting "special rights, privileges, or immunities." St.1941, p. 3501, § 126; Const. art. 4, § 25, subd. 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Local or Special Law" and "Special Rights, Privileges, or Immunities".

Appeal from judgment of Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Fred G. Risley, LeRoy W. Wallace, John P. Hayhurst, and James F. Owsley, suing for and on behalf of himself and other employees of the City of Los Angeles similarly situated, against Board of Civil Service Commissioners of the City of Los Angeles and Guy W. Wadsworth, Jr., Samuel A. Lindauer, Emery E. Olson, Justin W. Gillette, and Frederic P. Woellner, as members of Board of Civil Service Commissioners of City of Los Angeles, to have statute relating to civil service declared void and to prevent its enforcement. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Entenza & Gramer, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams, Deputy City Atty., all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

Plaintiffs for some years past have been in the service of the Bureau of Power and Light of the Los Angeles Department of Water and Power. They gained admission to this service by passing civil service examinations, and by virtue of the passing of the years have acquired, under the provisions of the city charter, certain seniority rights which give them an advantage when promotional examinations are held and preferential treatment when slackness of work necessitates a reduction in the working force. Now a group of over five hundred former employees of the Los Angeles Gas and Electric Corporation and of the Southern California Edison Company will become competitors of the plaintiffs for the preferential treatment and advantages which go with seniority rights if section 126, added to the city charter in 1941 (Stats. 1941, p. 3501), is permitted to have its way. This section reads:

"Except as otherwise provided in Section 111 hereof, every person who is, on the effective date hereof, retained and employed by the City or any Department thereof pursuant to the terms of Section 431 of this Charter, shall forthwith be and become a member of the classified Civil Service of the City of Los Angeles as defined in Section 100 of this Charter, and shall be conclusively deemed to have been regularly appointed to the position in the class in which he is so retained and employed and to have served, in that position and class, the probationary period prescribed in Section 109.

"Every such person shall be conclusively presumed to have served in the class and in the department and major division in which he is so retained and employed on the effective date hereof, for the total of the following periods:

"1. The actual length of time, not to exceed three years, such person was employed in the service of the public utility acquired by the City or any department thereof, regardless of the duties performed, or the titles held by such person in such service.

"2. The total length of his service in the class and in the department and major division in which he is so retained and employed on the effective date hereof.

"The total of such service as specified in subdivisions 1 and 2 hereof, shall also be deemed to have been performed since original regular appointment to such class in the classified civil service. Where such person shall have taken and passed a civil service examination for the position in which he was theretofore so retained and employed and is on the effective date of this section retained and employed in such position, although classified as a civil service employee, he shall be entitled to and shall receive all of the benefits and rights granted by this section.

"Except as in this section otherwise specifically provided, the provisions of Article IX of this Charter and of the rules and regulations of the Board of Civil Service Commissioners adopted pursuant thereto shall apply to persons so employed to the same extent and in the same manner as to all other persons employed in the classified civil service."

To protect themselves against the invasion of those who, but for section 126, would be strangers to civil service, the plaintiffs have brought this action with its prayer that the section be adjudged void and that the steps necessary to carry its provisions into effect be halted. From a judgment denying them any relief, and affirming the validity of section 126, the plaintiffs have appealed. Our conclusion is that the section is not vulnerable to any of the attacks plaintiffs have made upon it.

This case may be said to be a sequel to Wallis v. Board of Civil Service Com'rs, 1938, 11 Cal.2d 430, 80 P.2d 972, 973, 81 P.2d 428. And see also Austin v. Board of Civil Service Com'rs, 1942, 50 Cal.App.2d 436, 123 P.2d 119. There the section of the Los Angeles City Charter that was involved was section 431, providing that: "All persons employed in the operating service of any public utility hereafter acquired by the city, or any department thereof, at, and for at least one year immediately prior to, the date of such acquisition, may be retained and employed by the city, or such department, in their respective positions, as nearly as may be, and, so long as continuously so retained and employed in such positions, shall be exempt from the civil service provisions of this charter * * *." This section was added to the charter in 1935 (Stats. 1935, p. 2356), and thereafter the city had acquired the electrical distributing system of the Los Angeles Gas and Electric Company, and with it a considerable number of those employed in its operating service. A slack period developed in a branch of the city's service and some of the regular civil service employees of the department of water and power were laid off, while the newly acquired employees, who had not entered through the civil service gates, and were exempt from civil service, continued at work. The precise question before the court was whether the employees who were exempt from civil service, by reason of section 431, could lawfully be retained in service in preference to civil service employees at a time when a reduction in the number of employees was necessary. But for section 431, by other previously existing sections of the charter the department would have been compelled to lay off employees not under civil service before dispensing with those who had a civil service status and appurtenant rights. In deciding that section 431 created a class of employees exempt from civil service who did not have to give way to civil service employees, when slackness of work required some to go, our Supreme Court stated (11 Cal.2d at page 435, 80 P.2d at page 975): "It is a special provision applicable to the class to which the petitioners [former L. A. Gas and Electric employees] belong. The people of the city have so provided in their charter and there can be no question of their power so to do."

If the plaintiffs in the case before us are correct in the positions they take, then the Supreme Court was in error in its conclusion in the Wallis case, for section 431, as interpreted by the Supreme Court, is not to be distinguished from section 126, as regards the evils plaintiffs see in it. According to plaintiffs, section 126 is an unconstitutional attempt to impair the contracts they have with the city; its effect would be to deprive plaintiffs of their property without due process of law; it purports to grant privileges and immunities to a class of citizens which are not granted to all; and it is a special law granting special or exclusive rights, privileges and immunities.

[1, 2] We should note, first of all, that, basically, plaintiffs' relation with the city of Los Angeles is not a contractual one, entered into after a meeting of the minds fixing the terms of the employment, including the usual terms concerning its duration, compensation, and the duties to be rendered. By the very provisions of the city charter upon which plaintiffs rely—those giving them civil service status (Article IX, St.1925, p. 1062), with protection against discharge, other than for cause; with a right of review, if discharged or suspended; with promotional rights; etc.—plaintiffs are filling positions created by and under the charter. These "positions" do not rise to the dignity of "offices," perhaps, because not "clothed with a part of the sovereignty of the state" (People ex rel. Chapman v. Rapsey, 1940, 16 Cal.2d 636, 640, 107 P.2d 388, 391), but they partake of the other attributes of "office," and lack those arising out of contract. Pacific Finance Corp. v. City of Lynwood, 1931, 114 Cal.App. 509, 514, 300 P. 50, 1 P.2d 520. We note just a few expressions used in Article IX of the Los Angeles Charter to illustrate what is meant. We find repeated references to "positions" to which "appointments" may be made. "* * * in all cases where it is practicable * * * vacancies shall be filled by promotion." A transfer may be made "from one position to another." All of these expressions connote a place, whether office or position is unimportant, "that exists independently of the presence of a person in it" because created by and under the charter, and not by virtue of an

agreement of the parties, and so is a position or office and not a contractual relationship. See case last cited and the authorities to which it refers.

[3, 4] Plaintiffs' first two contentions may be considered together, as they involve the same fallacious concept, which is that plaintiffs have a vested, contractual, right to have the terms of their employment continue unaffected by charter amendments. That they have rights, by virtue of the provisions of the charter, which the courts will protect against unauthorized infringement by the city or any of its legislative or executive officers or boards, is undoubtedly true, and is recognized in the large number of cases cited by the plaintiffs. But that these rights are vested, contractual, rights, protected by the state and federal constitutional provisions forbidding the impairment of contracts and the taking of "property" without due process, so that they cannot be changed, is not true, and none of the cases relied upon by plaintiffs hold it to be true. The rights to which plaintiffs would cling are created by or under the provisions of the charter and are dependent upon those provisions. They may all be lost by the repeal of the provisions or modified by an amendment to the provisions, at the will of those who determine what the charter's terms shall be.

The principle involved is not unknown in the appellate reports of this state. In Cornell v. Harris, 1936, 15 Cal.App.2d 144, 59 P.2d 570, the plaintiff, a deputy sheriff, sought to avoid a threat to his official life which he saw in an amendment to the San Diego County Charter providing for civil service. The situation is revealed in this statement of one of his contentions (15 Cal.App.2d at page 146, 59 P.2d at page 571): "(1) That as he was appointed, qualified, and took office under the provisions of the charter * * * before the civil service provisions of the charter became effective, he had a vested right to his office of which he could not be deprived in the manner contemplated here." Concerning plaintiff's position the court observed (15 Cal.App.2d at pages 146, 147, 59 P.2d at page 571): "Plaintiff's first contention is answered by the case of Boyd v. Pendegast, 57 Cal.App. 504, 207 P. 713, 714, where it is said concerning the removal of a police officer of the city of Los Angeles: 'The possession of an office, or the enjoyment of employment with the government, or under any of its agencies, does not confer a vested property right of any quality whatsoever. The more ancient offices to which the common law attached the property character of incorporeal hereditament find no legal counterpart under the political systems of government in this country.'"

In Mansfield v. Chambers, 1915, 26 Cal. App. 499, 147 P. 595, it was questioned whether or not the office of superintendent and cashier of the motor vehicle department had been abolished. In its discussion of the problem the court made these statements and quotations (26 Cal.App. at page 504, 147 P. at page 597):

"It will not be disputed that: 'A public officer, at least one whose term and compensation are not prescribed by the Constitution, has no contract by which he can have or hold either his office or his salary against the legislative will.' Pennie v. Reis, 80 Cal. 266, 269, 22 P. 176. Or, as is said in Miller v. Kister, 68 Cal. [142], 144, 8 P. [813], 814: 'Salaried public offices created by the Legislature are not held by contract or grant. The Legislature has full control over them, unless restricted by the Constitution, and may abolish them altogether, or impose upon them new duties or reduce their salaries.'

"Under the well-settled rule as thus stated, it will not for an instant be questioned that it lies within the legitimate power of the Legislature to abolish at any time any public office created by it; there being no constitutional limitation upon the exercise of such power in the particular case by the Legislature."

In Butterworth v. Boyd, 1938, 12 Cal.2d 140, 150, 82 P.2d 434, 439, 126 A.L.R. 838, this statement is made: "It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority." The principle is recognized in these further cases: In re Carter, 1903, 141 Cal. 316, 319, 74 P. 997; Ludolph v. Board of Police Com'rs, 1938, 30 Cal.App.2d 211, 216, 86 P.2d 118, 121; Nider v. City Commission, 1939, 36 Cal.App.2d 14, 30, 97 P.2d 293, 301.

As we have already stated, none of the cases relied upon by the plaintiffs and, we add, none of which we are aware, holds that rights such as plaintiffs have are "vested" in the sense that they are constitutionally immune from modification or destruction. We need not find fault with the use of the word "vested," in such cases as Eisenhuth v. Department of Motor Vehicles, 1934, 2 Cal.App.2d 207, at page 214, 37 P.2d 725, at page 728, where it appears in the sentence "That [civil service] tenure is a vested right is no longer open to question in this state," if we do not fail to see that a right may be vested so as to be the object of the court's protection, without being so vested that it may not be the subject of legislative control. As already noted, plaintiffs refer to many cases where the rights of those in the civil service are protected by the courts from unauthorized rules or ordinances or executive challenge. The basis of these decisions is not that the vested right may not be taken away or modified by the power which created it, but that the officer or board who has attempted to override it has not been vested with the right to do so. The thought is illustrated in this quotation from Mansfield v. Chambers, supra, 26 Cal.App. 499, at pages 504, 505, 147 P. 595, at page 597, following the portion of the opinion already quoted by us: "The case of Marquis v. City of Santa Ana, 103 Cal. 661, 37 P. 650, cited by the petitioner, is not opposed to the views thus expressed. The decision in that case merely amounts to this: That a municipal office created by the Legislature cannot directly or indirectly be abolished by a municipal corporation organized as such under the municipal corporation act, * * * which is a general law of the state. * * * But we think no one will question the proposition that, had the office of city assessor of Santa Ana been solely the creature of an ordinance passed by the governing body of that city in the exercise of corporate powers conferred upon it by the municipal corporation act, which placed no restriction upon the corporation in that respect, such governing body could at any time abolish said office by ordinance, thus exercising the identical power within the sphere of its corporate jurisdiction that rests in the Legislature with respect to offices created by it and as to the right to abolish which at any time no restriction or qualification is imposed by the Constitution."

Nor in the field of the pension cases do we find a decision that causes us to doubt the correctness of our conclusion, although some things have been said which, if controlling, would be disturbing. We have particular reference to these words, found in Dryden v. Board of Pension Com'rs, 1936, 6 Cal.2d 575, 579, 59 P.2d 104, 106: "It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant. O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464; French v. Cook, 173 Cal. 126, 160 P. 411; article 17, § 183, Charter of the City of Los Angeles." We do not find this statement controlling in our case because it is plainly dictum and the cases cited by the author of the opinion, which was not written in but was adopted by the Supreme Court, do not support the statement. The cases, where the question is before the court, agree that the right to a pension is not a part of a contract which, having been entered into, cannot constitutionally be altered. The leading case is that of Pennie v. Reis, 1889, 80 Cal. 266, 22 P. 176, 177. The plaintiff was the administrator of the estate of one who for over ten years had had two dollars each month "deducted" from his compensation as a police officer under a statute which provided that upon his death the sum of one thousand dollars should be paid his estate. Within a month before his death the statute was supplanted by one with different terms. The plaintiff claimed that his intestate had a vested right to the thousand dollars, safe from legislative change. The Supreme Court held "no"; (80 Cal. at page 269, 22 P. at page 177) "A public officer—at least one whose term and compensation are not prescribed by the constitution—has no contract by which he can have or hold either his office or his salary against the legislative will." The same conclusion was reached in Clarke v. Police, etc., Board, 1898, 123 Cal. 24, 26, 55 P. 576, 577, where, speaking of the Pennie case, the court stated: "It was there held * * * that the act did not violate the constitution of the United States, because the member of the police department had no contract which he could assert against the legislative will. The office was accepted with the distinct understanding that the legislature may modify or amend all laws providing for his compensation during the term." The Pennie case was also cited by the court in Butterworth v. Boyd, supra, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838, in support of the statement which we have already quoted from that case. See also, Richards v. Wheeler, 1935, 10 Cal.App.2d 108, 115, 51 P.2d 436; Jordan v. Retirement Board, 1939, 35 Cal.App.2d 653, 656, 657, 96 P.2d 973, 976; Sweesy v. Los Angeles, etc., Retirement Bd., 1941, 17 Cal. 2d 356, 362, 110 P.2d 37.

So far we have been considering plaintiffs' first two objections to the validity of section 126. Their next two objections may also be considered together; that is, that the section is obnoxious to section 21 of art. I and to the nineteenth subdivision of section 25, article IV, of our state constitution. Section 21, art. I, reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall, any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." In the nineteenth subdivision of section 25, art. IV, we find:

"The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *

[5, 6] "Nineteenth—Granting to any corporation, association, or individual any special or exclusive right, privilege or immunity."

Clearly section 126 violates neither of these provisions. Section 21 of Article I must embarrass plaintiffs, for they have taken the position that special privileges, which have been granted to them, may not be altered by granting like privileges to others. Their emphasis is on the latter portion of the section, however. With respect to this, and to subdivision 19 of section 25, we find it unnecessary to do more than observe that those who, in the competitive business world, secured and kept their positions with public utilities for at least a year, thereby acquiring experience and as surely proving their fitness to continue as though they had passed a civil service examination, constitute a class which may, without constitutional objection, be accorded such special privileges as are accorded them by section 126. Cook v. Mason, 1929, 103 Cal.App. 6, 9-11, 283 P. 891.

Plaintiffs suggest that section 126 is unconstitutional on other grounds which we deem so lacking in merit that they need not be discussed. The trial court properly found the section to be intelligible and valid.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

60 Cal.App.2d 66

PEOPLE v. CORRAL.

Cr. 3699.

District Court of Appeal, Second District, Division 3, California.
July 30, 1943.

1. Burglary 🔑4

The word "store" within statute defining burglary is broad enough to include a modern department store even though at time statute was enacted stores were not of the large size and multifarious character now attained. Pen.Code §§ 459, 484, 490a.

See Words and Phrases, Permanent Edition, for all other definitions of "Store".

2. Burglary 🔑4

The word "building" within statute defining burglary is broad enough to include a large, modern department store. Pen.Code §§ 459, 484, 490a.

See Words and Phrases, Permanent Edition, for all other definitions of "Building".

3. Burglary 🔑9(2)

That the building which defendant entered in committing burglary was a department store which the public in general was invited to enter did not establish that defendant's entry was not wrongful. Pen. Code §§ 459, 484, 490a.

4. Burglary 🔑9(2)

An entry with owner's consent into any of the places mentioned in statute defining burglary would nevertheless constitute a "burglary" if made with intent to commit a felony therein. Pen.Code §§ 459, 484, 490a.

See Words and Phrases, Permanent Edition, for all other definitions of "Burglary".

5. Burglary ⚷2

To prove a burglary it must be shown that one of the places mentioned in statute defining burglary was entered with the purpose of committing a theft or a felony. Pen.Code §§ 459, 484, 490a.

6. Burglary ⚷41(3)

Evidence that defendant, when he made his entry into department store, wore a belt which could be so adjusted as to make possible the concealment of a suit within his clothes and that by this means he took from the store and concealed one suit and after disposing of it returned and took another suit concealed in the same manner, was sufficient to show that defendant entered store with intent to commit theft. Pen.Code §§ 459, 484, 490a.

7. Burglary ⚷41(1)

Evidence as to the commission of a burglary by defendant was not inherently improbable so as to preclude conviction for burglary in the second degree. Pen. Code §§ 459, 484, 490a.

8. Burglary ⚷28(7)

In prosecution for burglary by entering a store and taking and carrying away some clothes, it was unnecessary for representative of the store to appear and testify as to ownership of the clothes. Pen.Code §§ 459, 484, 490a.

9. Burglary ⚷28(7)

A showing as to ownership of clothes taken from a department store was not material to the burglary charge, except as bearing on question of intent in entering the store, for burglary would be complete without an actual theft. Pen.Code §§ 459, 484, 490a.

10. Burglary ⚷41(1)

Ownership of suits taken from a store in a burglary was sufficiently proved by the showing that when defendant took suits they were in possession of the store on hangers which were on racks in the salesroom. Pen.Code §§ 459, 484, 490a.

11. Burglary ⚷46(1)

In prosecution for burglary where the court gave jury a definition of burglary in the words of the statute, except that "theft" was substituted for "larceny" under amending statute, failure to give further instruction defining theft was not error. Pen.Code §§ 459, 484, 490a.

12. Burglary ⚷46(7)

In burglary prosecution, trial court properly instructed that where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in possession of a person who gives a false account or refuses to give any account of the manner in which he came in their possession, proof of such possession and guilty conduct is evidence, not only that he stole the goods, but that he made use of means by which access to them was obtained. Pen.Code, §§ 459, 484, 490a.

13. Burglary ⚷46(7)

Where defendant charged with burglary failed to give any explanation of his possession of stolen suits, trial court properly instructed that such unexplained possession was evidence of guilt. Pen.Code §§ 459, 484, 490a.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Charles Corral was convicted of burglary in the second degree, and he appeals.

Affirmed.

Redmond & Redmond, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

After a trial by jury defendant was convicted of burglary in the second degree, and appeals from the judgment. The charge against him was that he entered the store and building of the Fifth Street Store, a corporation, with intent to commit theft.

Briefly stated, the evidence for the people shows the following facts. The Fifth Street Store is a large department store in the City of Los Angeles. Mrs. Myrtle Norton, a store detective in the employ of that store, saw defendant, accompanied by another man, walk into its men's suit department, take a suit down and hand it to the other man, who tried to put it under his coat. The defendant then took this suit from the other man, folded it over the hanger and put it down inside his trousers. The two men left the store, followed by Mrs. Norton, and went to a parking lot, where they entered an automobile and sat in the back seat. Mrs. Norton looked for an officer but could find none. Defendant and the other man entered another store near by, where Mrs. Norton picked up a store detective of this store, Mrs. Wills, and the two of them watched and followed defendant and the other man, who looked at some women's coats, but took nothing. The two men returned to the Fifth Street Store and went again to the men's suit department. There defendant took another suit off the rack, wrapped it around a hanger and put it inside his trousers. The defendant did not, on either of these visits to the Fifth Street Store, speak to any salesperson and there was none near where he took the suits. After taking the second suit the two men again left the store and went to the same parking lot as before. On the way Mrs. Norton met a special police officer named Chatterton, who went with her. At the parking lot Chatterton arrested defendant and while he was doing so the other man escaped. The first suit taken by defendant was found concealed in a compartment back of the back seat of the automobile to which he went the first time, and the second suit was found in defendant's trousers. When this suit was found, defendant said "I give up." Mrs. Norton testified to all these facts, and she was corroborated by Mrs. Wills as to all the happenings after Mrs. Wills joined Mrs. Norton. Chatterton also testified to the arrest of defendant and the finding of the suits, but said that both of them were found in defendant's clothes. Of this location he seemed not to be certain, however. Mr. Simpson, a superintendent of store detectives, who went to the parking lot after defendant's arrest, testified that he saw one of the suits in a special compartment built in back of the back seat of defendant's car.

The defendant took the stand and denied taking either of the suits and laid the blame therefor on the man who got away. He also made an experiment intended to show the impossibility of putting a suit inside of his trousers. However, a police officer testified that when defendant was arrested he wore an unusually long belt and that by extending this a suit could be put inside the trousers. Defendant's credibility may have been considerably impaired with the jury by the fact that on direct examination he testified that the other man, whose name he did not know, picked defendant up and gave him a ride down town, while on cross-examination defendant admitted that the car was his and said that he picked up the other man and gave him a ride.

Appellant's brief appears to raise the following points: (1) that the place entered by defendant does not come within the list of places, entry in which is necessary under section 459 of the Penal Code to constitute burglary; that the evidence is not sufficient to show (2) a wrongful entry, or (3) the intent required by that section; (4) that the evidence is inherently improbable; (5) that the owner of the property stolen did not testify and there is no evidence of ownership thereof; that the court erred in its instructions (6) by failing to give the jury a definition of theft, and (7) by giving an instruction regarding possession of stolen property.

[1, 2] Section 459 of the Penal Code provides that "Every person who enters any house, room, * * * shop, * * * store * * * or other building * * * with intent to commit grand or petit larceny or any felony is guilty of burglary." The name of the crime formerly known as "larceny" having been changed to "theft" (Pen.Code, § 484, as amended in 1927, St. 1927, p. 1046,), section 459 is to be read as if it used the word "theft" instead of "larceny." (Pen.Code, § 490a; People v. Bayne (1934) 136 Cal.App. 341, 348, 28 P.2d 1068.) Defendant's contention under his first point seems to be that when section 459 was adopted in 1872, and even when it was last amended in 1913, stores were not of the large size and multifarious character now attained by modern department stores, especially that where defendant was charged with committing his crime, and therefore such modern department stores are not to be deemed within the meaning of the word "store" as used in that section. There is no merit in this contention. The character of a place as a store does not depend upon its size or the number of departments contained in it; but if it did, section 459 contains also the word "building," and in view of its context no legislative intent can be discerned to limit this word to anything less than its broadest meaning (People v. Burley (1938) 26 Cal.App.2d 213, 79 P.2d 148), which undoubtedly comprehends the building housing the store in question.

[3-6] Defendant's second and third points may be discussed together. It is true, as he contends, that the public in general are invited to enter such places of business as that here involved; but this invitation is not extended to those who enter for the purpose of theft. (People v. Barry, (1892) 94 Cal. 481, 483, 29 P. 1026; People v. Brittain, (1904) 142 Cal. 8, 10, 75 P. 314, 100 Am.St.Rep. 95.) Moreover, even an entry with the owner's consent into one of the places mentioned in section 459 would nevertheless constitute a burglary if made with the intent specified in that section. (People v. Descheneau, (1921) 51 Cal.App. 437, 197 P. 126; People v. Barry, supra, 94 Cal. at page 482, 29 P. 1026; People v. Brittain, supra, 142 Cal. at page 9, 75 P. 314, 100 Am.St.Rep. 95.) Such an intent must be shown to prove a burglary, and here the information narrows the necessary proof to that of an intent to commit theft. Perhaps the mere fact that defendant committed a theft while inside the store is not sufficient to show his intent when he entered (see People v. Barry, supra, 94 Cal. at page 484, 29 P. 1026), but here there are other facts. The defendant had on, when he made his entry, a belt which could be so adjusted as to make possible the concealment of a suit within his trousers; and not only did he take and conceal by this means one suit from the store, but after disposing of it he returned there and took another suit and concealed it in the same manner. These and the other circumstances shown are ample to support a finding that he entered the store with intent to commit theft.

[7] Defendant's fourth point, that the evidence against him is improbable, may be dismissed with the statement that to one reading it the impression is quite to the contrary. The question of its credibility was one for the jury.

[8-10] It was not necessary for any representative of the store to appear and testify to its ownership of the suits. Except for the bearing of that fact on the question of defendant's intent in entering the store, it was not material to the charge of burglary, for burglary would be complete without an actual theft (4 Cal.Jur. 720); and it was sufficiently proved by the showing that when defendant took the suits they were in possession of the store on hangers which were on the racks in its salesroom. (People v. Hayes, (1925) 72 Cal.App. 292, 299, 237 P. 390; People v. Brannon, (1939) 30 Cal.App.2d 445, 86 P. 2d 842.)

[11] The trial court gave the jury a definition of burglary in the words we have above quoted from section 459 of the Penal Code, except that "theft" was substituted for "larceny." Defendant now complains that no further instruction was given defining theft, pointing out that section 484 of the Penal Code defines theft so as to include several different acts, and arguing that for lack of a definition of theft the jury were left in ignorance of the precise nature of the intent on defendant's part which must be shown to support a conviction. It may well be that in some cases of burglary such an argument would be well taken, but this is not one of them. Only one sort of theft—larceny—was indicated by the evidence, and the showing of defendant's intent to commit that crime is so clear that we do not see how the jury could have had any doubt about it, or misunderstood the instruction. (See People v. Tibbitts, (1939) 35 Cal.App.2d 669, 673, 96 P.2d 812.) Even if such an instruction should properly have been given here, its absence has not resulted in a miscarriage of justice.

[12, 13] The trial court also gave the following instruction, to which objection is made: "Where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives a false account or refuses to give any account of the manner in which he came in their possession, proof of such possession and guilty conduct is evidence, not only that he stole the goods, but that he made use of means by which access to them was obtained."

This instruction is correct. It is copied from a statement made in People v. Lang, (1904) 142 Cal. 482, 485, 76 P. 232, except that the trial court, before giving it, eliminated the word "presumptive," which appears in People v. Lang before the word "evidence." This statement from People v. Lang has been quoted and approved in People v. Morrell, (1915) 28 Cal.App. 729, 733, 153 P. 977; People v. Farrell, (1924) 67 Cal.App. 128, 133, 227 P. 210; People v. Murphy, (1928) 91 Cal.App. 53, 54, 266 P. 374; People v. McClain, (1931) 115 Cal. App. 512, 514, 1 P.2d 1023; People v. Robertson, (1931) 117 Cal.App. 413, 415, 3

P.2d 946; People v. Darnel, (1938) 28 Cal. App.2d 122, 126, 82 P.2d 209. People v. Lang, supra, was cited and followed on this point, though not quoted, in People v. Le Roy, (1923) 192 Cal. 498, 500, 221 P. 353. Substantially the same rule as that stated in the foregoing instruction was declared in People v. Russell, (1932) 120 Cal. App. 622, 625, 8 P.2d 209; People v. Reynolds, (1933) 130 Cal.App. 754, 757, 20 P.2d 952; People v. Taylor, (1935) 4 Cal. App.2d 214, 217, 40 P.2d 870; and People v. Russell, (1939) 34 Cal.App.2d 665, 669, 94 P.2d 400. The court, in giving the instruction, omitted the word "presumptive," on which criticism of an instruction containing it, and of People v. Lang, supra, was based in People v. Enriquez, (1940) 39 Cal. App.2d 168, 174, 102 P.2d 770. The instruction was applicable to the evidence, for not only did the defendant, when arrested and found in possession of the stolen suits at the parking lot, fail to give any explanation of that possession, but he spoke the words "I give up," which are indicative of guilt.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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59 Cal.App.2d 744

In re McCOLLUM'S ESTATE.

YOUNG et al. v. BIAS et al.

Civ. 2871.

District Court of Appeal, Fourth District, California.

July 22, 1943.

1. **Appeal and error 🔑1011(1)**

Conflicts in the evidence are addressed to the trier of fact, and a judgment may not be reversed because of such conflicts where there is substantial evidence supporting the findings and judgment.

2. **Wills 🔑155(1)**

Such "undue influence" as will invalidate a will must be such as overpowers the will of the testatrix so that the will of another is substituted.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

3. **Wills 🔑166(1)**

Positive testimony that testatrix acted of her own free will and not under undue influence which was contradicted only by inferences and presumptions sustained judgment upholding validity of will against contention that it was procured by undue influence.

4. **Evidence 🔑571(2)**

Physician's testimony that in his opinion testatrix was incompetent to make a will, though entitled to be carefully weighed by trial judge, was not conclusive.

5. **Wills 🔑55(1)**

Adjudication on day after execution of will that testatrix was unable unassisted properly to manage and take care of herself and her property and appointment of guardians of her person and estate, though evidence to be considered on issue of mental capacity to make a will, did not necessarily establish that testatrix was of unsound mind at time of adjudication or incompetent to make a valid will.

6. **Wills 🔑55(1)**

Finding in guardianship proceeding that alleged incompetent by reason of age, disease, and physical infirmity was unable unassisted properly to care for herself and property inferentially negatived allegation of petitioner that she was mentally incompetent and wholly incompetent to transact business and together with appointment as guardian of person requested by alleged incompetent constituted strong evidence of mental capacity of alleged incompetent to make a will.

7. **Wills 🔑55(1)**

Conflicting evidence sustained judgment upholding validity of a will against contention that testatrix lacked mental capacity.

8. **Wills 🔑384**

In will contest, exclusion of evidence that property of testatrix had its origin in the separate property of her deceased husband whose children by former marriage would receive nothing under the will was not prejudicial where such fact sufficiently appeared from the record.

9. Appeal and error ⚷1048(6)

Any error in refusing to permit contestants to cross-examine a beneficiary under the will when called as a witness by contestants was not prejudicial, where contestants cross-examined such witness at length and without limitation when she was called as a witness by proponents. Code Civ.Proc. § 2055.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding in the matter of the application of J. Belden Bias and another for admission to probate of the last will and testament of Lulu A. McCollum, deceased, wherein Jennie McCollum Young and others instituted a contest. From a judgment admitting the will to probate and appointing an executor, contestants appeal.

Judgment affirmed.

F. F. Grant, of San Diego, and Don. C. Bitler, of El Centro, for appellants.

P. A. Whitacre and J. A. Donnelley, both of San Diego, and Lucas & Wyckoff, of Santa Cruz, for respondents.

MARKS, Justice.

This is an appeal from a judgment admitting to probate the last will and testament of Lulu A. McCollum, deceased, and appointing an executor. The proponents of the will are two nephews of deceased who were named in it as principal beneficiaries. The other beneficiary is Beatrice Burger who was an intimate friend of deceased. The contestants are stepchildren of deceased.

Emmet S. McCollum went to Imperial Valley in 1902. He was then married and had seven children. He bought property there which he operated as a dairy with the help of his children. His wife died in 1905 and he married his second wife in 1909, the Lulu A. McCollum whose estate is involved here.

The dairy farm was sold and Mr. and Mrs. McCollum bought a home in San Diego, the title to which was placed in the name of Mrs. McCollum, as was a smaller farm which was purchased in Imperial Valley. The record titles remained in her name until the day after the death of Mr. McCollum on September 17, 1938. Mr. and Mrs. McCollum were a happy, devoted and affectionate married couple.

There is no showing that Mrs. McCollum had any property at the time of her marriage nor that she engaged in any gainful occupation. As far as the record discloses the property belonging to Mrs. Collum at the time of her death represented the proceeds of that owned by Mr. McCollum at the time of their marriage, and increases resulting from it. After coming to San Diego the couple lived on the income from that property.

There was no issue from this marriage and the heirs at law of Mrs. McCollum at the time of her death in 1939 were nephews and nieces and their children.

After the marriage of Mr. and Mrs. McCollum in 1909, Mr. McCollum's seven children remained in the family home, but within a few years the older ones began drifting away because they did not like the family discipline of the stepmother. While there seemed to be some affection between Mrs. McCollum and two of the children, this did not seem to extend to the other five. There is evidence in the record indicating that Mrs. McCollum regarded all of these children as shiftless and inconsequential.

Mrs. McCollum lived in Santa Cruz prior to her marriage. Harry J. Bias and J. Beldon Bias, residents of the same city, were her favorite nephews and she entertained a strong affection for them. Mr. and Mrs. McCollum visited them in Santa Cruz and they visited at the San Diego home of the McCollums. Harry J. Bias was an attorney at law. Robert B. Bias, the son of J. Belden Bias, was admitted to practice law in 1938. He was employed in the office of his uncle until about September, 1941, when he entered the office of the general counsel for the Civil Aeronautics Board in Washington, D. C.

Mr. and Mrs. McCollum became financially embarrassed during the depression and Mrs. McCollum's nephews came to their assistance with loans which were not repaid. The record indicates that but for this financial assistance Mr. and Mrs. McCollum might have lost their properties.

Mrs. McCollum executed a will dated March 24, 1930, in which she left all of her property to her husband, or, in case he predeceased her, to his seven children. She executed another will dated August 31, 1934, leaving her husband a life estate in her property with the fee, subject to this life estate, to the seven children.

Mrs. McCollum had a paralytic stroke in 1937 and thereafter had difficulty with her speech. She was very heavy, had high blood pressure and in the last year of her life could not walk without assistance.

Mr. McCollum executed a will the day before he died. In it he nominated Letha O. W. Cordrey, a friend, as executrix and as guardian of his wife, reciting that Mrs. McCollum was not competent to manage her affairs.

On September 18, 1938, the day following Mr. McCollum's death, Mrs. Cordrey took charge of Mrs. McCollum and her properties. She recorded two deeds conveying the property in Imperial Valley and the home in San Diego from Mrs. McCollum to Mr. McCollum. Mrs. Cordrey, with her associate, Miriam W. Hezar, were indebted to Mrs. McCollum in the sum of approximately $10,000.

On January 14, 1939, Mrs. Cordrey filed a petition to be appointed guardian of the person and estate of Mrs. McCollum. This petition did not list as assets of the estate the real property, deeds to which had been recorded after the death of Mr. McCollum. A contest to the petition was filed by J. Belden Bias on the ground that Mrs. Cordrey was indebted to the guardianship estate and that the recording of the two deeds had clouded the title of the real estate of Mrs. McCollum, necessitating suits to quiet title against the estate of Emmet S. McCollum.

A physician employed by Mrs. Cordrey filed an affidavit in the guardianship proceedings reciting that Mrs. McCollum, because of physical disability and general mental incompetency, could not attend the guardianship hearing. This affidavit was sworn to on January 19, 1939. The hearing was had on January 27, 1939, and Mrs. McCollum not only appeared in court but was interrogated by the judge who presided at the hearing. She requested the appointment of Beatrice Burger, a long time friend, as her guardian.

The trial court found that Mrs. McCollum, "by reason of old age, disease, and physical infirmity, is unable, unassisted, properly to manage and take care of herself or her property, * * *." The petition of Mrs. Cordrey was denied and Mrs. Burger was appointed guardian of the person, and a San Diego bank was appointed guardian of the estate of Mrs. McCollum. We find in the record an order authorizing and directing the guardian of the estate to institute suits against the estate of Emmet S. McCollum to quiet title to the San Diego home and the Imperial County farm. We are informed by counsel for respondents that both actions have been filed and that judgment quieting title to the San Diego home has been entered and that the other action is pending in Imperial County.

On January 26, 1939, Mrs. McCollum executed a third will revoking all previous wills, leaving the San Diego home to Harry J. Bias, the Imperial County farm to J. Belden Bias, her jewelry and personal effects to Mrs. Burger and the residue equally to her two nephews. J. Belden Bias was named as executor and he filed this will for probate. A contest was instituted by the seven children of Mr. McCollum on the grounds of mental incompetency, duress, menace and undue influence of the three legatees, and improper execution of the will. After a trial before the court without a jury this will was admitted to probate and the contestants have appealed.

The trial court found all facts in favor of the petitioner and against the contestants. The insufficiency of the evidence to support these findings, together with errors in receiving and rejecting evidence, are urged as grounds for reversal of the judgment.

Little need be said about the due execution of the will. All the evidence on this subject shows that the formalities of law were observed and the findings upholding due execution may not be questioned. There was no evidence of menace or duress so these grounds of contest may be summarily dismissed from consideration here, leaving the questions of mental capacity and undue influence to be considered.

The evidence of proponents discloses that Harry J. Bias visited his aunt in San Diego just after the death of her husband; that Mrs. McCollum told him that the death of her husband had changed the situation concerning the disposition of her property; that she wanted to make a new will and leave the San Diego home to Harry, the Imperial County farm to J. Belden Bias, and some remembrance to Mrs. Burger. Harry J. Bias discovered that Mrs. Cordrey had recorded the two deeds but he did not tell his aunt of this because he did not want to cause her worry. He did advise her to obtain independent legal advice from some attorney in San Diego.

J. Belden Bias and his wife visited Mrs. McCollum in October and again in December, 1938. She expressed to them the same desires concerning the testamentary disposition of her property.

On January 13, 1939, Mrs. Burger took Mrs. McCollum to interview an attorney whom Mrs. McCollum authorized, in writing, to act for her and to represent her in every way in protecting her property rights. This attorney was the personal attorney of Mrs. Burger. He had not met Mrs. McCollum prior to that date. He did not know Harry J., nor J. Belden Bias, and did not meet either of them until about January 26, 1939.

Robert B. Bias was the grand nephew of Mrs. McCollum. He, with J. Belden Bias and his wife, came to San Diego on January 25, 1939, and saw Mrs. McCollum on that and the two succeeding days. Mrs. McCollum again explained the disposition she desired to make of her property. Robert made pencil notes of the directions given him by Mrs. McCollum which he took to the office of the San Diego attorney the following morning. The attorney dictated the will which was delivered to Robert after it had been transcribed. On the afternoon of the same day J. Belden Bias, his wife and Robert, took Mrs. McCollum to the home of Thomas A. Bruning, an intimate friend of long standing of Mr. and Mrs. McCollum. The will was read to Mrs. McCollum by Robert in the presence of Mr. Bruning, his wife and daughter, and Mr. and Mrs. Bias. All of these persons, except Mr. Bruning who had died, testified that Mrs. McCollum understood the contents of the will; that she said it was just what she wanted; that it was executed in accordance with the formalities of law. All of these witnesses testified that Mrs. McCollum understood the terms of the will, knew what she was doing, that she was mentally competent to make a will and was acting of her own free will and not under undue influence.

[1] There are only inferences, and perhaps presumptions, to contradict this testimony. These inferences and presumptions are not conclusive and while they might have created a conflict in the evidence, that conflict was resolved against contestants by the trial court. Of course conflicts in the evidence are settled in the trial court and a judgment may not be reversed because of such conflicts, where, as here, there is material and substantial evidence supporting the findings and judgment.

[2, 3] Undue influence must overpower the will of the testatrix so that the will of another is substituted for hers. In re Estate of Bryson, 191 Cal. 521, 217 P. 525; In re Estate of Shay, 196 Cal. 355, 237 P. 1079; In re Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Finkler, 3 Cal. 2d 584, 46 P.2d 149. Instead of leading us to the conclusion that the two nephews had overpowered the will of Mrs. McCollum and substituted their testamentary desires for hers, a study of the record indicates that the will was the result of the free and voluntary act of Mrs. McCollum. Mrs. Burger did not know the will was being executed so no charge of undue influence can be directed at her.

The evidence on the question of the mental capacity of Mrs. McCollum to execute a will is hopelessly conflicting. The witnesses for contestants were of the opinion that Mrs. McCollum was incompetent and the majority pictured her as a person entirely without understanding. Two of those witnesses, Mrs. Cordrey and the nurse who cared for Mrs. McCollum, after testifying that she could only mumble and use monosyllables, detailed conversations with her, thus in effect impeaching themselves. One of these conversations pertained to the title to real property and the witness, after reciting the conversation, explained that Mrs. McCollum had carried on her part of it largely by means of gestures. The trial judge, in commenting on this evidence, remarked that even a learned professor of law might have great difficulty in describing an estate in real property by means of gestures. If the explanation be assumed to be true, it would indicate that Mrs. McCollum had developed the art of pantomine to a high degree, exceeding the capabilities of the ordinary person.

[4] Contestants produced the only doctor who testified in the case. He was general practitioner and testified that in his opinion Mrs. McCollum was incompetent to make a will. While this opinion was entitled to be carefully weighed by the trial judge it was not conclusive on the subject, (In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25), and like the evidence of any other witness could be rebutted by other satisfactory evidence.

The will was executed on January 26, 1939, and the next day Mrs. McCollum was adjudged to be "unable, unassisted, properly to manage and take care of herself and her property" and guardians of her person and of her estate were appointed.

[5] It is urged that this is strong evidence of mental incompetence on the day before. This was evidence to be weighed and considered by the trial court. As was said in Re Estate of Johnson, 200 Cal. 299, 252 P. 1049, 1052: "Adjudications of incompetency in the guardianship proceedings did not necessarily mean that the decedent was of unsound mind at the time of such adjudications, or that she was not then competent to make a valid will."

[6] A strong bit of evidence on the mental capacity of Mrs. McCollum is found in the record of the guardianship proceeding. In her petition Mrs. Cordrey had alleged that Mrs. McCollum was mentally incompetent, and wholly incompetent to transact business. While there is no direct finding on this allegation it was negatived by the finding that by reason of old age, disease and physical infirmity Mrs. McCollum was unable, unassisted, to properly take care of herself and of her property. Further, Mrs. McCollum was interrogated by the judge before whom the guardianship proceedings were held and he inserted in his judgment the following: "And said Lulu A. McCollum, did, in open Court, request that Beatrice Burger be appointed such guardian."

The judge had a number of years experience on the bench. He was trained by experience to observe witnesses and weigh their testimony. The question of mental competency was an issue before him. Had his interrogation of her, and her answers to his questions, raised any suspicion in his mind of her mental incompetency, he certainly would not have acted on her request nor would he have incorporated in his judgment that request as a reason for the appointment of Mrs. Burger as guardian. Thus we have, by inference at least, the opinion of an entirely disinterested trial judge, a trained observer, to the effect that Mrs. McCollum was not mentally incompetent on January 27, 1939.

[7] No good could be accomplished by further reviewing the conflicting evidence on the question of competency. There is ample evidence to support the finding of competency, as there is sufficient evidence to support one of incompetency had it been made. Such conflicts are addressed to the trier of fact and cannot be settled in an appellate court.

[8] Contestants urge that the trial court committed prejudicial error in excluding evidence that the property of Mrs. McCollum had its origin in the separate property of Mr. McCollum. As we have observed, we believe this sufficiently appears from the record so that further evidence on that subject would have been cumulative only. There was no prejudice in this ruling of the trial court.

[9] Contestants called Mrs. Burger as a witness under the provisions of section 2055 of the Code of Civil Procedure. On objection of proponents they were not permitted to cross-examine her at that time. We may assume that this ruling was error and still cannot reverse the judgment because of lack of prejudice in it. Mrs. Burger was called as a witness by the proponents of the will and was cross-examined at length by contestants. We have not found a single objection to any question propounded to her by counsel for contestants. Their cross-examination was not limited in any manner and they do not suggest what further facts they could have brought out had they been permitted to call her for cross-examination. The error, if any, was entirely abstract and no prejudice is shown to have resulted from it.

We have considered the other questions raised by contestants and they do not possess sufficient merit for detailed consideration here.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

RIBLE v. HUGHES et al.

Civ. 6863.

District Court of Appeal, Third District,
Sacramento, California.
July 31, 1943.

Rehearing Denied Aug. 30, 1943.
Hearing Granted Sept. 27, 1943.

1. Schools and school districts 🔑55, 144(4)

A school board is authorized to exercise reasonable discretion in fixing teachers' salaries and to reduce a teacher's salary if such reduction is not arbitrary or discriminatory and to make reasonable rules for the government of schools in its district.

2. Schools and school districts 🔑144(4)

A city board of education was not authorized to promulgate a rule compelling its teachers to acquire additional college units by penalizing them by a reduction of their salary if they do not. School Code, §§ 5.120–5.152, 5.420, 5.530, 5.541 to 5.547, 5.650, 5.652 et seq., 5.731, 5.734.

3. Schools and school districts 🔑55

Since boards of education are "quasi municipal corporations" of limited power, they have only special powers and are powerless to impose penalties, which is a purely "legislative power" and such rules as such boards may be authorized to make must be reasonable and they can promulgate no rules in contravention of statutes, nor accomplish by indirection that upon which a statute has placed a ban. School Code, §§ 5.420, 5.530, 5.541 to 5.547, 5.650, 5.652 et seq., 5.731, 5.734.

See Words and Phrases, Permanent Edition, for all other definitions of "Legislative Power" and "Quasi Municipal Corporations".

4. Schools and school districts 🔑141(1), 144(4)

A board of education cannot arbitrarily reduce salaries or change assignments of permanent teachers, and classification of teachers for salary purposes must be reasonable, natural, and based upon a substantial difference germane to the subject, or upon some basis having a reasonable relation to the work assigned. School Code, §§ 5.420, 5.530, 5.541 to 5.547, 5.650, 5.652 et seq., 5.731, 5.734.

5. Schools and school districts 🔑144(4)

A city board of education rule providing that as a condition to receipt of the annual salary increment that during each four year period teachers must complete in residence specified college units was invalid as applied to permanent high school English teacher, where rule, in contravention of statute, ignored successful experience as a factor in determining teachers' salaries, and ignored every other method by which teachers might acquire mental stimulus and was based on no valid classification of teachers or duties. School Code, § 5.734.

6. Schools and school districts 🔑144(4)

A city board of education rule providing that as a condition to receipt of the annual salary increment that during each four-year period, teachers must complete in residence specified college units was arbitrary and invalid as to permanent high school English teacher, where no basis appeared for fixing of annual increment, or the number of units required, or the requirement that university courses be taken every four years. School Code, § 5.734.

7. Schools and shcool districts 🔑144(4)

A city board of education rule providing that as a condition to receipt of the annual salary increment that during each four year period teachers must complete specified college units was invalid as imposing an unauthorized "penalty". School Code, §§ 5.420, 5.530, 5.541 to 5.547, 5.650, 5.652 et seq., 5.731, 5.734.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty".

8. Schools and school districts 🔑144(4)

Where only salaries reduced were those of teachers who had not complied with condition of city board of education rule requiring teachers during each four year period to complete specified college units as a condition to receipt of the annual salary increment, English teachers with as little as ten years' experience were receiving the maximum salary, and petitioner, who was a permanent high school English teacher with 29 years' successful experience, after reductions because of failure to comply with the rule was the lowest paid among such teachers, rule, as applied to petitioner, was "discriminatory" and invalid. School Code §§ 5.420, 5.530, 5.541 to 5.547, 5.650, 5.652 et seq., 5.731, 5.734.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

9. Schools and school districts ⚿144(4)

The fixing of permanent school teachers' salaries by school district boards of trustees must not be discriminatory, arbitrary, or unreasonable.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by L. M. Rible against Charles C. Hughes, as Superintendent of Schools of the City of Saramento and Secretary of the Board of Education of the City of Sacramento, and others for a writ of mandate to require the Board of Education of the City of Sacramento to pay to petitioner $96 deducted as a penalty from her salary as a teacher of English in the Sacramento high school for the school year 1939–1940. From a judgment denying the writ and discharging an alternative writ previously issued, petitioner appeals.

Reversed with directions.

Anthony J. Kennedy and Carl Kuchman, both of Sacramento, for appellant.

J. Q. Brown, Dist. Atty., and Wm. A. Green, Deputy Dist. Atty., both of Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment denying to petitioner a writ of mandate requiring the Board of Education of the City of Sacramento to pay to her, a teacher of English in the Sacramento High School, the sum of $96 deducted as a penalty from her salary for the school year 1939–1940, and discharging an alternative writ previously issued.

The facts of the case, as found by the trial court, are as follows: The Sacramento High School is under the government of the Board of Education of the City of Sacramento (hereinafter called the Board). Petitioner is a graduate of Stanford University, with a Bachelor's Degree and three semesters of graduate work of 16 units each. On January 4, 1912, she was employed under contract as a teacher of English in the Sacramento High School, and at all times since has been under contract, the last written contract having been executed in 1921, on which year she became a permanent teacher under the tenure act. She has at all times possessed all necessary state and county credentials, including a life diploma issued to her in 1932. During the summer recesses of 1929–1938 petitioner traveled extensively for her professional improvement, her travels including trips to the British Isles, France, Germany, Italy, Japan, Hawaii and Alaska. These travels were designed to have a definite bearing upon particular courses in her subject of literature, and independent research was done and data were collected on the works of Burns, Stevenson, Dickens, Shakespeare, Sheridan, and other authors. Such travels and research complied with a rule of the Board adopted in 1922 allowing "rating units" or credits for training, of which the petitioner accumulated some forty or fifty. That rule was abolished in 1935, at which time a new salary schedule was established.

When petitioner entered into her 1921 contract she was receiving the then maximum salary for high school teachers, to wit: $2,700 per annum, and she continued to receive this salary until July 1, 1939, when respondents reduced her salary to $2,604. A further reduction to $2,508 was made by respondents on July 1, 1940. At all times petitioner's duties and responsibilities have remained the same and have always been successfully discharged by her. Some other teachers of English, with like responsibilities and duties, now receive $2,748 per year. No disciplinary proceedings of any kind have ever been invoked against petitioner, and it is conceded that at all times there has been sufficient money to pay petitioner a salary of $2,748 annually, and of course sufficient for a salary of $2,700. No question is raised as to petitioner's efficiency or competency, and it is conceded that she is fully qualified to teach.

The reductions in petitioner's salary were made under the salary schedule adopted by the Board in 1935, which purported to base salary on years of service. Under said salary schedule in high schools the starting salary was fixed at $1,548 per annum, which should obtain for the first three years. The fourth year the salary was to increase to $1,740, and thereafter increase at the rate of $96 a year until the fourteenth year when a salary of $2,700 was reached. After fifteen years a maximum of $2,748 was to be paid. It was provided, however, as a "condition" to the receipt of the "annual increment" of $96, that during each four year period each teacher must complete "six semester units" "in courses open to undergraduates, or four semester units in courses open only to graduates, in an institution or institutions of four-year college rank accredited by the

State Department of Education," the work to be done "in residence."

It was further provided that: "(5) Having reached the maximum salary, in order to retain it, the training condition must be met each four year period. If condition is not met by the beginning of the fifth year, the salary will be decreased by one annual increment each year until the condition is met, whereupon one annual increment per year shall be restored until the maximum is again reached."

The reductions of petitioner's salary were made solely because of petitioner's failure to secure the required semester units during the preceding four years.

On this appeal petitioner contends that California laws relating to credentials give exclusive authority to the State Board of Education to determine qualifications requisite for teaching positions, and grant to one qualified, rights which cannot be impaired by local rules relating to qualifications (School Code, §§ 5.120–5.152); that the salary reductions provided for by respondent Board are penal in their nature, are without authority in law and are in contravention of statutory rights of tenure; that the rights of the Board to fix salaries of permanent employees must be reasonably exercised and may not be exercised in a discriminatory or arbitrary manner, and that when schedules are adopted basing salary on years of training and years of service, there is a mandatory requirement that persons of equal years of training and experience shall receive the same salaries; that section 5.734 of the School Code requires that when a salary schedule is adopted, years of experience and training are the determining factors; and that the rule adopted by the Board reducing petitioner's salary, as was done, is arbitrary in its operation and in its administration.

Respondents in reply assert that even though petitioner's employment is on a contractual basis, it is subject to all reasonable rules established by the Board of Education; that the provisions of the salary schedule in question do not conflict with the authority given by law to the State Board of Education; that the salary deductions made by the Board are not a penalty and are not in contravention of tenure rights; that the law does not require that even when a salary schedule is adopted, teachers of equal years of training and experience must necessarily receive the same salary; and that the rule is not arbitrary or unreasonable in its operation.

[1] We are of the opinion that such a rule is arbitrary, unreasonable, discriminatory and oppressive and in excess of the powers of the Board. Conceding the power of a school board to exercise a reasonable discretion in the matter of fixing salaries (Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229), and to reduce the salary of a teacher if such reduction is not arbitrary or discriminatory (Hodge v. Board of Education, 22 Cal.App.2d 341, 70 P.2d 1009), and to make reasonable rules and regulations for the control, management and government of the schools of their district, the rule under consideration does not even purport to relate to the control or management of the school or to the duties of the teachers therein as prescribed by the School Code (secs. 5.541–5.546). The diminution in petitioner's salary is not based upon any lack of efficiency on her part, since the trial court found "that at all times from and after on or about the 4th day of January, 1912, petitioner has successfully served and is now serving as a teacher of high school English in said position in the Sacramento High School"; and "that at all times from and after the 1st day of July, 1939, petitioner has successfully performed and discharged, and does now so perform and discharge the same duties and responsibilities as were performed and discharged by her many years prior to said date." It is based solely upon the failure of petitioner to fulfill the requirement as to additional college units. It ignores petitioner's years of training, service and experience, though section 5.734 of the School Code provides that "uniform allowance may be made in any schedule of salaries for years of training and for years of service." It assumes that, instead of qualifying, years of service and experience tend to disqualify—that teachers retrograde with experience, and that the taking of four or six units of some kind of university work once in four years is necessary in order to effect a stay of such retrogression.

Section 5.530 of the School Code provides that boards of school trustees and city boards of education shall have power and it shall be their duty to fix and prescribe the duties to be performed by all persons in public school service in the school district. Section 5.420 provides that they shall employ only persons holding proper credentials and certificates; section 5.731 imposes upon them the duty to fix and order paid the compensation of persons in public school service employed by them; sections 5.541–5.547 prescribe the duties of teachers; section 5.650 provides that no permanent employee of a school board shall be dismissed except for the reasons set forth therein, and section 5.652 et seq., provide the time and method by which charges must be made and heard. There is no provision in the law for disciplinary action against a teacher short of dismissal.

[2-4] It is not contended or even suggested by respondent herein that petitioner is subject to dismissal or that it would be within the power of the Board to promulgate and enforce a rule requiring that permanent teachers in its employ continue to take college courses. It is said in respondents' brief that "the question here is not whether the district can require the petitioner to take more training as a teacher in order to hold her position, but whether or not she can be required to take more training or else suffer a reduction in salary." Obviously, then, the Board is attempting to do indirectly what it could not do directly—that is, compel teachers to acquire additional college units by penalizing them by way of a reduction of salary if they do not. This, we believe, is in excess of the powers of the Board. Inasmuch as such boards are quasi municipal corporations of limited power, they have only special powers which may not be exceeded (23 Cal.Jur. 90; Pasadena School District v. City of Pasadena, 166 Cal. 7, 9, 134 P. 985, 47 L.R.A.,N.S., 892, Ann.Cas.1915B, 1039; Grigsby v. King, 202 Cal. 299, 304, 260 P. 789. They are powerless to impose penalties—a purely legislative power. Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, 22 Am.St.Rep. 321; Gilbert v. Stockton Port District, 7 Cal.2d 384, 390, 391, 60 P.2d 847. And such rules and regulations as they may be authorized to make and enforce must be reasonable and not discriminatory or oppressive, or arbitrary. Dutart v. Woodward, 99 Cal.App. 736, 739, 740, 279 P. 493; Chambers v. Davis, 131 Cal.App. 500, 507, 22 P.2d 27; Lotts v. Board of Park Commissioners, 13 Cal.App. 2d 625, 57 P.2d 215; McLeod v. State, 154 Miss. 468, 122 So. 737, 63 A.L.R. 1161; Hutton v. Gill, 108 Ind.App. 1, 7 N.E.2d 1011; Hutton v. Gill, 212 Ind. 164, 8 N.E. 2d 818, 820; Valentine v. Independent School District, 187 Iowa 555, 174 N.W. 334, 6 A.L.R. 1525; 24 R.C.L. 575, sec. 23. They can promulgate no rules in contravention of statutory provisions, nor accomplish by indirection that upon which a statute has placed a ban. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Mitchell v. Winnek, 117 Cal. 520, 527, 49 P. 579; Dutart v. Woodward, supra. There can be no arbitrary or unreasonable exercise by the Board of its power to reduce salaries or change assignments of permanent teachers. Abraham v. Sims, 2 Cal.2d 698, 711, 42 P.2d 1029; Dutart v. Woodward, supra. And classification of teachers for salary purposes must be reasonable, natural, and based upon a substantial difference germane to the subject, or upon some basis having a reasonable relation to the work assigned. Hutton v. Gill, 212 Ind. 164, 8 N.E.2d 818, 820.

[5] In the case before us the rule enforced against petitioner by the reductions of her salary ignores successful experience and efficiency as a factor in determining salaries, in contravention of section 5.734 of the School Code; it arbitrarily assumes that a teacher becomes not more, but less efficient with experience; that failure to take additional college work makes a teacher less competent; it also assumes arbitrarily that the taking of any six (or four) units of college work every four years will restore efficiency (though only by degrees); it ignores rating credits acquired under the former salary schedule; it compels a teacher, at her own expense and on her own time, to leave her home and go to a college one semester each four years; it is not a rule governing the conduct of the schools under the jurisdiction of the Board, but of the teacher during her vacation from school duties; it ignores every other method by which a teacher might acquire mental stimulus; and in this case it implies inefficiency in conflict with the finding of the trial court of petitioner's efficiency. It is based upon no classification of either teachers or duties, unless it be contended that teachers are to be classified as those that do and those that do not take the prescribed additional college work; and such a classification would be purely an arbitrary one not based upon qualifications or experience, and could not be justified. Lotts v. Board of Park Commissioners, supra; Mansur v. City of Sacramento, 39 Cal.App. 2d 426, 103 P.2d 221.

[6] The rule is arbitrary also in that no basis appears for the fixing of the so-called

"annual increment" of $96 deducted from appellant's salary, no basis for the number of college units teachers are required to complete, and no basis for the requirement that such university courses be taken every four years. If six college units every four years can be required, six units each year can be required; and if a penalty of $96 per annum can be imposed for noncompliance, any other arbitrary amount could be imposed and the advantages of tenure utterly defeated. It does not prescribe what kind of courses shall be taken by teachers, but merely the number of units that must be completed; so a teacher of English, if she so desired, might present six units of hygiene or home economics, kinesiology or Coptic. Though the rules of the Board provide that written standards shall be set up by the superintendent of schools to govern training conditions, it is admitted that none such were set up.

[7] Petitioner did not fail to perform any duty prescribed by the law or the Board. It is not contended that she has not kept up to date in her methods; and except for her failure to acquire the requisite college units her salary would have been the same as previously, $2,700. There was no change in her rank or grade, working hours or duties. The deductions were not made because of any inefficiency on her part, but as a penalty for failing to go to school. Respondents in their brief contend that there is no penalty involved; but we note that in the Bulletin issued by the Board in September, 1936, it is recited: "It was concluded that teachers reaching the maximum should be stimulated to maintain their professional proficiency by continued training. To make this effective, it was agreed that a *salary penalty* should be imposed upon those failing to do this within a reasonable length of time." (Italics ours.)

[8] Also, the rule as applied to petitioner is discriminatory. The evidence shows that high school teachers of English with as little as ten years of experience were receiving $2,748 per annum, while petitioner, with twenty-nine years of successful experience, was, after the reductions, the lowest paid among such teachers. There was no general reduction of salaries, the only ones reduced being those of teachers who had not complied with the "condition."

[9] In Kacsur v. Board of Trustees, 18 Cal.2d 586, 592, 116 P.2d 593, 596, the court said: "However, there are limitations on the powers of boards of trustees to change salaries of permanent teachers. One of the 'legal consequences' referred to in the Abraham case, supra [Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029], is that the fixing of salaries must not be *discriminatory, arbitrary or unreasonable*. The above cited cases all so qualify the general power of the administrative agencies to fix the salaries of permanent teachers. Because of this qualification it necessarily follows that there must be a comparison with the salaries of other teachers or salaries of previous years. If this could not be done, the qualification would be meaningless." (Italics ours.)

The record there showed that the respondent board attempted to reduce appellants' salaries from $1,600 to $1,325, practically the minimum allowed by law. No other salaries were reduced; most of them were raised; and the salary of a teacher of approximately the same years of service, experience and qualifications remained the same. The court said: "These facts standing alone are sufficient to force the conclusion that the attempted action of the board was unreasonable and arbitrary. The fact that the salary of a teacher of like experience and years of service was not reduced is particularly strong in support of appellants' claim of discrimination. That there must be some degree of uniformity was recently recognized by this court in the case of Fry v. Board of Education, 17 Cal.2d 753, [at page 757], 112 P.2d 229, 233, wherein it is stated: '"It must be conceded that, within the limits fixed by the School Code, the Board has discretionary control over the salaries of teachers. (Citing cases.) However, it must also be conceded that the legislature has enjoined on such Boards, within reasonable limits, the principle of uniformity of treatment as to salary for those performing like services with like experience. * * *"'" And in that case the Supreme Court reversed the finding of the trial court that the Board had not acted arbitrarily.

We conclude that the rule of the Board requiring petitioner to acquire additional college units or suffer a reduction in salary to which she was otherwise entitled was in excess of the powers of the Board. The judgment is reversed and the lower court is directed to issue the writ of madamus as prayed.

PEEK and THOMPSON, JJ., concur.

Rehearing denied; THOMPSON, J., dissenting.

In re EASTER'S ESTATE.

CALIFORNIA TRUST CO. v. JONES et al.

JONES v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 13920.

District Court of Appeal, Second District,
Division 3, California.
July 23, 1943.

As Corrected on Denial of Rehearing
Aug. 11, 1943.
Hearing Granted Sept. 20, 1943.

1. Wills ⇨506(2)

The word "heirs", as used in wills, designates the persons who would, by law, succeed to the estate of a person if he should die without disposing of it by will. Probate Code, § 108.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

2. Wills ⇨524(2)

Generally, in absence of clear indications of a different intention, the class described as testator's "heirs", or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder is given by will, is to be ascertained at testator's death, and mere words of futurity, without the adverb of time, are insufficient to preclude application of the general rule.

3. Wills ⇨629

In construing wills, words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right.

4. Wills ⇨629

There is a presumption in favor of vesting of testamentary provisions at testator's death. Probate Code, § 28.

5. Wills ⇨524(2)

Under decree distributing testator's estate to a trustee to pay a specified portion of the income to testator's widow for life, and providing that the trust should terminate on widow's death and the trust fund "should go to" and "vest" in testator's heirs at law in accordance with the succession statute in force in March, 1920, notwithstanding that the widow was also an heir, identification of testator's heirs was determined as of his death, and not as of termination of the trust; the word "vest" referring to a vesting of the enjoyment only, rather than to the right to the fund; and effect of words "shall go to" as clear words of direct devise at the time of death, being unaffected by word "vest" or provision that trustee should "convey, deliver, and pay over" the trust fund.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall Go to" and "Vest".

6. Wills ⇨534

Although the circumstance that the one who is a member, or the sole member, of the class to which the limitation over is made, is the first taker, is considered in determining whether testator has impliedly excluded such first taker from participation in the gift over, it is not, of itself, sufficient to prevent the first taker from so participating.

7. Executors and administrators ⇨315(5, 6)

Decree of distribution, if inconsistent with will, must control, and, in construing decree, will can be considered only to clear up some ambiguity in decree.

8. Executors and administrators ⇨315(5)

Where decree distributing testator's estate in trust was not ambiguous and did not limit its benefits to those who were "of the blood" of testator, identity of testator's heirs was not determined as of termination of the trust on ground that the interpretation of a will by which property goes to those of testator's blood is preferred.

"Of the blood" is a technical legal phrase meaning to be descended from the person referred to or from the same common stock and from a common ancestor.

See Words and Phrases, Permanent Edition, for all other definitions of "Of the Blood".

9. Husband and wife ⇨273(1)

Under statute providing that upon the husband's death, one-half of the community property goes to the surviving wife and one-third of the husband's separate property goes to the surviving wife where he leaves more than one child and no will, the share of the community property which the wife takes goes to her as an "heir" of her husband. Civ.Code, § 1386, subd. 1; § 1402.

10. Wills ⇨800

A widow's "election" as to whether to take under her husband's will or to assert her community rights is merely an election whether to take the provision made for her in her husband's will or to take her statutory share of the community property, but, if she takes under the will, her election so to do is to be strictly construed and no rights are surrendered by it except by clear and explicit language. Civ.Code, § 1386, subd. 1; § 1402.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

11. Wills ⚿800

Where widow, on being required to elect whether to take under her husband's will or to assert her community rights elected to take under the will, widow did not "waive" her right to take under the will the share of the community property which the succession statutes of 1920 would give her as an heir. Civ.Code, § 1386, subd. 1; § 1402.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

PARKER WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge pro tem.

Proceeding in the matter of the estate of Alfred Easter, deceased, by the California Trust Company, as administrator, etc., and another, opposed by Paul W. Jones, as administrator, etc., and Security-First National Bank of Los Angeles, as trustee, and others. From adverse portions of an order construing a distribution decree, plaintiffs appeal.

Reversed with direction.

Stephens, Jones, Inch & La Fever, of Los Angeles, for appellant California Trust Co.

B. R. Ware, of Los Angeles, for appellant Paul W. Jones.

Craig & Weller and Frank C. Weller, all of Los Angeles, for respondents Martha B. Todd, Elizabeth B. Marriott, Grace Winkler, and Kathleen Broadridge.

Gibson, Dunn & Crutcher and E. H. Conley, all of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

SHAW, Justice pro tem.

By the decree of distribution of the estate of Alfred Easter, deceased, a trust was set up under the provisions of his will. On the termination of this trust the trustee filed its final account with a request that the court construe that decree and determine to whom the trust property remaining in its hands should pass and be delivered. The trial court, proceeding under section 1200 of the Probate Code, made an order which, in part, determined that the trust property passed to respondents and directed that it be delivered to them. Other claimants have appealed from these parts of the order and their appeal is now before us for consideration.

The decree of distribution was made October 3, 1923, and distributed the entire estate to a trustee, in trust to manage the property and from the income to pay $300 per month to Catherine Easter, widow of Alfred, and the balance to the children of Alfred in a specified manner, with further provisions in case of the death of any child. This decree contained the following provision upon which the question before us arises: "Upon the death of the said Catherine Easter, the trust hereinbefore referred to shall terminate and all of the property then in the hands of the trustee or in its possession or control, shall go to and vest in the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession of the State of California in force in the month of March, 1920, and the trustee is directed to convey, deliver and pay over all the corpus of said trust fund then in its possession or under its control unto such heirs in accordance with the statute of succession of the State of California in force in the month of March, 1920."

At the time of the death of Alfred Easter on February 1, 1923, his heirs, according to the statute here mentioned, were his widow, Catherine, a son, Ephraim, and three daughters, Martha B. Todd, Elizabeth Marriott and Kate B. Gherky. None of these children was the daughter of the widow. During the lifetime of the widow, the daughter Kate B. Gherky died, leaving two children, Grace Winkler and Kathleen Broadridge, and the son Ephraim died leaving no issue, so that, at the death of Alfred's widow on January 8, 1942, which terminated the trust, the heirs of Alfred, according to the statute referred to in the decree, if heirship were then ascertained, would have been the respondents herein, who are Martha B. Todd, and Elizabeth Marriott, his daughters, and Grace Winkler and Kathleen Broadridge, children of the deceased daughter. The question here for decision is, whether the identity of the "heirs" of Alfred Easter, to whom, by the decree of distribution, the remainder interest after the termination of the trust is distributed, is to be determined as of the time of his death or as of the time of termination of the trust. The respondents appeared in the trial court and claimed the whole of the property on the theory that the proper time was that of the termination of the trust, and they were therefore the only heirs. The trial court agreed with them and gave judgment accordingly. The appellants, who are the personal representatives of the estates of the widow and of the son, Ephraim, respectively, resisted this claim and now seek a reversal of the order on the theory that the time with respect to which the determination of the identity of the heirs of Alfred should be made is that of his death, that their respective decedents were heirs and took a vested interest in remainder at that time, and that therefore the estates represented by them are entitled to share with respondents in the trust property. We conclude that appellants' contention is well founded.

[1-5] The word "heirs," whether used in its ordinary sense or as a technical term, designates the persons who would, by law, succeed to the estate of a person in case he should die without disposing of it by will. (Estate of Watts, (1918) 179 Cal. 20, 175 P. 415; Prob.Code, sec. 108.)

"It is a general rule of testamentary construction, so universally recognized as to render unnecessary a full citation of the cases which support it, that, in the absence of clear and unambiguous indications of a different intention to be delivered from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder is given by will, is to be ascertained at the death of the testator. (33 L. R. A. (N. S.), p. 2, note.)" (Estate of Newman, (1924) 68 Cal.App. 420, 424, 229 P. 898; see also note in 49 A.L.R. 178 and supplementary note in 127 A.L.R. 604, where substantially the same rule is stated, with many supporting citations.) In Estate of Newman, supra, the court further said, at page 429 of 68 Cal.App., at page 902 of 229 P.: "Mere words of futurity, without the adverb of time, are insufficient to preclude the application of the general rule. Mortimer v. Slater, L.R. 7 Ch.Div. 322. Words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right. In re Kenyon et al., 17 R.I. 149, 20 A. 294, 296." This rule, with supporting authorities, also appears in notes, 49 A.L.R. 186, 187 and 127 A.L.R. 609, 610. The will considered in Estate of Newman, supra, provided that upon the termination of a trust created by it "said Trustee shall convey, deliver, pay and transfer to my heirs at law, wherever and whoever they may be, according to the laws of succession of the State of California, all of said trust estate." Applying the rules above quoted to this provision, the court held that those who were the testator's heirs at the time of his death took a vested remainder in the trust property. The words there construed are very much like those used in the decree of distribution here and we think the construction there adopted should be given the decree here. The statement in the decree that at the termination of the trust the property shall "vest" in the heirs can, when considered with its context, be construed as referring to a vesting of the actual enjoyment only, rather than the right to the property, and in view of the presumption in favor of the vesting of testamentary provisions at death (Prob.Code, sec. 28, formerly Civ.Code, sec. 1341; Estate of Newman, supra, 68 Cal.App. at page 424, 229 P. 898; In re De Vries, (1911) 17 Cal.App. 184, 190, 119 P. 109), it should be so construed here. This context includes the provision that on expiration of the trust the property "shall go to" the heirs. These are "clear words of direct devise" at the time of death (Estate of Wallace, (1938) 11 Cal.2d 338, 341, 79 P.2d 1094), and their effect to that end is not defeated by the company of the word "vest" (In re De Vries, supra, at pages 191, 192, 119 P. 109) nor by the provision that the trustees shall "convey, deliver and pay over" the trust fund. (Estate of Wallace, supra; Estate of Newman, supra.)

[6] The further question arises here, whether the fact that the life tenant, whose estate intervenes before that of the "heirs" who are to take in remainder, is also one of those heirs, affects or defeats the application of the rule of construction above stated. Nothing was expressly decided on this question in Estate of Newman, supra, but all save one of the life tenants

there were also heirs, and the decision upholds their right to share in the remainder as heirs. This holding was approved in Estate of Goldberg, (1938) 10 Cal.2d 709, 714, 76 P.2d 508, where the court further cited as authority a note in 13 A.L.R. 615, 620. In that note, at the place to which reference was thus made, appears this statement on the point: "It is held that although the circumstance that the one who is a member, or the sole member, of the class to which the limitation over is made, is the first taker, is properly to be taken into consideration in determining whether the testator has impliedly excluded such first taker from participation in the gift over, it is not, of itself, sufficient to prevent the first taker from so participating, both in cases where the first takers were a part of the members of the class [citing cases], and in cases where they were the sole members of the class [citing cases]." Further citations of cases to the same effect are made in supplements to this note, appearing in 30 A.L.R. 915, 917, and 61 A.L.R. 1011, 1014, and in other notes at 49 A.L.R. 182-183 and 127 A.L.R. 607. For an illustrative case see Brown v. Spring, (1922) 241 Mass. 565, 135 N.E. 701. Following this rule here we hold that no sufficient reason appears for excluding the estates represented by appellants from participation in the remainder interest.

[7,8] The trial court found that it was the intention of Alfred Easter to pass the trust estate on the termination of the trust to his blood relatives, and respondents now invoke the rule, declared in Estate of Hartson, (1933) 218 Cal. 536, 540, 24 P.2d 171, that "where the provisions of a will are capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred." The foundation of this rule is that the will be capable of two interpretations. We do not find that foundation present here. It is to be noted that we are dealing here with the decree of distribution, not the will, that if there should be any inconsistency between the two the decree must control, and that in construing the decree the will can be considered only for the purpose of clearing up some ambiguity, vagueness or uncertainty in the decree. (Estate of Goldberg, (1938) 10 Cal.2d 709, 713, 76 P.2d 508; Keating v. Smith, (1908) 154 Cal. 186, 191, 97 P. 300.) We find no such uncertainty, ambiguity or vagueness here when the decree is construed by the aid of the rules of interpretation already stated. The decree does not limit its benefits to those who are "of the blood" of Alfred Easter. That is a technical legal phrase, meaning, to be descended from the person referred to or from the same common stock or from a common ancestor. (11 C.J.S., Blood, p. 366.) A large part of the income of the trust here goes to Alfred's widow, and another part, in the contingency that his son Ephraim dies without issue—the contingency that in fact occurred—goes to Ephraim's widow. Neither of these beneficiaries is, in the legal sense, of the blood of Alfred, as far as appears from the record. The provision for disposition of the corpus is only that already quoted from the decree and it contains no words suggesting that the disposition of that corpus is limited to heirs who are "of the blood" of Alfred Easter. As the Supreme Court said in Estate of Watts, supra, (1918) 179 Cal. 20, 23, 175 P. 415, any such suggestion is based on mere conjecture and can have no force here.

[9] Our conclusion on the matter already discussed makes it necessary for us to consider another point. Alfred Easter declared in his will that his estate consisted largely of community property. The representative of his widow's estate offered evidence tending to show that certain specific parts of the remaining trust property were community property but this evidence was rejected on the ground that the widow had waived her right to claim any community property interest in the estate. Unless she had made such waiver and it was applicable here the evidence was clearly proper, for her right as heir would be greater in case of community property than it would in case of separate property. The statute of succession in force in 1920, referred to in the decree, was contained in the Civil Code, which then provided, so far as material here, that "upon the death of the husband one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband" (Civ.Code, sec. 1402, as originally enacted in 1872), and that in case of the husband's separate property, where he leaves a wife and more than one

child and no will, one third of such property goes to the surviving wife. (Civ. Code, sec. 1386, subd. 1, this particular provision of which had been the same since its original enactment in 1872.) The share of the community property which the wife took under this provision went to her as an heir of her husband. (Estate of Moffitt, (1908) 153 Cal. 359, 95 P. 653, 1025, 20 L.R.A.,N.S., 207.)

Annexed to the will itself was a writing signed by the widow declaring that "I hereby promise and agree that I will take under the terms of this will, which are satisfactory to me, and will not elect to take or claim any part of the estate of Alfred Easter as my share of the community property." In addition to this she signed and filed in the estate proceeding, before distribution, a paper stating that she "has elected, and does hereby elect, to take and accept the share of the property of said estate to which she would be entitled under the terms of the last will and testament of said deceased and the codicils thereto * * * and hereby waives any claim which she might make or assert in or to any of the property of said estate by reason of any community interest or share that she may have or be entitled to therein."

[10, 11] For the purposes of this decision we assume that the terms of the will and the condition of the testator's property were such as to put the widow to an election whether to take under the will or to assert her community rights and that by these papers she did make such an election. We do this without inquiry into the validity of either assumption because of our conclusion that neither of these waivers is applicable to the disposition of the corpus of the trust property after the termination of the trust. When a widow, in such cases, is put to an election, it is merely an election whether to take the provision made for her in her husband's will or to take her statutory share of the community property. If she takes under the will, her election so to do is to be strictly construed and no rights should be held to have been surrendered by it except by clear and explicit language. (Estate of Whitney, (1916) 171 Cal. 750, 756, 154 P. 855.) The papers signed by the widow here constituted a clear and explicit declaration of her intention to take the provision made for her by the will but they did not clearly, explicitly or at all waive any claim she might have as to the proper construction of the will. On this matter no election was required of her. What she waived was the right to defeat the will by claiming adversely to it the share of the community property which would go to her by law and which the husband could not dispose of otherwise by will without her consent. What her estate now claims is a right to take under the will the share of the community property pointed out by the will, that is, the share which the succession statutes of 1920 would give her as an heir. The waiver and the present claim are not inconsistent.

The portions of the order appealed from are reversed and the trial court is directed to retry and determine the issues as to what parts of the trust property remaining in the hands of the trustee were community property of Alfred Easter and his wife, Catherine Easter, and thereupon to enter an order in accordance with the conclusions stated in the opinion of this court filed herein.

SHINN, Acting P. J., concurs.

PARKER WOOD, Justice (dissenting).

I dissent. In my opinion the order of the trial court should be affirmed.

One of the appellants is the administrator of the estate of Catherine Easter, who was the widow of the testator Alfred Easter and was the one whose life determined the duration of the trust herein. Catherine was not the mother of the testator's children, and it does not appear that she had issue. Ephraim Easter, a son of the testator, and one of the beneficiaries of the trust, died without issue prior to the time his (Ephraim's) wife died. His wife died prior to the time Catherine died. The other appellant is the administrator of the estate of Ephraim. In other words, the appeals are in behalf of the heirs of the widow of the testator, and in behalf of those who would succeed to the estate of Ephraim, who apparently are the heirs of his widow. The respondents are the children and grandchildren of the testator.

The decree of 1923, made "in pursuance of and according to the provisions of the last will of said decedent," stated: "Upon the death of the said Catherine Easter, the trust hereinbefore referred to shall terminate and all of the property *then* in the hands of the trustee or in its possession or control, *shall go to and vest in* the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession of the State of California in force in the month of March, 1920, and the trustee is directed to convey, deliver and pay over all the corpus of said trust funds *then* in its possession or under its control unto such heirs in accordance with the statute of succession of the State of California in force in the month of March, 1920." (Italics added.)

The will stated: "This trust shall terminate upon the death of my said wife Catherine," and, "Upon the termination of this trust my said Trustee shall convey, deliver and pay over all the corpus of said trust fund then in its possession or under its control unto my heirs at law in accordance with the present statute of succession of the State of California."

The decree of 1923 used practically the same language, in regard to the heirs, as was used in the will. The words of the will, "heirs at law," were repeated in the decree, and although an ambiguity existed by reason of the intervening life estate as to the meaning of those words, the only part of the decree which indicated an attempt to interpret those words, or to designate in clear language whether those words meant persons who were living at the time of the death of the testator or those who were living at the time of the death of the life tenant (Catherine, his wife), were the words, "* * * the property *then* * * * *shall go to and vest in,*" preceding the words, "heirs at law."

The will did not include the words, "*shall go to and vest in,*" preceding the words, "heirs at law," or at all. The addition of those words in the decree, thereby making the statement that "the property then * * * shall go to and vest in the heirs at law," indicates that the judge who signed the 1923 decree had in mind that the passing of title to the property was to occur in the future and that title had not passed at the time of the death of the testator. It is argued by appellants, however, that the statement, "then * * * the property shall go to and vest in the heirs at law," did not mean that the property would go to and vest in the heirs in the future, but it did mean that the property had already gone to and had vested in the heirs; and that the word "property" did not mean property, but meant "enjoyment of property."

That provision of the decree, relative to the property then vesting in the heirs, was stated in common, ordinary words which are generally understood to mean precisely what was stated; namely, that the property would at a future time pass to and become the property of the heirs. If it be considered that the words, "heirs at law," in the 1923 decree, although merely repeated from the will, were used in a technical sense, owing to the fact that they were used by a judge, it is to be noted that the technical meaning of those words, under circumstances involving a precedent life estate, was favorable to the children according to the case law of this state at the time they were used. In re Winter's Estate (1896) 114 Cal. 186, 45 P. 1063; Estate of Wilson (1920) 184 Cal. 63, 193 P. 581. The matter of the Estate of Newman, 68 Cal.App. 420, 229 P. 898, decided in August, 1924, upon which appellants rely, had not been decided at the time the 1923 decree was made. It is assumed that the judge had the case law in mind at the time he made the decree, and intended that the words used by him should be interpreted in accordance with the existing case law. The 1923 decree became final, of course, without an appeal by the children of Alfred Easter, but there was nothing in the decree or the case law to indicate that the children were aggrieved by the decree and entitled to appeal therefrom, and nothing appeared otherwise to indicate that the children were aggrieved by the 1923 decree until the complex interpretation of the decree was made by the strangers in blood after the expiration of 19 years. If, however, that provision, "then * * * the property shall go to and vest in the heirs at law," was susceptible also of such an interpretation as that placed upon it by appellants through an intricate process of legal reasoning, then the decree was ambiguous and vague, and reference should be made to the will upon which the decree was based to ascertain the meaning of the decree. It was stated in the Estate of Goldberg (1938) 10 Cal.2d 709, 713, 76 P.2d 508, 510: "* * * should the language of such a decree appear to be 'uncertain, vague or ambiguous,' it is subject to judicial explanation or interpretation, and in such circumstances, the will itself may be used to establish the true meaning and intent of the decree." At the time the judge signed the 1923 decree it was not an established rule in this state that the use of the word "heirs" under similar conditions, involving an intervening life estate, meant exclusively those who were living at the time of the testator's death (and it is not such rule now), and in other jurisdictions the interpretations of that word under such circumstances were not (and are not) in harmony. At that time in some jurisdictions the rule was that words as to survivorship under such circumstances referred to the time of the testator's death only when there was no other time to which such words could refer. For these reasons, also, the decree, which did not state expressly who were intended by the use of the word "heirs," was ambiguous and vague, and it was proper to consider the will to determine the meaning of the decree.

"The paramount rule of construction is, of course, that effect must be given, if possible, to the intent of the testatrix [testator], if that intent can be ascertained." Estate of Hartson (1933) 218 Cal. 536, 539, 24 P.2d 171, 173. Alfred Easter provided in his will that his wife should have an income of $300 each month during her life, and a place in which to live without payment of rent; that if the trustee purchased a place to be used as her residence, the title thereto should not pass to her, but should be in the trust estate; that certain proportions of the income above the $300 were to be paid to his children during the life of his wife, or to the children of any deceased child by representation; that in the event of the death of his son Ephraim before Catherine's death, a proportion of the income should be paid to Ephraim's wife during Catherine's life. He also created the trust above mentioned. He provided further that no beneficiary should have the right to anticipate any of the income, or to sell, pledge or otherwise alienate the income, and that the income was donated by him for support and maintenance only. He stated also that his wife had agreed with him that the provisions in his will were for her best interests, but he stated further that if she elected to take a share of the community property then the provisions in his will for her benefit should lapse. The wife, Catherine, signed a statement at the end of the will that she promised and agreed to take under the terms of the will, which were satisfactory with her, and she would not take any part of the estate as her share of the community property.

The provision of the will that the wife should not have title to a house purchased for her indicates an intention to exclude her from the ownership of any part of the trust. The provision for payment of income to Ephraim's widow during Catherine's lifetime indicates an intention to limit the interest of his daughter-in-law to support while Catherine lived. The references in the spendthrift provisions to income only and not to the corpus, indicate that the testator did not consider any remainder should vest in the beneficiaries during the period of the trust. The references to the issue of deceased children indicate the desire of the testator as to the class who should take in the event of the death of any of his children.

Catherine was not the mother of the testator's children. She and Alfred had been married since 1896. It does not appear that she had issue or that she had any known relatives. She had agreed with Alfred, for some reason that does not appear in the record, that it was for her best interests not to claim a share of the community property but to take a substantial income and a rent-free place of abode for life. It does not seem reasonable that the testator intended, after making ample provision for her comfort during her life, to also give her, as appellants contend, a vested interest in the trust property at the time of his death and to suspend the "enjoyment" of that interest by her until after she died. Such a construction would mean that it was his intention to provide generously for her heirs by not referring to them generally or at all as her heirs, but including them as beneficiaries on the unexpressed theory that his widow, the life tenant, would be entitled to a vested interest in the trust fund at the time of his death.

The statement in the will that, "Trustee shall convey * * * the corpus of said trust fund then in its possession * * * unto my heirs at law in accordance with the present statute of succession of the State of California," was for the purpose of providing a method for determining who should receive the property, and in what proportions, upon the termination of the trust. Whether the word "heirs" in the will was used in its technical sense is to be determined from the context of the will. Appellants state that the will appears to have been drafted by an attorney and the word "heirs" was used presumably in its technical sense. Although the will in the Estate of Wilson (1920) 184 Cal. 63, 193 P. 581, was prepared by an attorney "of recognized standing and ability," the court said, at page 71 of 184 Cal., at page 584 of 193 P.: "The case is one where 'the context clearly indicates' (section 1327, Civ. Code) that the word 'heirs' was not used in the strict technical sense * * *."

As above stated, it was not an established rule in this state, when the decree was signed, that the use of the word "heirs" under similar conditions, involving an intervening life estate, meant exclusively those who were living at the time of the testator's death.

In the matter of In re Winter's Estate (1896) 114 Cal.186, page 187, 45 P. 1063, the will provided: "* * * which [referring to a ranch] I will and bequeath to my wife, Annie Winter, for the remainder of her life. Then it is to be sold, and the proceeds to be divided between my surviving brothers and sisters." Four brothers and one sister survived the testator; but two of the brothers died during the life of Annie Winter. After the death of Annie the ranch was sold and application was made for distribution of the proceeds. The heirs of the deceased brothers contended that two-fifths of the proceeds should be distributed to them. Distribution was made to the brothers and sister who survived Annie, and did not include the heirs of the two deceased brothers. On appeal the court said, on page 188 of 114 Cal., on page 1064 of 45 P., in affirming the judgment: "The solution of the question depends upon whether the survivorship mentioned in the will relates to the time of the death of the testator, or to the time when the ranch was to be sold, after the death of the widow, Annie Winter. * * *" It was said further therein, on page 189 of 114 Cal., on page 1064 of 45 P.: "The meaning of that clause of the will now under consideration seems to be plain. The widow took a life estate; at her death the ranch to be sold, and the proceeds to be divided among the surviving brothers and sisters, i.e., to the brothers and sisters *then* surviving. The exact wording of the clause is: 'To my wife, Annie Winter, for the remainder of her life. *Then* it is to be sold and the proceeds to be divided between my surviving brothers and sisters.' I do not think that can be construed to mean the brothers and sisters surviving at the time of the testator's death."

It is to be noted that the provision in the decree under consideration in this present matter, "* * * all of the property *then* * * * shall *go* to and *vest* in the heirs at law * * * and the trustee is directed to convey, deliver and pay over all the corpus * * * *then* in its possession * * *," is similar to the clause under consideration in that matter, "*then* it is to be sold and the proceeds to be divided between my surviving brothers and sisters," which the court interpreted to mean, as above shown, "brothers and sisters *then* surviving." Following that interpretation, the words in the present case, "then * * * shall go to and vest in the heirs at law," should be interpreted to mean, "*then* * * * shall go to and vest in the *then* heirs at law."

In the Estate of Wilson, supra, 184 Cal. 63, 193 P. 581, the will provided: "All the real property * * * I give and devise unto my said son, to have and to hold the same for and during the term of his life; * * * it being my intention to devise unto him a life estate * * * with remainder over at his death, to his then living children; and if he leave no issue, then upon his death, all such real property shall be distributed among my heirs, as provided by the laws of the state of California, the same as if I had died intestate." She had only one son. He died without living issue. His sole heir was his widow, who claimed all of the Wilson estate on the theory that her husband, the son of Mrs. Wilson, had succeeded to it under his mother's will. Other claimants were various nieces and nephews who survived the son. The court said, at page 67 of 184 Cal., at page 582 of 193 P.: "Statutory rules of interpretation are to be followed in so far as they aid in determining the intention of the testator, but they are all subject to the fundamental rule that the intention *as shown by the will* must prevail." The court held that the son's widow was not entitled to the distribution, and said on page 71 of 184 Cal., on page 584 of 193 P.: "* * * we think it clear that the intention was that they [the heirs] should be determined as of the date of the termination of the life estate."

In the Estate of Hartson (1933) 218 Cal. 536, 538, 24 P.2d 171, 172, the decree of distribution, made in conformance with the provisions of the will, provided that the income from a trust should be paid monthly in certain proportions to the children and a granddaughter of testatrix, and provided further that upon the death of any one of his children then the amount which should have been paid to said deceased child "shall be paid by the said trustees *to the legal heirs of her said deceased child.*" (Italics added.) One of the children died leaving his wife and a daughter. The income which would have been paid to the deceased child was then paid to his wife and his daughter. Later the widow of the deceased child died leaving two sisters as her heirs. The two sisters claimed that they were entitled to the income formerly paid to the widow, upon the theory that upon the death of the deceased child of the testatrix his interest vested under the will in his "legal heirs," which included his widow, and since the two sisters were her heirs they should receive the income. The daughter claimed the income on the theory that she was the sole surviving heir of her father, and the interest of her father (the deceased child) did not vest in his heirs upon his death but was contingent upon his heirs being alive at the time the monthly dividends were to be made. The court held that the widow's heirs were not entitled to the income, that the daughter of the deceased child was so entitled, and said at page 540 of 218 Cal., at page 173 of 24 P.2d: "* * * we must interpret the will to mean that the income is to be paid to *the heirs* of a deceased child *living at the time of the distribution* of the income. This conclusion is strengthened by the fact that under this interpretation the income is paid to *those who are of the blood* of the testatrix, and will *not go to strangers.*" (Italics added.) The court said further, on page 541 of 218 Cal., on page 173 of 24 P.2d: "To hold that the interest of the heirs of Burnell [the deceased child] vested upon his death, as contended for by appellants, *would be to do violence to the obvious intent* of the testatrix * * *." (Italics added.)

As above stated, in some jurisdictions the rule, when the decree was signed, was that words as to survivorship under similar circumstances, involving an intervening life estate, referred to the time of the testator's death only when there was no other time to which such words could refer.

In Horner's Probate Practice and Estates (1940) Vol. 3, page 445, sec. 2118, it was said, in referring to "Jarman on Wills": "Jarman says of the recent cases that the rule referring the words [as to survivorship] to the testator's death applies only where there is no other period to which the words can be referred; and that where such gift is preceded by a life estate or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only. The Illinois [Supreme] Court quotes this rule from Jarman as reasonable * * *."

In Burlet v. Burlet (1910) 246 Ill. 563, at page 566, 92 N.E. 965, 966, it was said: "The decisions in regard to determining when, in cases such as this, the survivorship is referred to the time of the death of the testator, and when to the death of the person to whom has been given an intervening interest, are not in entire harmony. The rule now prevailing, and which we follow, is that, where a gift to survivors is preceded by a life or other prior interest it takes effect in favor of those who survive the period of distribution, and those only, unless a special contrary intent is found in the will. This is the rule now generally accepted, and which we have followed and approved in Ridgeway v. Underwood, 67 Ill. 419 * * * [other cases]." The case of Burlet v. Burlet, supra, was cited with approval in Bushman v. Fraser (1926) 322 Ill. 579, at page 585, 153 N.E. 611.

In the case of the Estate of Washburn (1909) 11 Cal.App. 735, at page 741, 106 P. 415, at page 418, it was stated: "The law prefers to consider future estates as vested, but the law also seeks to effectuate the wishes of the testator, and when his desire is clearly expressed, as we think it is here, it should be carried out, *regardless of the conventional distinctions made between vested and contingent remainders,* for this is the paramount duty of the court. * * * In all cases it is the intention, expressed in the instrument creating the expectant estate, that is to govern, and, therefore, if the language employed shows an intention to postpone the vesting until the happening of a certain event it is contingent." (Italics added.)

The will in the Estate of Newman, supra, 68 Cal.App. 420, 422, 229 P. 898, 899, upon which appellant relies, stated that the trust should terminate upon the death of the survivor of his brother and 5 sisters, who were named as beneficiaries of the income of the trust, and the trustee, "shall * * * transfer to my heirs at law, wherever and whoever they may be, according to the laws of succession of the state of California, all of said trust estate." The will in that matter was executed one month prior to the testator's death. At the time of making the will he was 51 years of age and in excellent health. (He was killed accidentally.) The court said, at page 425 of 68 Cal.App., at page 900 of 229 P.: "Charles Newman was in the prime of a vigorous manhood when he made his will, and was not expecting an early and sudden passing. * * * The phrase used was a rational one, such as might be used by a person who had before him the reasonable expectancy of life that testator had when he made his will. The language of the will, it seems to us, indicates that testator * * * wished to keep the *corpus* of the property intact, and insure the payment of the income to the beneficiaries (naturally the objects of his bounty) during their lives; and that, while he may have wished to postpone the distribution of the corpus of his estate, 'beyond that,' as respondent concedes, *he was not really concerned, and 'did not care who received the remainder*, except that he wanted his legal heirs to receive the same.'" (Italics added.)

Of course, in the present case *there is no basis for a statement* that the testator *did not care* who received his estate. On the contrary, it is certain that the testator herein was concerned particularly as to the distribution after the death of his wife.

In the Estate of Newman, supra, the period designated for the duration of the trust had not elapsed, the trustee had not been appointed, and the question was whether the estate of the testator who had died one month after he made the will should be held in trust until all of the 6 beneficiaries who were to receive the income had died, presumably many years, and then distribute it to various unknown heirs or whether it should be concluded that the interests of the 6 income-beneficiaries vested when the testator died, inasmuch as the testator did not care particularly who received his estate after the death of the 6 beneficiaries.

In the present case the period designated for the duration of the trust had elapsed, after a period of approximately 18 years; the widow, whose life determined the period of the trust, had received the income ($300 each month for approximately 18 years) which she agreed to accept in lieu of community property; and it was a question whether the estate which had been held in trust for the period designated should be distributed to the persons who were the heirs of the testator at the termination of the life estate, not including the heirs of the daughter-in-law and the heirs of the widow, who were strangers; or to include them on the theory that the testator intended to vest interests in them at the time of his death.

It is to be noted that it was said in the Estate of Newman, supra, 68 Cal.App. at page 425, 229 P. at page 900, that, "Another reason assigned [as a reason for the rule the law favors the vesting of interests] is the bias of the courts in favor of heirs or next of kin, as against third persons." It therefore appears that the application in the present case of the rule that the law favors the vesting of interests would not favor the next of kin, in accordance with the reason for the rule as stated in the Estate of Newman, supra, but on the contrary would be in favor of strangers. "It is also well settled that, where the provisions of a will are capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred." Estate of Hartson, supra, 218 Cal. 536, 539, 24 P.2d 171, 173.

The trust which was to continue during the life of the widow of the testator, was created by the testator principally for the support of the widow during her lifetime. When the testator provided in his will that the property should be conveyed "to my heirs" after the death of the widow, whose life measured the duration of the trust, it is apparent that the words "*my* heirs" were not meant to include the widow or *her* heirs, or to vest in her a remainder at the time of the testator's death, and suspend the "enjoyment" of that remainder until after she had died. It is apparent also that the words "*my* heirs" were not intended to include the heirs of the widow of Ephraim.

The 1923 decree included practically the same words as were in the will and in addition thereto included, by way of interpretation, ordinary words of futurity. It would seem that the decree itself justified the order of the trial court. If the decree itself was not sufficiently clear to justify the order of the trial court, then far less was it sufficiently clear, in view of the case law when the decree was made (or the case law now), to include the appellants as distributees; therefore, under such circumstances, the decree would be vague and uncertain, and it would be proper to refer to the will to ascertain the intention of the testator. Such reference to the will under the circumstances would not violate the rule as to finality of judgments (the decree would be recognized as final, but vague), or violate the rule that the law favors the vesting of interests unless a contrary intention appears; and would give effect to the paramount rule that the obvious intention of the testator should prevail.

On Petition for Rehearing.

The respondents' petition for a rehearing is denied.

SHAW, Justice pro tem., and SHINN, Acting P. J., concur.

PARKER WOOD, J., votes for a rehearing.

SWALL v. ANDERSON et al.*

Civ. 12448.

District Court of Appeal, First District, Division 2, California.

July 26, 1943.

Rehearing Granted Aug. 25, 1943.

1. Appeal and error 🔑839(1)

On appeal from a part of a judgment not so intimately connected with remainder that reversal of part appealed from requires consideration of whole case in court below, an appellant court can review only portion appealed from.

2. Appeal and error 🔑839(1)

Where plaintiff's notice of appeal specified that she appealed only from that part of judgment disallowing treble damages, costs and disbursements, question whether judgment was erroneous because it did not run against one of the defendants could not be considered.

3. Trespass 🔑61

Proof that defendant acted willfully or maliciously is necessary in order to recover treble damages under statutes permitting treble damages for wrongful injury to trees. Code Civ.Proc. § 733; Civ. Code, § 3346.

4. Statutes 🔑227

The word "may" in ordinary statutory and judicial acceptance is permissive and not mandatory.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

5. Trespass 🔑61

The statute providing that any person who injures a tree of another is liable to owner for treble the amount of damages which "may" be assessed therefor is not a "mandatory statute". Code Civ.Proc. § 733.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

6. Appeal and error 🔑941

"Judicial discretion" means the power of trial court to decide what is just and proper under all the circumstances of the case before it.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Discretion".

7. Appeal and error 🔑946

An "abuse of judicial discretion" does not mean merely that reviewing court would have decided differently under the same circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Judicial Discretion".

8. Appeal and error 🔑946

Where trial court has exercised its best judgment upon occasion that called for it, appellate court will demand more than a nisi prius argument on merits of controversy before it will reverse determination on ground that there has been an abuse of discretion.

9. Trespass 🔑61

Where plaintiff's trees extended into highway so as to obstruct and hinder movement of house along highway by defendants and defendants deliberately damaged trees and sawed off some of limbs, refusal to allow treble damages on ground of failure to show that defendants acted "willfully" and "maliciously" was not improper. Code Civ. Proc. § 733; Civ.Code, §§ 3346, 3479, 3495.

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* For subsequent opinion see 141 P.2d 912.

See Words and Phrases, Permanent Edition, for all other definitions of "Maliciously" and "Willfully".

◆

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Ellen G. Swall against Albert Anderson and others, individually, and as copartners, doing business under the firm name and style of Anderson Bros., for damages for destruction and injury to trees. From a portion of the judgment, plaintiff appeals.

Portion of judgment appealed from affirmed.

Earl C. Berger, of Los Altos, for appellant.

Kenneth R. Malovos and Herman J. Mager, both of San Jose, for respondent.

NOURSE, Presiding Justice.

This was an action for damages for the destruction of and injuries to trees forming part of an orchard owned by the plaintiff. The damages were caused by the defendants when they moved a house along a road bordering the orchard. The complaint was framed in two counts; the first was for damages for the negligent injury to the trees and the second one sought treble damages and attorneys' fees for "deliberate" injury to the trees. The lower court gave judgment for actual damages only. This appeal is taken by plaintiff from "that part of the judgment which disallows treble damages, costs and disbursements."

Defendant Lawrence Anderson, who owns the house moving business conducted under the name of Anderson Brothers, was in Alaska at the date of the injuries to plaintiff's trees and at the date of the trial. His brother Albert Anderson, another defendant, was his employee and was directing the moving of the house at the date of the injuries complained of. Plaintiff's orchard is in Santa Clara County near the town of Mountain View. It is bordered on one side by Levin Avenue down which the defendants were moving a house. Before proceeding down Levin Avenue, Albert Anderson observed that to proceed it would be necessary to touch the bordering trees at least on one side. He chose to strike those of plaintiff which bordered the road rather than the trees on the other side which had power poles interspersed among the trees bordering the road. He stated that it was his judgment that "the house would brush by the limbs without any extensive damage to the trees." After striking the limb of the first tree and breaking it at its joinder with the trunk, he continued down the road, damaging thirty-nine trees. To facilitate the house's passage along the roadway with the least amount of damage to the trees he sawed off some limbs which he feared would break farther back and thus cause permanent damage to the trees.

With respect to the intent with which the damage was done the trial court found "That although the initial damage inflicted by defendants may have been accidental, the ensuing damage was not accidental, rather, it was incurred with the knowledge of the defendants that same would result if they continued to move the load further, which they did, and also when they used saws and other tools to remove limbs and branches, and in carrying same away from plaintiff's premises."

[1, 2] The principal question presented by the plaintiff's appeal is the scope and application of section 733 of the Code of Civil Procedure and section 3346 of the Civil Code. Although plaintiff asserts in her brief that the judgment erroneously does not run against Ellis Anderson, another defendant who was present during the house moving, and seeks to have this error corrected, "Upon an appeal from a part of a judgment or order not so intimately connected with the remainder that a reversal of the part appealed from requires a consideration of the whole case in the court below, an appellant court can review only the portion appealed from." 2 Cal.Jur. 807, Whalen v. Smith, 163 Cal. 360, 362, 125 P. 904, Ann.Cas.1913E, 1319. We can not see that there is any connection between the rights of plaintiff against Ellis Anderson and the rights of plaintiff to treble damages; therefore, we are limited in the questions to be presented on appeal by the plaintiff's notice of appeal which specified that she appealed only from that

part of the judgment disallowing "treble damages, costs and disbursements."

Section 733 of the Code of Civil Procedure reads as follows: "Trespass for cutting or carrying away trees, etc., actions for: (Treble damages). Any person who cuts down or carries off any wood or underwood, tree, or timber, or girdles or otherwise injures any tree or timber *on the land* of another person, or on the street or highway in front of any person's house, village, or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the *owner of such land, or to such city or town,* for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction." Emphasis ours.

Section 3346 of the Civil Code reads as follows: "Injuries to trees, etc. For wrongful injuries to timber, trees, or underwood *upon the land* of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment." Emphasis ours.

[3] The appellant contends that the awarding of treble damages is mandatory under these two sections of the codes. She argues that upon a showing of a wrongful injury to trees without more, it is incumbent upon the trial court to grant treble damages. Section 251 of the Practice Act, which is substantially the same as section 733 of the Code of Civil Procedure, was construed in Barnes v. Jones, 51 Cal. 303, 306. In that case it was determined that the statutory measure of damages could not be imposed in the absence of pleading and proof that the trespass causing the injury to the trees was "willful." The supreme court, in interpreting section 733, relied on Barnes v. Jones, supra, in Stewart v. Sefton, 108 Cal. 197, at page 206, 41 P. 293, at page 296, in which case the court said, "To entitle the plaintiff to treble damages, under section 733 of the Code of Civil Procedure, she must have proved her allegation that defendant willfully or maliciously removed the trees, knowing them to be the property of plaintiff." Again in Butler v. Zeiss, 63 Cal.App. 73, 218 P. 54, 55, an award of treble damages under section 733 in favor of plaintiff was affirmed on the ground that plaintiff had pleaded and proved that the defendant "wilfully and maliciously" cut down and destroyed the plaintiff's trees. From these authorities it seems clear that in this state it is necessary, in order to recover treble damages under these code sections, to prove that the defendant acted willfully or maliciously. Although the problem was not discussed, the court in Mosesian & Sons v. Danielian, 52 Cal.App.2d 387, 390, 126 P.2d 363, assumed that to entitle the plaintiff to recover treble damages under section 3346 of the Civil Code it was also necessary to prove that the defendant wrongfully and maliciously removed the trees.

The appellant next contends that, even if to recover treble damages under the code sections it is necessary to plead and prove "willfulness and maliciousness," such pleading and proof were offered in this case. She argues that the finding of the court that defendants knowingly inflicted the damage is tantamount to a finding that defendants did the acts "wilfully and maliciously" within the requirements which have been read into the statutes by the above-cited cases. She asserts that all that is required to come within those cases is a showing of malice in law, not malice in fact, and that on the facts before us it is clear that the defendants intentionally and knowingly disregarded the rights of others.

From the historical development in the above three cases, it seems clear that the words "willfully" and "maliciously" were used synonymously. Although no case has been cited, nor has our research disclosed one, that directly defines the words which have been read into the statute under consideration by the courts, we do find that the court has directly considered the problem in connection with section 3345 of the Civil Code, into which section the same requirement of willfulness has been read, and which section is comparable in purpose and scope to the section immediately before us. It should be noted that section 3345 of the Civil Code was mandatory by its use of the words "must pay * * * treble rent" and has been impliedly repealed by the amendment to section 1174 of the Code of Civil Procedure in 1907. Field v. Walton, 94 Cal.App. 596, 599, 271 P. 500. In Alden v. Mayfield, 33 Cal.App. 724, at page 727, 166 P. 382, at page 383, in reversing the trial court which refused to give the plaintiff treble rent, the court said: "Doubtless the word *'willful'* is used in different statutes with various shades of meaning, but herein the conduct of defendant in refusing to surrender possession was deliberate, intentional, and obstinate, with knowledge that the tenancy was terminated, and that he was holding over against the will and consent of the landlord. We think nothing more is required to constitute *willfulness* on the part of the tenant."

For many illustrations of the use of the term, and of the different significations attached to it, we may refer to Words and Phrases, Perm.Ed., vol. 45, page 190. The following quotation therefrom is instructive: "The word 'willfully' has various meanings, and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. When used in criminal statutes, it usually means with a malevolent purpose or motive, with a wicked or criminal intent, especially if the forbidden act is one that is wrong in itself or involves moral turpitude; but if the forbidden act is not wrong in itself, or does not involve moral turpitude, the word is then used in the sense of intentionally or purposely, so that when the act is so done it is done willfully. The word, however, should be given that meaning only which the context indicates was intended. United States v. Sioux City Stock Yards Co., C. C., 162 F. 556, 562."

It is conceded by both parties that no satisfactory interpretation of the code sections relating to treble damages for injuries to trees is to be found in our decisions. A strict construction of these sections would indicate that the right to sue for treble damages is given to the landowner where trees upon his land are cut or injured, and that the same right is given the city or town when trees are cut or injured which are on the street or highway in "front of any person's house, village, or city lot" or other public property. A liberal construction of the section would permit the landowner to sue if the damage was done to trees in front of his house or cultivated grounds. The Civil Code section limits the right to sue to recover for injuries to trees "upon the land" of another. At the time these sections were enacted, in 1872, section 2633 of the Political Code was enacted reading, in part: "Any owner or occupant of land adjoining a highway * * * may plant trees on the side contiguous to his land * * * not more than six feet from the boundary of the highway * * * Whoever injures any of them is liable to the owner * * * for the damage which is thereby sustained, and is guilty of a misdemeanor." At the same time section 2755 of the Political Code was enacted reading: "Whoever digs up, cuts down, or otherwise injures or destroys any shade or ornamental tree planted and standing on any highway forfeits twenty-five dollars for each such tree, and is guilty of a misdemeanor." In 1883 the latter section was repealed and reenacted in section 2742 omitting the permission to the landowner to plant within the boundaries of the highway and this section was, in turn, carried into section 1495 of the Streets and Highways Code in the codification of 1935, St.1935, p. 339. This section reads: "Any person who maliciously digs up, cuts down, injures or destroys any shade or ornamental tree on any county highway, unless such tree is considered an obstruction by the road commissioner and is removed under his direction, is liable to a penalty of one hundred dollars, recoverable as provided in section 1496, for each such tree." It will be noted that the original section 2755, taken with section 2756, gave the right of action to the public to recover the penalties for injuries to the trees and made the offending party guilty of a misdemeanor. The latter provision was eliminated when the section was re-numbered 2742 in 1883 (Stats.1883 p. 19); but at the same time the word "maliciously" was added, so that malicious or wilful injury was an element in an action to recover the penalties, as in the former section wilful intent would be necessary in a criminal charge of misdemeanor.

Reading these sections all together as they were enacted in 1872, as we are required to do to determine the legislative intent at that time, we find that the landowner was given special permission to plant ornamental and shade trees within the boundaries of the public highways, but that, for any injury to such trees, the public was given the right to sue the wrongdoer for penalties, and to prosecute for a misdemeanor. (The amended statutes were held applicable to fruit, as well as shade and ornamental trees, in County of Santa Barbara v. More, 175 Cal. 6, 12, 164 P. 895, L.R.A.1917E, 385.) Then, in the Civil Code section, the owner of the land was given the right to sue for treble damages for injuries to his trees "upon the land," and in section 733 of the Code of Civil Procedure the "owner of such land" was given the same right as to injuries to "any tree or timber on the land," and the city or town was given the same right when the tree injured is "on the street or highway in front of any person's house, village, or city lot." But it is clear that none of the sections covered a situation such as we have here, where the trees base wholly upon the private lands of the owner and their branches extend over the travelled portion of a county highway. It cannot be disputed that if trees planted in this manner are permitted to extend over and into the public highway they may create both a public and a private nuisance in so far as they obstruct the free public use of the highway. Section 3479 of the Civil Code defines a nuisance as "Anything which * * * unlawfully obstructs the free passage or use, * * * of any * * * public park, square, street, or highway * * *." Section 3495 provides that: "Any person may abate a public nuisance which is specially injurious to him by removing * * * the thing * * * without committing a breach of the peace."

Hence, when the defendants found themselves in the predicament where their forward progress was blocked by the overhanging branches and a retreat would block the traffic upon the main state highway, they were put to their election to determine whether the general laws relating to abatement of nuisances would prevail over the special laws relating to the rights of the landowner in the portion of his trees which extended over and obstructed the free use of the highway. Since this is a question which our courts have not determined, the layman should not be charged with malice if he determined that the general rules relating to nuisances prevailed. This is the purport of the opinion of the trial judge preceding the signing of the findings. In denying treble damages because of the failure to show malice or wilfullness the trial judge said:

"I am of opinion in that the facts of this case do not justify a trebling of damages. The first damage was accidental—a negligent accident, perhaps; but still unintended and without malice or expectation of wrongdoing.

"The damage next following was the result of an awkward attempt to repair part of the first damage. And finally the succeeding damage was caused by poor judgment in endeavoring to escape from the difficult situation which had then developed."

It should be noted that the complaint did not allege malice nor wilfullness, but alleged that the defendants "did deliberately damage the trees, limbs, branches, leaves and fruit of said plaintiff * * *." The proof was in accord with these allegations, and, if we may treat the code sections as penal in purpose and effect, there is a want of pleading and proof of "a malevolent purpose or motive, with a wicked or criminal intent." United States v. Sioux City Stock Yards Co., supra [162 F. 562].

[4, 5] But, assuming that the code sections should be given the liberal construction for which the appellant contends, we are still confronted with the question whether they are mandatory so that the court must award treble damages in every case of deliberate injury to trees. Section 733 of the Code of Civil Procedure appears in Chapter II, which is entitled "Actions for Nuisance, Waste, and Willful Trespass, in Certain Cases, on Real Property". Several sections of the chapter clearly make it discretionary with the trial court whether treble damages should be awarded. Section 732, relating to waste, and section 735, relating to forcible entry, were enacted at the same time as section 733, and no reason has been advanced calling for a different interpretation. The language of section 733 is that the offending party "is liable" for treble damages "which *may* be assessed." Section 3346 of the Civil Code appears in Article III, which is entitled: "Penal Damages." All the other sections of that Article contain the mandatory language "must pay." The word "may" in ordinary statutory and judicial acceptance is permissive and not mandatory. When we examine all these statutes of 1872 which have hereinabove been noted, particularly those enacted to the same purpose but calling for criminal prosecution for a misdemeanor, we can find no reason of policy or principal which would require us to hold that this particular section was intended to be mandatory.

[6-8] If we are correct in this conclusion the only question remaining is whether the trial court abused its discretion when it denied the imposition of treble damages. When we speak of judicial discretion we refer to the power of the trial court to

decide what is just and proper under all the circumstances of the case before it. When we speak of an abuse of judicial discretion we do not mean merely that we would have decided differently under the same state of circumstances, but we give to the trial court the benefit of the presumption that official duty has been regularly performed—that the trial court has acted fairly and with sound judgment in the light of all the circumstances before it. Chief Justice Marshall said, in Osborn v. Bank of United States, 22 U.S. 738, 866, 9 Wheat. 738, 866, 6 L.Ed. 204: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it." When a trial court has thus acted, exercising its best judgment upon the occasion that calls for it, the appellate court will demand more than a nisi prius argument on the merits of the controversy before it will say that such discretion has been abused.

[9] Here the undisputed evidence is that the branches of appellant's trees extended six feet or more into the highway proper, that, though they did not interfere with the ordinary traffic of passenger automobiles upon the center pavement, they were an obstruction and hindrance to the passage of large trucks and similar vehicles. These facts were pleaded as a defense and the evidence would have supported a finding favorable to respondents. Though we do not hold that, under these particular circumstances, they had the legal right to remove such obstructions, since none of our decisions have clearly determined the question, we do say that these circumstances add support to the conclusion of the trial court that respondents should not be penalized by the addition of treble damages because they may have incorrectly judged their legal rights and responsibilities under the circumstances.

This disposes of the appeal from that portion of the judgment denying appellant's recovery of attorney's fees.

The portions of the judgment appealed from are affirmed.

SPENCE, J., and DOOLING, J., pro tem., concur.

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60 Cal.App.2d 214

PEOPLE v. WEISKOPF.

Cr. 3711.

District Court of Appeal, Second District,
Division 3, California.
Aug. 11, 1943.

1. Criminal law 🔑1023(12)

An order denying motion in arrest of judgment on conviction of crime is not appealable. Pen.Code, § 1237.

2. Criminal law 🔑1134(8)

The sufficiency of information cannot be considered on appeal from order denying defendant's motion for new trial after conviction of crime charged.

3. Indictment and information 🔑110(15)

Information charging in terms of statute the making and uttering of forged affidavits of birth of two males 36 and 41 years of age with intent to defraud named corporations one of which was engaged in defense work was sufficient to charge a public offense, where affidavits were made at a time when and in county where such proof of United States citizenship was in great demand by applicants for employment in defense work.

4. Criminal law 🔑1178

Points, concisely stated without argument on less than one page at end of appellant's brief, as to insufficiency of evidence to support conviction of crime, need not be considered on appeal from order denying motion for new trial.

5. Criminal law 🔑1168(1)

In prosecution for forging and uttering birth affidavits, absence of evidence that purported corporation, referred to in evidence as employer of witness whose affidavit was forged, was in fact a corporation, was immaterial.

6. Forgery 🔑44, 44(3)

In prosecution for forging and uttering birth affidavits, no evidence showing how persons and corporations mentioned in information could be defrauded by such instruments was necessary, as they could be used as means of fraud.

7. Forgery 🔑44, 44(3)

In prosecution for forging and uttering birth affidavits, evidence that defendant uttered one affidavit with knowledge that it was not signed or authorized by named affiant, who was dead at time of signature, was sufficient to support conviction.

8. Forgery ⚷44(2)

In prosecution for forging and uttering birth affidavits, the jury, having before them a proven specimen of defendant's genuine handwriting, were authorized to make their own comparison thereof with that appearing on one of affidavits, though handwriting expert testified that he had no opinion as to whether defendant wrote signature and her own name as notary on affidavit. Code Civ.Proc. § 1944.

9. Criminal law ⚷1144(13)

In prosecution for forging and uttering birth affidavit, where exhibits are not brought up in record on appeal from order denying defendant's motion for new trial after conviction, appellate court must presume that comparison of signature of affiant's name with proven specimen of defendant's genuine handwriting before jury shows identity of handwriting on the two papers and thus support jury's finding of defendant's guilt. Code Civ.Proc. § 1944.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Ethel Weiskopf, alias Ethel Parker, was convicted of forging and uttering two birth affidavits, and from orders denying her motions in arrest of judgment and for new trial she appeals.

Appeal from order denying motion in arrest of judgment dismissed, and order denying new trial affirmed.

Donald MacKay, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, Justice pro tem.

[1] The defendant was charged by the amended information herein in four counts with the forging and uttering of four affidavits of birth relating to certain named persons. Copies of these affidavits were set forth in the information. She was found guilty on two of these counts and acquitted on the other two. She then made a motion in arrest of judgment and a motion for new trial, both of which were denied. She was placed on probation without the rendition of any judgment against her. She appeals from the orders denying her motions above mentioned. The order denying her motion in arrest of judgment is not appealable (Pen.Code, sec. 1237), so the appeal therefrom must be dismissed.

[2, 3] On appeal she presents but two points: first, that the counts of the information on which she was convicted state no public offense because the affidavits set forth therein are not such writings as can be the subjects of forgery; and second, that the evidence is insufficient to support her conviction on either count.

The first point, as to the sufficiency of the information, cannot be considered on appeal from an order denying a new trial. (People v. Lovlee, (1939) 35 Cal.App.2d 554, 96 P.2d 177; People v. Duncan, (1942) 50 Cal.App.2d 184, 186, 122 P.2d 587; People v. Darcy, (1943) Cal.App., 139 P.2d 118.) Assuming that the question whether the affidavits are such instruments as will support a charge of forgery may be raised under defendant's second point, insufficiency of the evidence, we have already decided it adversely to her. After defendant's conviction a writ of habeas corpus was issued in her behalf by this court, on the hearing of which the question presented was the sufficiency of these identical counts of the information to state a public offense, it being contended in behalf of the petitioner there that the affidavits set forth in the information were not instruments, the fabrication of which would constitute forgery. We held the information sufficient under the rule which governs in habeas corpus proceedings, and also expressed the opinion, which was perhaps obiter dictum there, that it would also be sufficient under the somewhat more liberal rule as to the scrutiny of defects which prevails on appeal, (In re Parker, (1943) Cal.App., 134 P.2d 302.) The difference in name is due to the fact that defendant was first prosecuted under the name of Parker, but later stated her true name to be Weiskopf. That opinion we now adopt as expressing our views on this appeal. Since the nature of the papers forged and the reasons for our decision that they support the charge are fully set forth in that opinion, we do not repeat them here.

[4,5] On less than one page at the end of her brief, defendant states, very concisely and without argument, eight points of insufficiency of the evidence. These "points" might do for specifications of insufficiency of the evidence in a bill of exceptions but they are of no assistance to an appellate court looking for evidence bearing on these matters. We might very well pass them without consideration. (People v. Purcell, (1937) 22 Cal.App.2d 126, 129, 70 P.2d 706.) Most of them appear to be unimportant. The sufficiency of the evidence to show that defendant did falsely make and utter the instrument set forth in Count I of the information with intent to defraud is not attacked. It is complained that there is no evidence that California Shipbuilding Corporation, which was to be defrauded, according to the information, is in fact a corporation. However, it was referred to in the evidence as employer of the witness whose affidavit of birth was forged, and a variance as to its status as corporation or other form of organization would be immaterial.

[6] As to each affidavit it is objected that there was no evidence showing how the persons and corporations mentioned in the information could be defrauded by the instruments forged. These instruments could be used as a means of fraud and no further showing in that respect was necessary. (In re Parker, supra, Cal.App., 134 P.2d 302.)

[7-9] Count III alleges the forgery of the name of "Jose Riso" as affiant to an affidavit of birth, and defendant now says that there is no evidence that there was such a person or that defendant did not have authority to sign his name to the affidavit, or that she did sign it. The information indicates that the spelling "Riso" in this name is a typographical error for "Rios," for it shows this name is supposed to be that of the father of Edward B. Rios. The evidence confirms this, showing clearly that Edward B. Rios went to defendant to obtain an affidavit of his birth and told her that his father's name was "Jose Rios." Later he received this affidavit by mail. Obviously the intention of whoever prepared the affidavit which was alleged in Count III and produced in evidence was to use the name "Jose Rios." Edward B. Rios testified that the signature to it was not that of his father and that the latter had been dead six years. There is no direct evidence that defendant herself wrote the name, but if she did write it she could not have been authorized to do so by Jose Rios, who was dead, and if she did not write it she must have known that it was not signed or authorized by him. If she uttered the paper with this knowledge, the offense charged, which includes uttering, is sufficiently shown. While plaintiff's handwriting expert testified that he had no opinion whether defendant wrote this signature and her own name as notary appearing on the affidavit, the jury had before them a proven specimen of defendant's genuine handwriting, and were authorized to make their own comparison of this handwriting with that appearing on the affidavit. (Code Civ.Proc. sec. 1944; In re Estate of Johnson, (1927) 200 Cal. 299, 304, 252 P. 1049; People v. Storke, (1900) 128 Cal. 486, 60 P. 1090; Castor v. Bernstein, (1906) 2 Cal.App. 703, 84 P. 244.) The exhibits have not been brought up in the record, so we cannot say from inspection what the result of such a comparison might be; we must, therefore, presume that it shows identity of handwriting on the two papers and thus supports the jury's finding.

The appeal from the order denying the motion in arrest of judgment is dismissed. The order denying a new trial is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

60 Cal.App.2d 207

TELANDER v. TELANDER et al.

Civ. 14108.

District Court of Appeal, Second District, Division 1, California.

Aug. 11, 1943.

Hearing Denied Oct. 7, 1943.

1. Attorney and client ⚷75(1)

Under statute, in absence of any relation of attorney to subject matter of the action, aside from that arising out of his employment, the client possesses right to change attorneys at any stage of the action. Code Civ.Proc. § 284.

2. Attorney and client ⚷76(1)

The plenary power of a client to discharge his attorney does not exist where attorney has an interest in the subject matter of the litigation, aside from that arising out of his employment. Code Civ.Proc. § 284.

3. Appeal and error ⚷151(3)

Wife's attorney had no interest in subject-matter of separate maintenance action, or in a contingent fee for services performed therein, aside from that arising out of his employment, and hence attorney was not an "aggrieved party" entitled to appeal from orders denying attorney's motion for an order determining his compensation, and granting wife's motion for a substitution of attorneys. Code Civ.Proc. §§ 284, 938; Civ.Code, § 137.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

* * *

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Mary M. Telander against Tell Munson Telander for separate maintenance. From an order denying his motion for an order determining compensation to be paid him for professional services which he as an attorney allegedly rendered to plaintiff in the action, and from a further order granting plaintiff's motion for a substitution of attorneys, William Ellis Lady appeals. On motion to dismiss appeal.

Appeal dismissed.

William Ellis Lady, of Los Angeles, for appellant.

Charles M. Johnson, of Los Angeles, for respondent.

WHITE, Justice.

This is a motion by respondent Tell Munson Telander to dismiss an appeal taken by appellant William Ellis Lady from an order of the superior court of Los Angeles County made December 21, 1942, denying his motion for an order fixing and determining compensation to be paid him for professional services which he as an attorney allegedly rendered to plaintiff in this action, and from the further order of the court granting the motion of plaintiff Mary M. Telander for a substitution of attorneys.

As grounds for his motion respondent urges: (1) That the orders appealed from herein are not appealable orders as contemplated by subdivisions 1 or 2 of section 963 of the Code of Civil Procedure. (2) That the appellant is not an aggrieved party as contemplated by section 938 of the Code of Civil Procedure. (3) That the appellant has no interest in the subject matter of this action or in a contingent fee as contemplated by section 284 of the Code of Civil Procedure or otherwise. (4) That no "final judgment" has been rendered in this action requiring any affirmative act on the part of appellant or otherwise entitling him to bring this appeal. (5) That appellant and respondents stipulated in open court below that the balance of attorneys' fees, if any (over and above an allowance made by order of court on August 6, 1942), should be fixed and determined at the time of the trial of the above entitled action. (6) That no trial of said action has been had.

Briefly, the factual background here present may be thus epitomized: Prior to July 27, 1942, plaintiff Mary M. Telander employed appellant William Ellis Lady, who is an attorney at law, to institute an action against her husband, defendant herein, for separate maintenance. We think it may fairly be stated that the record shows that attorney Lady's agreement with his client was that he was to obtain his compensation from the defendant husband through appropriate orders to be made by the court in the separate maintenance action. In any event, after the action was commenced, and upon hearing following issuance of an order to show cause re alimony pendente lite and attorney's fees, the court made its order directing defendant husband to pay plaintiff's counsel, appellant herein, the sum of $250 attorney's fees and $50 costs. The order further provided "by stipulation the balance, if any, to be fixed at the time of trial". Pursuant to the terms of such order, the amounts named therein were paid by defendant husband to appellant. Subsequently the latter's client effected a reconciliation with her husband and they entered into an agreement settling and determining their respective property rights. Following such reconciliation plaintiff wife requested appellant, as her attorney, to dismiss the separate maintenance action. This appellant refused to do, contending that he was entitled to additional fees for further services allegedly rendered by him in the separate maintenance action as well as in the preparation of the property settlement agreement. Plaintiff wife then engaged the services of another attorney and served upon appellant a notice of motion to substitute such other attorney in place of appellant, pursuant to the provisions of subdivision 2, section 284 of the Code of Civil Procedure. Appellant thereupon served upon both plaintiff wife and and defendant husband a notice that he would move the court for an order directing defendant husband to pay him further compensation in addition to the $250 received pursuant to the former court order. Both of the last mentioned motions came on for hearing, following which the court made its order denying appellant Lady's motion for additional fees and granting the motion to substitute appellant out of the case as attorney for plaintiff therein.

Because of our belief that it is determinative of this appeal, we shall first give consideration to respondent's claim that appellant has no interest in the subject matter of the separate maintenance action, or in a contingent fee as contemplated by section 284 of the Code of Civil Procedure; is therefore, not an aggrieved party within the purview of section 938 of the Code of Civil Procedure and consequently is not entitled to appeal from the orders made in the action.

[1] Regardless of what the rule may be in other jurisdictions, it is the settled rule in this state that under the provisions of section 284 of the Code of Civil Procedure, in the absence of any relation of the attorney to the subject matter of the action, aside from that arising out of his employment the client possesses the right to change attorneys at any stage in the action. The client's interest in the successful and satisfactory prosecution or defense of his cause is paramount to that of the attorney. The former is within his rights in seeking to dissolve the relationship of attorney and client whenever his confidence in either the integrity or the judgment of the attorney ceases. Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581. In the case of Woodbury v. Nevada Ry. Co., 121 Cal. 165, 53 P. 450, 451, it was said: "The right of a party to change his attorney of record is conferred by section 284, Code Civ.Proc., and it is only necessary for him to prefer his request for such change in order to justify the court in making an order therefor". See, also, Echlin v. Superior Court, 13 Cal.2d 368, 372, 90 P.2d 63, 124 A.L.R. 719, in which it was held that the right of a client to change attorneys with or without cause has been characterized as "universal".

[2, 3] Appellant, however, relies upon the well recognized exception to the foregoing rule which provides that the plenary power of a client to discharge his attorney does not exist where the attorney has an interest in the subject matter of the litigation (O'Connell v. Superior Court, 2 Cal. 2d 418, 421, 41 P.2d 334, 97 A.L.R. 918), but the exception does not apply when the relation of the attorney to the subject matter arises from his employment. We think it must be held in the instant case that whatever relation appellant had to the subject matter of the litigation arose solely and alone from and out of his employment. Appellant contends that by the adoption in 1937 of section 137.5 of the Civil Code the attorney was invested with an interest in the subject matter of the litigation when it was provided in said section that in actions of the character here involved the court was empowered to make the attorney's fees allowed payable direct to the attorney. However, we are impressed that whatever "interest" in the subject matter of the litigation was conferred upon the attorney by section 137.5 of the Civil Code, such interest was one that "arises from his employment" and consequently does not impair the rule long recognized in this state that a client may at any time change his attorney in an action. O'Connell v. Superior Court, supra.

The case of McManus v. Montgomery, 12 Cal.2d 397, 84 P.2d 787, relied upon by appellant, does not aid him because in that case the attorneys were not wrongfully discharged but withdrew from the case after preparing findings but before the filing of such findings and judgment, and with full knowledge that their client was without funds with which to pay their fees; and the court upon application of the attorneys provided for their fees up to the time of entry of judgment. The case of Neblett v. Getty, 20 Cal.App.2d 65, 66 P.2d 473, because of the similarity of facts with the case at bar, is controlling herein.

By reason of the foregoing it follows that the appeal herein should be dismissed. It is so ordered.

YORK, P.J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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60 Cal.App.2d 169

COLLIER et al. v. LOS ANGELES RY. CO. et al.

Civ. 14010.

District Court of Appeal, Second District, Division 1, California.

Aug. 9, 1943.

1. Trial 🔑139(1)

Before evidence can be disregarded as inherently improbable, there must exist a physical impossibility of evidence being true or its falsity must be apparent without any resort to inference or deduction.

2. Trial 🔑139(1)

In action for death of motorist, injured in collision with street car, physical facts did not render inherently improbable testimony of motorman and corroborating witnesses regarding manner in which accident occurred.

3. Street railroads 🔑114(21)

In action for death of motorist fatally injured in collision with street car, evidence that motorist did not stop at stop sign, but entered intersection at excessive speed and struck street car with such force as to cause derailment, warranted jury's finding that proximate cause of accident was motorist's negligence.

4. Appeal and error 🔑1001(1)

Appellate court cannot disturb finding of jury supported by substantial evidence

5. Street railroads 🔑101

In action for death of motorist fatally injured in collision with street car, finding, sustained by substantial evidence, that motorist was contributorily negligent, supported verdict for carrier and operator of street car even if motorman violated city ordinance regulating speed of street cars.

6. Trial 🔑296(7)

In action for death of motorist fatally injured in collision with street car, even if giving of instruction on presumption of due care insofar as it applied to motorman was error, the error was not prejudicial where jury was told in plain and unequivocal language that presumption would only support finding in absence of evidence to contrary. Code Civ.Proc. § 1963, subds. 1, 4.

7. Street railroads 🔑98(8)

A railway track is a sign of danger, and it is duty of one about to cross it to use his faculties of sight and hearing to apprise himself as to whether cars are approaching.

8. Street railroads 🔑118(13)

In action for death of motorist fatally injured in collision with street car, it was proper for court to instruct jury regarding obligation resting on motorist to look and listen as he approached street car tracks.

9. Appeal and error 🔑999(3)

Where verdict could have been based on lack of negligence on part of defendant as well as on contributory negligence of deceased, appellate court would not look behind verdict in an attempt to ascertain theory adopted by jury.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Nancy M. Collier and Sally E. Collier, by their guardian ad litem, Elizabeth Collier, and Elizabeth Collier, individually and as executrix of Leon Collier, deceased, against Los Angeles Railway Company and others for death of Leon Collier. Judgment for defendants, and plaintiffs appeal.

Affirmed.

A. J. O'Connor, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondents.

WHITE, Justice.

This action was instituted by the surviving spouse and two minor children of Leon Collier to recover damages for the claimed wrongful death of the latter which it was alleged resulted from negligence upon the part of defendants. By their answer defendants denied any negligence and by way of a further and separate defense charged that decedent himself was guilty of contributory negligence. Trial was had before a jury resulting in a verdict for the defendants. From the judgment entered thereon plaintiffs prosecute this appeal.

The accident out of which this litigation arose occurred about midnight on December 13, 1940, and involved a collision between a street car of defendant railway company and an automobile driven by the decedent husband and father of plaintiffs. The accident happened at the intersection of First and Anderson Streets in the city of Los Angeles.

While conceding that the evidence was in sharp conflict as to the issue of decedent's contributory negligence, appellants contend that the physical facts shown in evidence are consistent only with the conclusion that the sole, proximate cause of the fatal accident was the speed at which the street car was operated by defendant motorman. In epitomizing the factual background of this litigation, we shall therefore state not only the facts which tend to support the verdict rendered but shall also set forth the facts relied upon by appellants. Narrated in that form, we feel it may fairly be stated that the record discloses that First Street, in the area here involved and particularly at the intersection of Anderson Street, is protected by boulevard stop signs which require vehicles entering First Street from either the north or south on Anderson Street to come to a stop before making such entry. The street car here involved was of the modern type commonly known as the "streamliner P.C.C.", equipped with four 55-horsepower motors and weighing 36,000 pounds and equipped with three sets of brakes, viz., air, mechanical and electric. The street car was 46 feet in length. According to the testimony of the motorman, as he approached Anderson Street he had attained a speed of approximately 20 miles an hour, the bell was ringing and the headlight and the night lights were burning. At a point some 30 to 40 feet west of Anderson Street, the motorman first observed the lights of the deceased's automobile, which was then more than a half a block away, approaching from the south. When the street car reached the curb line of Anderson Street, the motorman observed the automobile was about 100 feet south of First Street, and according to his estimate, was traveling at approximately 65 miles an hour.

He immediately applied his brakes in full emergency; i.e., the air, mechanical and electric brakes, but the automobile without diminishing its speed and without making the boulevard stop, continued north and violently collided with the right front portion of the street car, causing the latter to be immediately derailed. According to the motorman's testimony, from the time he was first able to estimate the position and speed of the automobile, he had but 20 feet within which to stop. The testimony of the motorman was corroborated by two witnesses who were passengers on the street car. One of them testified that he first saw the automobile as the street car was entering the intersection, at which time the former was 20 to 30 feet south of the boulevard stop line and that the automobile did not make the boulevard stop. He corroborated the motorman's testimony that the bell on the street car was sounded as it approached the intersection; that the right front doors of the street car were damaged in the collision so that they could not be opened after the impact, and also as to the application of the brakes on the street car prior to the collision. The other witness testified that the automobile was past the boulevard stop sign when he first observed it, at which time it was traveling at a rate of speed which he estimated to be between 25 and 30 miles per hour. This witness also testified that the bell was rung as the street car approached the intersection and that the brakes were applied before the impact. There was also testimony given by the chemist for the coroner's office of Los Angeles County and by Dr. Louis J. Gogal, autopsy surgeon in the Los Angeles County Coroner's office, that on the day following the death of decedent an examination of his blood showed that the same contained .09 or 1/100ths of 1% ethanol, or grain alcohol, and that at the time of the accident such content amounted to "perhaps about .10, or slightly over that", and that the percentage of this ethanol, or grain alcohol, "indicated that the man was under the influence of alcohol; that is, there was present so much alcohol in his blood, while he would not have reached the point we consider as acute intoxication. If you take a large amount in the average man, which has been stated to be .15 percent, he would be under the influence of alcohol". It should be noted that on cross-examination the doctor testified "I don't think that the average person is actually intoxicated at .09" and when asked:

"Q. And Doctor, as a scientific medical man, before you passed an opinion on whether or not an individual was under the influence, with a finding of .09, you would want to know something else about the person, wouldn't you? A. Well, not necessarily; if we go by practice and tests that have been made and cases reported, .09 or .10 is sufficient alcohol in the blood to indicate that there are certain re-action changes in the average person that would take place. It is true that there are differences in people's re-action to alcohol; that would depend somewhat upon the aspect of tolerance, but in certain situations and with certain tests, the average person, with a presence of .09 or .10, would be definitely impaired in his reactions in a certain sense and would be considered as under the influence of alcohol to a certain degree".

The only testimony contrary to the foregoing was that given by a witness produced by the plaintiffs who testified that deceased did observe and make the boulevard stop; that "The street car hit the left side of the automobile about amidship". Appellants in their brief contend that this witness testified that the street car was going about 55 miles per hour at the time of the collision while the automobile was traveling about 8 or 10 miles per hour. However, an examination of the record indicates that for good and sufficient reasons the testimony given as to the speed of the street car was stricken out by the trial court.

[1-5] Appellants contend that certain physical facts such as photographic evidence that the street car ran into the left side of the automobile, coupled with the fact that it was shown that the street car traveled 135 feet from the point of impact, brushed a telephone pole, hurdled the north curb and side walk on the north side of First Street and came to rest leaning against a telephone pole; that the front of the street car was facing in a northeasterly direction while the automobile was facing southwesterly, parallel with the street car, all indicate that the street car ran into the left side of the automobile. In connection with appellants' implied claim that certain physical facts tend to render inherently improbable the testimony of the motorman and witnesses corroborating him as to the contributory negligence of the decedent and the manner in which the accident occurred, we are not greatly impressed with these arguments for as was said in Nagamatsu v. Roher, 10 Cal.App.2d 752, 755, 756, 53 P.2d 174, 175: "As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element. * * * 'perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred'." In any event before evidence can be disregarded as inherently improbable there must exist a physical impossibility of the evidence being true, or its falsity must be apparent without any resort to inferences or deductions. Arundel v. Turk, 16 Cal.App.2d 293, 295, 296, 297, 60 P.2d 486. No such showing appears in the case at bar. Since the record discloses substantial testimony to warrant the jury in finding that the proximate cause of the accident was the undoubted negligence of the decedent, we are not authorized to disturb such finding, and manifestly such a finding, sustained as it is by the evidence as to the contributory negligence of the decedent, supports the verdict in favor of the defendants even though it be conceded that the motorman was guilty of a violation of a city ordinance regulating the speed of street cars.

Appellants, however, contend that in the giving of certain instructions and the refusal to give other proffered by them, the court fell into error which militated prejudicially against their substantial rights. In this connection it is asserted that appellants were entitled to have the jury instructed that at the time here in question decedent obeyed the law and exercised due care for his own safety. Subdivisions 1 and 4, section 1963, Code of Civil Procedure. While it is true that the court declined to give the instruction offered by appellants upon this subject, nevertheless of its own motion the court instructed the jury as follows: "At the outset of this trial, each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumption, to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof".

[6] Appellants, however, contend that the instruction given by the court was erroneous because by it the presumption of due care was made applicable not only to the decedent but as well to the motorman operating the street car. This claim is grounded on appellants' contention that "negligence and proximate causation were clearly established against defendants * * * the motorman had admitted his negligence before the jury * * *"; that proof of such negligence being wholly irreconcilable with the presumption in question, the latter was dispelled and disappeared from the case. Mar Shee v. Maryland Assur. Corp. 190 Cal. 1, 9, 210 P. 269. Conceding that the giving of the instruction, insofar as it applied to defendant motorman, was error, we are not impressed that it was a prejudicial error. The jury was told in plain and unequivocal language that while the presumption was a form of prima facie evidence, it would only support findings in accordance therewith "in the absence of evidence to the contrary"; that it was the duty of the jury to weigh any such contrary evidence against the presumption as well as any evidence that might support it, and "to determine which, if either, preponderates". The jury heard the evidence produced by each party for or against the guilt or innocence of each party mentioned in the instruction, according to the respective contentions of each, and we must assume from the language of the instruction that each juror understood the limitations placed upon the application of the presumption and that its force was dissipated by satisfactory "evidence to the contrary". If we adopt appellants' claim with reference to what the evidence showed as to negligence on the part of the motorman, it can only be said that the effect of giving the instruction was merely to instruct on a subject that was not present in the trial of this action. It could not have been prejudicial. Medeiros v. Soares, 17 Cal. App.2d 176, 178, 61 P.2d 501; Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 295, 297, 77 P.2d 530. Two additional instructions dealing with the aforesaid presumption, and the limitations applicable thereto, one requested by appellants and the other by respondents, were also given by the court.

Finally, appellants charge error upon the part of the trial court in giving the following instruction to the jury: "General human experience supports the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence, or the person was negligently inattentive."

[7, 8] In their attack upon this instruction appellants urge that there was no evidence, direct or indirect, that the decedent looked and failed to see the street car or listened and did not hear it. It will, of course, never be known whether the deceased actually did look or listen, but it must be conceded that it was his duty to do so, for to say nothing of the boulevard stop which decedent was required by law to make, and of the fact that he failed to make it, there is creditable evidence, a railway track is in and of itself a sign of danger, and it is the duty of one about to cross it to utilize his faculties of sight and hearing in order to apprise himself as to whether cars are approaching. Badostain v. Pacific E. R. Co., 83 Cal.App. 290, 295, 256 P. 576. It was therefore proper for the court to instruct the jury as to the obligation resting upon decedent to look and listen as he approached the tracks because if he did look he undoubtedly saw the street car for, undeniably, it was approaching the intersection, and if he did look, saw the car and attempted to cross immediately in front of it in violation of the dictates of ordinary prudence and care, he was negligent. And if he looked and listened but failed to see or hear the on-

coming street car, he was equally guilty of negligence. There was substantial evidence in the instant case to justify a conclusion on the part of the jury that the deceased either did not look and did not listen (or he must have seen or heard the approaching street car), or that, if he did look and did listen, he looked with unseeing eyes and listened with unhearing ears. Manifestly, under no reasonable construction of the evidence could appellants have been prejudiced by the challenged instruction.

[9] Furthermore, from a reading of the transcript of the evidence herein, we are impressed with the fact that the verdict of the jury could as well have been based upon an entire lack of negligence upon the part of the defendants as upon the contributory negligence of the deceased. When such a situation is presented, an appellate tribunal will not look behind the verdict in an attempt to ascertain the theory adopted by the jury. Schultheiss v. Los Angeles Ry. Corp., 11 Cal.App.2d 525, 528, 54 P.2d 49.

From the foregoing it follows that the judgment should be affirmed, and it is so ordered.

YORK, P. J., and DORAN, J., concur.

59 Cal.App.2d 730

KAUFFMAN v. MEYBERG et al.

SAME v. LEON, Inc., et al.

Civ. 14023, 14024.

District Court of Appeal, Second District,
Division 2, California.
July 22, 1943.

Rehearing Denied Aug. 10, 1943.
Hearing Denied Sept. 15, 1943.

1. Appeal and error 🔑801(4)

Where determination of motion to dismiss appeal required such familiarity with merits of entire cause that court could readily determine merits of appeal, motion to dismiss was denied.

2. Corporations 🔑171

Evidence sustained finding that brother owned half of entire issue of capital stock of corporation.

3. Corporations 🔑171

Where challenge to plaintiff's right to vote half of shares of family corporation was based on alleged invalidity of certificate issued to plaintiff for 50 shares, issuance of certificate and its freedom from attack for over nine years created presumption of validity. Civ. Code, § 374.

4. Corporations 🔑171

Where validity of plaintiff's certificate of stock depended on cancellation of prior certificate, defendant's access to stock book, his change of position from a statement that former certificate had been canceled to a denial of its cancellation, and his loss of memory with reference thereto after expert testified that cancellation was in hand of defendant but had been erased, warranted inference that defendant caused cancellation to be erased.

5. Corporations 🔑197

Where defendants admitted that plaintiff owned half of shares in family corporation, contention that plaintiff was not entitled to vote all his shares because valid certificates had not been issued for that amount could not be sustained.

6. Corporations 🔑94

Actual owner of shares may exercise his rights without a certificate therefor.

7. Corporations 🔑180

Technical rules commonly applied to corporations will not be applied to a close family corporation of two shareholders of equal ownership where such application would serve to defeat equality of ownership, impede justice and perpetuate fraud.

8. Corporations 🔑201

Where father who organized family corporation bequeathed shares in corporation to son and daughter in equal shares and daughter's husband who was company attorney knew of such intent, in action by son to enforce his right to vote half of shares equity would not entertain defense that son did not have all his shares of record.

9. Equity 🔑56

In dealing with family corporations, equity looks through form to substance and on beholding substance will require corporation to reform its transactions to meet ends of justice.

10. Corporations ⚷180

Mere irregularities in transactions of a family corporation do not affect their validity.

11. Corporations ⚷180

Where brother and sister each own shares of family corporation, their mutual rights will be upheld so far as they are ascertainable and neither can be deprived of his or her right by the wanton trespass of the other.

12. Corporations ⚷195

Where a quorum was not present at shareholders' meeting only legal action of meeting was to adjourn; hence inspector of elections appointed at such meeting usurped such office.

13. Corporations ⚷196

When a ballot is questioned at a shareholders' meeting, shareholder presenting ballot is entitled to be heard and inspector of elections has no right to make a challenge in secret and weigh his own challenge.

14. Corporations ⚷283(2)

Where shareholder is not challenged at threshold of shareholders' meeting called to elect directors, only remaining duty of those conducting election is to count ballots and return number of votes received by nominees.

15. Corporations ⚷171

Where defendants did not claim shares given plaintiff by plaintiff's father or question such gift and evidence disclosed that 50 shares in dispute constituted a valid gift to plaintiff from his father, court properly found that plaintiff owned such shares.

16. Courts ⚷200½

Where agreement between plaintiff and defendants to treat certificate to plaintiff's mother and certificate to plaintiff as representing same 50 shares of stock was result of misrepresentation by one defendant that first certificate was valid and uncanceled so that first certificate was treated as an asset of estate of plaintiff's mother, such fact did not give probate court power to declare ownership of such shares.

17. Courts ⚷200½

The probate court has no power to declare a decedent to be owner of property contrary to fact but may only determine succession to such title as decedent had at time of his decease.

18. Executors and administrators ⚷315(6)

Where agreement between plaintiff and defendants to treat certificate to plaintiff's mother and certificate to plaintiff as representing same 50 shares of stock was result of misrepresentation of one defendant that first certificate was valid and uncanceled, order of probate court distributing stock represented by first certificate between plaintiff and his sister did not affect plaintiff's ownership of shares represented by second certificate so as to preclude plaintiff from voting such shares at shareholders' meeting.

19. Corporations ⚷190

Action by one stockholder domiciled in California against only other stockholder, similarly domiciled, did not aim at obtaining a personal judgment against corporation but involved personal rights in property of individuals domiciled in California and was properly brought in California notwithstanding that corporation was a Delaware corporation. Civ. Code, § 315.

20. Corporations ⚷283(3)

When a complaint in action to contest election of directors presents a cause of threatened irreparable injury, equity will exercise jurisdiction.

21. Corporations ⚷669

In action to contest election of directors of foreign corporation, where corporation, after its motion to quash service had failed, made a general appearance, complaint could not thereafter be made that there was no jurisdiction over corporation.

22. Corporations ⚷665(1)

Where foreign corporation entered state for purpose of maintaining office and transacting part of its business in state, it impliedly agreed to submit itself to jurisdiction of state courts.

23. Trial ⚷2

Consolidation for trial of suit to enjoin interference with plaintiff's right to vote his shares at shareholders' meeting with suit to annul election of directors held in contravention of a preliminary injunction issued in first case rested in sound discretion of trial court. Code Civ.Proc. § 1048.

24. Equity ⚷65(2)

In suit to enjoin interference with plaintiff's right to vote his stock and to annul election of directors, evidence failed to sustain defense that plaintiff was without clean hands.

25. Equity ⚷65(2)

To deny a litigant a hearing because of inequitable conduct, the acts complained of must have affected cause of action and must relate to transaction concerning which complaint is made.

26. Equity ⚷65(2, 3)

The maxim "he who comes into equity must come with clean hands" does not apply to general morals of plaintiff or to his conduct in other relations.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

27. Evidence ⚷511

In action involving validity of certificates of stock where defendant denied he had canceled particular certificate or could not remember doing so, testimony of expert witness was properly admitted to show that defendant had canceled certificate with his own hand which cancellation was subsequently erased.

28. Evidence ⚷215(5)

Where sister and her husband, who, with brother, were sole owners of stock in corporation, questioned brother's right to vote 50 shares represented by particular certificate, federal tax return verified by sister and her husband containing statement that sister's father had given brother and sister each 250 shares and that 50 of brother's shares were evidenced by such certificate was properly admitted in action to enforce brother's voting rights.

29. Witnesses ⚷379(1)

Past declaration of witness is admissible to impeach subsequent declaration or testimony.

30. Appeal and error ⚷1170(1)

Where it was clear from record, in view of conduct of defendants, that they suffered no prejudice by reason of judgments for plaintiff notwithstanding any errors, judgments were affirmed. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Lazare M. Kauffman against Lorraine K. Meyberg and another to enjoin defendants from interfering with plaintiff's right to vote one-half of capital stock of Leon, Inc., and action by same plaintiff against Leon, Inc., and others to nullify election of directors effected at a meeting of stockholders at which plaintiff's right to vote half of the capital stock of defendant corporation was obstructed. Judgments for plaintiff, and defendants appeal.

Affirmed.

O'Melveny & Myers, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, for plaintiff and respondent.

Mitchel S. Meyberg, Paul M. Joseph, and Leonard J. Meyberg, all of Los Angeles, for defendants and appellants.

MOORE, Presiding Justice.

Two appeals are consolidated for the purpose of decision. The first action is to enjoin the defendants from interfering with plaintiff's right to vote 2500 shares, or one-half of the capital stock of defendant corporation at an election of directors. The second action was to nullify the election of directors effected at the meeting of the stockholders to which plaintiff's right to vote 2500 shares was obstructed by defendants in spite of the restraining order issued at the inception of the first action. The two causes were tried together. Only one record was made. The court made findings and decision in each case and adjudged in the first suit that plaintiff was entitled to be protected in his right to vote one half of the corporate shares at any meeting of stockholders and permanently enjoined defendants from obstructing plaintiff in the exercise of such rights. In the second action it was determined that the election of directors was in violation of plaintiff's right to vote one half of the corporate shares and the election was nullified.

[1] Plaintiff is hereinafter referred to as Lazare. He is the brother of defendant Lorraine K. Meyberg, hereinafter referred to as Lorraine. Defendant Leonard J. Meyberg is her husband and will be herein referred to as Meyberg. The parents of Lazare and Lorraine were Leon E. Kauffman and Clemence Kauffman, who, for brevity's sake, are hereinafter referred to respectively as Leon and Clemence. Clemence departed life November 18, 1932; Leon deceased December 4, 1935. They

left a successful corporation, to wit, Leon, Inc., to their children in equal ownership. Lazare became its president, Lorraine, its secretary. An annual meeting was convened by defendants, Meyberg and Lorraine, for the avowed purpose of electing directors. Prior to the meeting Lazare learned of the plan of defendants to defeat his right to vote his stock at the annual meeting on January 27, 1941. He anticipated the overt act by procuring an injunction to prevent the threatened obstruction. But the election was held, and, ignoring the court's order, the defendants scorned plaintiff's rights as a holder of one half of the authorized and paid for stock and declared themselves and plaintiff elected directors for the year 1941. Subsequently, defendants were punished for violating the restraining order (affirmed, Meyberg v. Superior Court, 19 Cal.2d 336, 121 P.2d 685), but they never took any steps to correct the injustice and, instead they maintained upon the trial their contention that no one can vote a share at a corporate election unless the share stands of record in his name, and they now persevere in upholding their reprehensible behavior as just and legal. A motion to dismiss their appeal was presented contemporaneously with the submission hereof. It will be denied for the reason that a determination of such motion required familiarity with the merits of the entire cause whereby we may readily determine the merits of the appeal.

In March, 1942, defendants having failed to restore the status quo ante the meeting of January 27, 1941, plaintiff filed his second action under section 315, Civil Code to annul the declared results. Upon the trial of both cases together the court decided for plaintiff and held that the corporation is subject to the jurisdiction of the superior court.

Appellants have set forth in voluminous briefs some fourteen points which they urge on appeal. They may be reduced to the following: (1) The evidence does not support the findings; (2) The court was without jurisdiction to interfere with the internal affairs of a foreign corporation; (3) Errors of law in admitting testimony; (4) Error in trying two causes together; (5) Miscellaneous alleged errors.

[2,3] (1) In their attempt to demonstrate that the evidence does not support the findings that plaintiff owned and was entitled to vote 2500 shares and that he has equality of voting rights with defendants, the latter contend that at the time of the election of directors, there were only 1950 shares standing in the name of plaintiff, and that he in fact owned only 2475 shares while defendants had of record 2525 shares. They maintain that because they had in the aggregate a majority of the shares of record they were entitled to determine the election. But the evidence is overwhelming that plaintiff owns 2500 of the 5000 authorized shares and that Leon intended to leave his estate and particularly the shares in his last corporate venture in equal ownership to both of his children. Upon this finding the evidence is convincing. Inasmuch as the finding of plaintiff's equal ownership was derived from a determination that certificate 8 was a valid issue of 50 shares to him, this discussion will be confined so far as possible to a presentation of the origin and treatment of that certificate. Its issuance alone and its freedom from attack for over nine years cloak it with the presumption of validity. Sec. 374, Civil Code. Its rightful place on the corporate records as evidencing 50 shares was never questioned by Meyberg although he had served Leon as attorney for years and was the master hand in guiding the corporation from the date of its birth to the date of the ill-starred election. Never once from the day she became owner of 250 shares in January, 1933, did Lorraine express a doubt as to its validity or as to Lazare's ownership of one half of the corporate shares. Meyberg testified that he had never raised a question about Lazare's right to certificate 8. In the minutes of the two meetings held in June and November, 1933, Meyberg entered after the name of Lazare "250 shares." This number was possible only by counting the 50 shares in 8. On several occasions he wrote Mr. Hawke, a corporation employee in Boston, that the two children share "equally in Leon Inc."; that neither owns more than the other. When two dividends were declared on the stock, $75,000 in December, 1939, and $50,000 in December, 1940, equal division was made between the two shareholders at a time when Lazare had only 250 shares in his name and Lorraine had none. (She had transferred her 250 shares to Meyberg.) Notwithstanding Meyberg was thus encompassed by a cloud of witnesses that he and his wife had long acquiesced in Lazare's equality with them in the ownership of the corporation and of certificate 8 in particular, defendants never ceased

from their scheming to remove Lazare from the presidency. Inasmuch as their perfidy gleams most brightly in the light of their dealing with the stock of Leon, Inc., these events can best be understood only by tracing the origin and course of those certificates used by defendants as the instruments of their chicanery.

While operating the L. Kauffman Company doing a wool and leather business at Vernon, suburb of Los Angeles, Leon incorporated Leon, Inc., as an addition to his marketing facilities on the Atlantic seaboard. He organized it in 1932 under the laws of Delaware and established its principal place of business at Boston, Massachusetts. It was strictly a one-man corporation, a veritable instrumentality of its founder. He subscribed and paid for the entire authorized 5000 shares, and caused them to be issued in the names of his nominees. The first certificates issued were to Boswell, 2500 shares; Brandt, 1000 shares; Andrews, 50 shares, in certificates 2 and 3. August 15, 1932, he caused 25 shares to be transferred to Lazare and 25 to Lorraine. At the same time he had the 50 shares in certificates 2 and 3 transferred to Clemence and evidenced by certificate 6. He did not make delivery of certificate 6. It remained in the book until after the decease of Clemence on November 18, 1932. Having concluded to make further gifts to his children and being sole devisee of Clemence, Leon caused 6 to be cancelled and certificate 8 thereupon to be issued to Lazare for 50 shares, December 12, 1932. The following month he carried out his plan to make the gifts by having 225 shares issued to Lorraine and an additional 175 shares to Lazare. Thus the records stood until the grim reaper had removed both parents from the earthly plane.

[4] In the spring of 1937 the estates of both Clemence and Leon were approaching a readiness for distribution. The actual status of the stock then was as follows: Lazare and Lorraine each owned 250 shares, 50 of Lazare's being evidenced by certificate 8. The estates of Leon and Clemence each owned one half of the remaining 4500 shares, although 1000 of them remained "unissued." Factually and legally the 4500 shares should have, in due course, been distributed to Lazare and Lorraine, share and share alike. But the divinity that shapes our ends was not to prevail without a dramatic contest with Meyberg. While Lazare was administrator with will annexed of the estate of Clemence and coexecutor with his sister of the estate of Leon, Meyberg counseled both. In February he advised Lazare that certificate 6 had never been delivered; that it had been cancelled. In this he spoke the truth, for at Leon's direction, Meyberg had with his own hand cancelled that certificate in December 1932. However, scarcely two months had passed when he "about faced" and stated to Lazare that after further investigation he was convinced that certificate 6 had been paid for; that it had been issued and never formally cancelled and should therefore be listed as an asset in the estate of Clemence. These facts are not disputed. To fortify such advice, Meyberg caused the words "cancelled, never delivered" to be erased from the stub of certificate 6, which fact was concealed from Lazare until it was brought to light by the use of infra-red photography by the expert witness, Clark Sellers, who testified that it was the hand of Meyberg who had cancelled certificate 6. His change of position, his denial of the cancellation, the failure of his memory with reference to it after Sellers had testified and his access to the stock book warranted the inference that he had caused the cancellation words on the stub of certificate 6 to be erased.

By his statements and concealments he induced Lazare to inventory the 50 shares of certificate 6 in the estate of Clemence, and thereby cleared the way for challenging the validity of certificate 8. Because of this alteration of the records it was necessary to reduce the number of shares not yet issued to the extent of 50 shares to avoid an over issue. Whereupon on April 2, 1937, Lazare, relying upon the truth of Meyberg's counsel, agreed as follows: To inventory in the estate of Clemence one half of the community holdings of 4450 shares and the 50 shares in certificate 6; that the unissued shares should be 950 instead of 1000 shares; that Lazare and Lorraine each owned 250 shares and that Lazare's included the 50 shares in certificate 8; that upon final distribution of both estates the brother and sister should become equals in the ownership of Leon, Inc., each to have 2500 shares. The net result of such agreement did not alter the respective positions of the brother and sister which would have followed a distribution of the estates according to the actual facts. Pursuant to the agreement the probate court distributed from the estate of Clemence to the estate of Leon 2275 shares.

From the estate of Leon the entire 4500 shares were on November 28, 1939, distributed share and share alike to Lorraine and Lazare. Added to the 250 shares each at first had received from Leon, both became owners of 5000 shares in equal ownership which was thereafter mutually recognized and acknowledged by both of them until the fateful day in January, 1941.

Following the agreement of April 2, 1937, friction between the brother on the one side and his sister and her husband on the other constantly increased. Defendants appear to have been ever alert to find some basis for complaint at Lazare's conduct of the corporation by which they might justify their act in removing him from office and to an inferior position in the division of power. In such quest defendants in 1940 resolved upon the scheme that certificate 8 was void, being an ostensible duplicate transfer of certificates 2 and 3. Upon arriving at that decision, and by means thereof in spite of the agreed basis upon which the two estates had been handled and the hitherto uniform recognition of certificate 8 as a valid certificate, defendants laid plans for utilizing their bold and piratical pretense to remove Lazare from the presidency.

Accordingly, from Boston, Meyberg and Lorraine directed their agents and attorneys, James Meyberg and M. S. Meyberg, to give notice of the annual stockholder's meeting for January 15, 1941, at 403 Lane Mortgage Building in Los Angeles. They armed ir two agents with proxies to represent them at the stockholder's meeting. The meeting was convened at the time appointed but because there was not a quorum present the meeting was adjourned to January 27, 1941, at the same place. But before adjourning James Meyberg appointed himself as chairman of the annual stockholder's meeting and M. S. Meyberg as "inspector of elections."

On the 24th day of January plaintiff having learned of the intention of defendants and their agents to allow him to vote only 2475 shares as against 2500 owned by defendants, he applied to the superior court and obtained an order, restraining the defendants from interfering with or in any way obstructing plaintiff from voting in person or by proxy 2500 shares at any meeting of the stockholders of Leon, Inc., pending any increase of the authorized capital and Lazare's ownership of his shares. Process was served with the restraining order and the order to show cause on the day of its issuance, but despite such measures defendants and their agents resolved upon their course to elect themselves as directors willy, nilly. Plaintiff and the proxies of defendants assembled on the 27th pursuant to adjournment of the 15th. While defendants sat in nearby seclusion, they pretended to comply with the letter of the restraining order by instructing their proxies to permit plaintiff to vote his 2500 shares. So they did. But after the votes had been cast, the "inspector of elections" advised those present that certificate 8 representing 50 shares of plaintiff was void as being a duplicate issue of certificate 6. Upon this startling disclosure the chairman announced that the board elected for the ensuing year consisted of Lorraine and Leonard Meyberg and Lazare Kauffman, each having received 1250 votes and that Pokross, Lazare's nominee, had received only 1225 votes and was therefore defeated. Thus as a result of such fraudulent acts of defendants and their agents and attorneys, plaintiff was deprived of his equal voting rights for the protection of which he had procured the restraining order.

For their disobedience of the court's order defendants were punished. The judgment of contempt was affirmed in a unanimous opinion of the Supreme Court which reviewed the facts and held that the conceded ownership of 2500 shares would not cease at the moment of election of directors.

[5-11] The proposition that Lazare was not entitled to vote his 2500 shares because valid certificates had not been issued for that amount is preposterous in view of his conceded ownership of one half interest in the informal, family corporation which was destined from its inception to pass from Leon to his children. The actual owner of shares may exercise his rights without a certificate therefor. Jean v. Jean, 207 Cal. 115, 121, 277 P. 313. Moreover, to permit the technical rules as commonly applied to corporations in the case of a close family corporation of two shareholders of equal ownership, would serve to defeat such equality of ownership, impede justice and perpetuate fraud.

Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709. Leon, sole devisee of Clemence, had emphatically bequeathed his property to his two children in equal shares. Meyberg testified that he knew such to have been the intention of Leon. Under such circumstances one could not with reason expect equity to hearken to the miserable defense that plaintiff did not have 2500 shares of record. Equity looks through form to substance and on beholding the substance will require the corporation to reform its transactions to meet the ends of justice. Mere irregularities in the transactions of a family corporation do not affect their validity. Wise Realty Co. v. Stewart, 169 Cal. 176, 185, 146 P. 534; Sargent v. Palace Café Co., 175 Cal. 737, 167 P. 146; Hunt v. Davis, 135 Cal. 31, 66 P. 957; Conover v. Smith, 83 Cal.App. 227, 256 P. 835. In the light of these authorities it is a dismal wail to chant the technique of corporate practice where the evidence overwhelmingly justifies the finding that Lorraine and Lazare have been the owners in equal shares of Leon, Inc. since the passing of their father in 1935. Seized of such property right neither may be deprived thereof by the wanton trespass of the other so long as the arm of equity may reach the offender. Their mutual rights must be upheld so far as they are ascertainable. Conover v. Smith, supra.

[12-14] Aside from the fact that equity may disregard the legalistic veil which appellants have draped about the alleged "election," a glance at the proceedings of that event reveals some aspects that reflect no honor upon the participants. The "inspector of elections" was self-constituted and for an especial purpose. The day his appointment was announced only the Meyberg faction was present and that was not a quorum . Its only possible legal action was to adjourn. Hexter v. Columbia Baking Co., 16 Del. Ch. 263, 145 A. 115. Hence whoever took an office at that meeting usurped it. But the inspector was not satisfied with an office whereby he might prevent an illegal vote. He asserted the privilege of making his challenge in secret and of weighing his own challenge in solitude. When a ballot is questioned at such an election the shareholder presenting the ballot is entitled to be heard. If he be not challenged at the threshold the only remaining duty of those conducting the election is to count the ballots and return the number of votes received by the nominees. After that they have no duty to perform. 14a Corpus Juris 57; 19 C. J. S., Corporations, § 720; Hartt v. Harvey, 32 Barb., N.Y., 55, 19 How. Prac., N.Y., 245, 246, 250. It would be sheer folly to conduct an election by ballot, if the inspector of elections, after ascertaining the victors in the contest, could determine that some of the ballots cast for the successful candidates were illegal and thereby cause the triumph of a minority. People ex rel. Harrt v. White, 11 Abb. Prac., N.Y., 168, 179.

[15] (2) Appellants challenge the jurisdiction of the court to enjoin the defendants on the ground that such action is an attempt to determine the ownership of the stock in question. Such jurisdiction they contend was vested solely in the superior court sitting in probate; and inasmuch as the 50 shares in certificate 6 had been awarded by the probate court to the estate of Leon and thereafter from the estate of Leon to Lazare and Lorraine the question of the ownership of those 50 shares was adjudicated by that order. This is specious reasoning. The major premise is a misstatement of the law. Appellants declare that they make no claim to the shares given plaintiff by his father. Since they make no question of plaintiff's gift from Leon that should dispose of their criticism of the finding that plaintiff owned the 2500 shares. They raise no question of the title of plaintiff to any of his shares except the 50 represented by certificate 8 which the evidence shows and the court found, was a legal gift from Leon. Therefore, no injury could result to appellants from the court's decision.

[16, 17] The jurisdiction of the probate court is not involved. The agreement of plaintiff and defendants to treat both certificates 6 and 8 as representing the same 50 shares, was the result of Meyberg's misrepresentation that 6 was valid. By the order distributing all of the shares in equal division to the two heirs the probate court performed its sole function. Although the treatment of the 50 shares as an asset of the estate of Clemence effected the same result exactly as though those shares had never been inventoried in her estate such treatment did not confer upon the probate court jurisdiction to declare Clemence owner of the stock. The probate court has not the power to declare a decedent to be owner of property contrary to fact. The limit of its power is to determine the suc-

cession to such title as the decedent had at the time of his decease. It is not its function to determine that he had any title at all. Rockey v. Vieux, 179 Cal. 681, 178 P. 712. But the claim of jurisdiction of the probate court is far fetched. It did not make any distribution of the 50 shares represented by certificate No. 8, nor did the parties agree that it should do so. Its decree merely distributed the shares of which Leon and Clemence were possessed on the dates respectively of their demises. Since all of the stock of Leon, Inc., was of the same class and concededly had equal voting rights the ownership of one half of it invested plaintiff with power to vote those shares at any election of directors.

[18] But the question of probate jurisdiction was effectually disposed of by the supreme court in the case of Meyberg v. Superior Court, supra, affirming the judgment of the superior court punishing the defendants for disobedience of the restraining order. It was there held that the test of a stockholder's right to vote his shares at a corporate meeting is his ownership of the stock. Such was impliedly a determination that the order distributing the 50 shares in certificate 6 did not affect Lazare's ownership of the 50 shares in 8.

[19-22] The second challenge to the court's jurisdiction is that the superior court had no power summarily to interfere with the internal affairs of a foreign corporation in doing business in this state. At the opening of the trial defendants moved to quash the service upon the corporation because of its foreign origin. An action to contest an election of directors under section 315 Civil Code, does not aim at obtaining a personal judgment against the corporation. Had it been so the doctrine of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, would now prevail. Elberta Oil Co. v. Superior Court, 74 Cal. App. 114, 119, 239 P. 415. This contest involves the personal rights in property of individuals domiciled in California. The action by plaintiff was to prevent the deprivation of his property rights. Courts of equity never hesitate to exercise such jurisdiction when a complainant presents a cause of threatened irreparable injury. Moreover, after its motion to quash the service had failed the corporations affirmatively invoked the jurisdiction of the court by making a general appearance. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792. Also, the corporation having entered into this state for the purpose of maintaining an office and of transacting part of its business here it thereby impliedly agreed to submit itself to the jurisdiction of our courts according to law. 14A Corpus Juris 1405; 20 C. J. S., Corporations, § 1938. The motion to quash was properly denied.

[23] (3) The contention that the court erred in granting the motion to consolidate the two cases for trial is contrary to statutory provision which commits such a motion to the sound discretion of the trial court. Section 1048, Code of Civil Procedure. The factual recitals of this discussion serve to show that such discretion was not abused.

[24-26] (4) The claim that plaintiff was without clean hands has likewise been disposed of by the history of the corporation and the conduct of the parties. It is not shown in any discussion in defendants' voluminous briefs that plaintiff was without equity in any respect with reference to the matters presented by either of the actions. The claim that he had taken moneys of the corporation to which he was not entitled is a thing wholly apart from his right to vote his stock at a stockholders' meeting. In order to deny a litigant a hearing because of inequitable conduct the acts complained of must have infected the cause of action and must relate to the transaction concerning which complaint is made. City of Los Angeles v. Watterson, 8 Cal.App.2d 331, 340, 48 P.2d 87. The maxim does not apply to the general morals of plaintiff or to his conduct in other relations. Western Union Tel. Co. v. Commercial Pac. Co., 177 Cal. 577, 171 P. 317. However, the record contains such evidence as would support the finding that the greater part of the expenditures by Lazare out of corporate funds was in conformity with his policy immediately following the decease of his father and with uses of the same nature as those to which his decedent had applied moneys of the corporation, to wit, the payment of miscellaneous expenses of Lorraine and other members of the family.

[27-29] (5) The rulings upon the admissibility of evidence were without error. The testimony of the witness Sellers was to expose the iniquity of Meyberg who had "cancelled" certificate 6 with his own hand and subsequently denied his act or could not remember it. Schedule G of the federal tax return was admitted over objection and properly so. Both defendants had

verified it on April 2, 1937. It contained the statement that Leon, inter vivos, had given his two children each 250 shares of Leon Inc. and that 50 of Lazare's shares were evidenced by certificate 8. One's own past declaration may always be received to impeach his subsequent declaration or testimony. The corporate minutes prepared by Meyberg served the same purpose. The letters that passed between Meyberg and Lazare's counsel in 1937 were proper impeaching evidence. They were proof of the agreement finally reached to treat both certificates 6 and 8 as valid for the purpose of the probate proceedings.

[30] Regarding the bewildering contentions of appellants with the utmost generosity, it would be to scorn the constitution (Art. VI, section 4½) to reverse either case in view of the trail left by defendants in their outside maneuverings and at the one annual meeting of the corporation in the six years of Meyberg's struggle for supremacy.

It is ordered that the motion to dismiss the appeals be and it is denied. The judgments are affirmed.

McCOMB, J., concurring.

22 Cal.2d 614

HONEA et al. v. CITY DAIRY, Inc.

L. A. 18637.

Supreme Court of California.
Aug. 3, 1943.

1. Negligence 🔑121(2)

Doctrine of "res ipsa loquitur" may be relied on to establish prima facie case of negligence, where instrumentality which causes injury is shown to have been under exclusive management or control of defendant or defendant's servants, and accident is such as in ordinary course of things does not happen if those who have management of instrumentality use proper care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence 🔑121(2)

Under doctrine of "res ipsa loquitur", where instrumentality which causes injury is shown to be under the exclusive management or control of defendant or defendant's servants and accident is such as in ordinary course of things does not happen if those who have management of instrumentality use proper care, inference arises that the accident resulted from want of proper care on defendant's part.

3. Negligence 🔑121(2)

Doctrine of "res ipsa loquitur" does not apply unless basic requisites of exclusive control of instrumentality causing injury, and probability of negligence, are proved by plaintiff.

4. Appeal and error 🔑931(1)

In action against dairy company for injuries sustained when company's bottle containing milk broke in plaintiff's hand, Supreme Court, accepting as true plaintiffs' testimony that bottle "just broke" because of judgment in her favor would assume that bottle was in some manner defective at time of accident.

5. Negligence 🔑121(3)

Plaintiff could not recover under the "res ipsa loquitur" doctrine for injuries sustained when bottle containing chocolate milk which plaintiff purchased at defendant's establishment broke in plaintiff's hands, where at time of accident bottle was not under control of defendant.

6. Negligence 🔑121(3)

Mere breaking of dairy company's bottle containing milk in injured person's hand could not give rise to inference that company was negligent in failing to discover defect in bottle.

7. Negligence 🔑25

Dairy company was not responsible for defects in company's bottle containing milk, which defects could not be found by reasonable, practicable inspection of bottle.

8. Negligence 🔑121(3)

The breaking of a bottle in purchaser's hands containing chocolate milk was not alone sufficient under the doctrine of "res ipsa loquitur" to permit the additional inference of negligence by the dairy company either in causing the defective condition, or in failing to discover it by proper inspection, where there was no evidence that a feasible means of discovering defect was available to the company.

9. Evidence 🔑20(1)

Court could not take judicial notice of technical practices and information available to bottling industry for discovering defective bottles.

10. Evidence 🔑20(1)

Court could not take judicial notice that glass bottles are not ordinarily damaged or that defects will not ordinarily occur unless bottler is negligent, since subject is not matter of common knowledge.

11. Negligence 🔑121(3)

Inference of "negligence" cannot be drawn from the breaking of glass, alone.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

12. Negligence 🔑121(3)

Doctrine of "res ipsa loquitur" does not apply to breaking or exploding of glass vessels containing noncarbonated liquids.

13. Negligence 🔑121(3)

Doctrine of "res ipsa loquitur" does not apply to breaking or exploding of container in which an ordinarily harmless commodity is sold.

14. Negligence 🔑134(1)

Recovery against dairy company for delivery of bottle of chocolate milk unwrapped, or without packaging, was not authorized, where no evidence was offered that due care required such wrapping or packaging or that it would have prevented the breaking of the bottle which caused injury to purchaser.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Pierson M. Hall, Judge.

Action by Eldora Honea, a minor, etc., and others against City Dairy, Inc., for injuries sustained when a milk bottle broke in plaintiff's hand. From a judgment for plaintiffs, defendant appeals.

Reversed.

Prior opinion, 131 P.2d 586.

Harry E. Sackett, of Los Angeles, for appellant.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, amici curiae on behalf of appellant.

Logan Beamer, of Glendale, and C. V. Caldwell, of Los Angeles, for respondents.

GIBSON, Chief Justice.

Eldora Honea, the principal plaintiff herein, a fourteen-year-old pupil at a junior high school, was sent by her teacher to the defendant dairy to buy three quarts of chocolate milk. Defendant's attendant took three bottles of milk, bottled by defendant, from the icebox and placed them on the counter unwrapped. Plaintiff picked them up and carried them to the school, a distance of about one block. As she entered the building one of the bottles broke in her hand, injuring her. She brought this action for damages, alleging negligence by defendant in supplying a defective bottle and in failing to wrap the bottles.

At the trial, held by the court without a jury, plaintiff testified that she carried one bottle under her left arm and one in each hand, that the bottles were not touching at any time and that the bottle in her right hand "just broke." The school janitor, called as a witness for plaintiff, testified that when he spoke to plaintiff as she entered the building, she pulled her arms in toward her breast and "clinked" the bottles. He also said that he had cleaned up the pieces of glass and still had them but that he had not brought them to court because no one had ordered him to do so. Plaintiff offered no other evidence of negligence. Defendant produced a former employee who said he had operated the defendant's bottling machine and had inspected all bottles, including those delivered to plaintiff, for dirt, cracks, and chips, removing those that were chipped or cracked. In his opinion as an expert the pressure exerted by plaintiff while carrying the bottles was insufficient to break them, but the bottles might have been broken if struck together. The trial court found that defendant was negligent both in delivering a defective bottle and in failing to wrap the bottles. Defendant has appealed from the judgment for plaintiff, contending that the evidence is insufficient to support the findings.

[1-3] As plaintiff has made no attempt to prove specific facts tending to show either that the bottle was defective or that defendant was negligent in delivering it in a defective condition, she may not recover upon this theory unless, under the doctrine of res ipsa loquitur, inferences of both defective condition and negligence may be drawn from the mere breaking of the bottle. This doctrine, as we said in Hinds v. Wheadon, 19 Cal.2d 458, 461, 121 P.2d 724, 726, may be relied upon to establish a prima facie case of negligence "where a thing [which causes injury] is shown to be under the exclusive management or control of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. In such cases an inference arises that the accident resulted from a want of proper care on the part of the defendants." The doctrine does not apply unless the basic requisites of exclusive control and probability of negligence are proved by plaintiff. See Gerhart v. Southern Cal. Gas. Co., 56 Cal.App.2d 425, 431, 432, 132 P.2d 874; Langazo v. San Joaquin L. & P. Corp., 32 Cal.App.2d 678, 695, 90 P.2d 825; cf. Parker v. James Granger, Inc., 4 Cal.2d 668, 674, 675, 52 P.2d 226; George Foltis, Inc., v. City of New York, 287 N.Y. 108, 115, 38 N.E.2d 455, 459, 460.

[4, 5] Accepting as true plaintiff's testimony that the bottle "just broke," we must assume that it was in some manner defective at the time of the accident, for glass milk bottles, unless defective, do not ordinarily break in the absence of applied force or some external factor. Defendant contends, however, that the doctrine of res ipsa loquitur is unavailable to establish that the bottle was defective when de-

livered to plaintiff, as defendant had lost control over it before the time of the accident and it is urged that the bottle could have been injured or weakened in the intervening period. Numerous authorities have stated that the instrumentality must be under the defendant's control at the time of the injury. See, for example, 9 Wigmore on Evidence (3rd ed. 1940) 380-382, § 2509; Gerber v. Faber, 54 Cal.App.2d 674, 683, 129 P.2d 485; Doherty v. Arcade Hotel, Or. 1943, 134 P.2d 118; Naumann v. Wehle Brewing Co., 127 Conn. 44, 15 A.2d 181; Slack v. Premier-Pabst Corp., 1939, 1 Terry 97, 40 Del. 97, 5 A.2d 516; Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743, 745, L.R.A.1916E, 1074; cf. Brooks v. Hill-Shaw Co., 7 Cir., 1941, 117 F.2d 682; Texas Co. v. Jamison, Okl.Sup. 1942, 129 P.2d 85. Other courts have held that it is sufficient if defendant had control at the time of the alleged negligent act, provided plaintiff proves that the condition of the instrumentality causing injury had not been changed after it left the defendant's possession. See 3 Cooley on Torts (4th ed. 1932) 386, sec. 480; (1937) 6 Fordham L.Rev. 483; Hotel Dempsey Co. v. Teel, 5 Cir., 1942, 128 F.2d 673; Jump v. Ensign-Bickford Co., 117 Conn. 110, 167 A. 90, 93, 94; Goldman & Freiman Bottling Co. v. Sindell, 140 Md. 488, 117 A. 866; Ortego v. Nehi Bottling Works, 199 La. 599, 6 So.2d 677; MacPherson v. Canada Dry Ginger Ale Inc., 129 N.J.L. 365, 29 A.2d 868; Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; Payne v. Rome Coca-Cola Bottling Co., 10 Ga.App. 762, 73 S.E. 1087; Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001; cf. Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833. The reason for the general requirement that defendant have control of the instrumentality at the time of the injury is to exclude the possibility that the accident was caused by an intervening act of the plaintiff or a third party, and this purpose is satisfied if plaintiff shows that there was no intervening cause. Plaintiff has brought herself within the rule by her testimony that the bottles were not touching at any time when she had them. It would follow, therefore, that the broken bottle was in some manner *defective* when delivered by defendant.

It must next be determined whether the breaking of the bottle is alone sufficient, under the doctrine of res ipsa loquitur, to permit the additional and necessary inference of *negligence* by defendant, either in causing the defective condition or in failing to discover it by proper inspection. We, of course, do not know the nature of the defect. From the evidence it is clear that no examination was ever made of the broken bottle and we therefore do not know whether such examination would have revealed the flaw. The pieces of glass were picked up by the school janitor after the accident and retained by him. Although it does not affirmatively appear that either party knew that the janitor had possession of the broken pieces until he so testified, they were available to plaintiff at the time of the trial. The bottle was broken at the neck or just below and the neck was in one piece. An examination of the pieces might have revealed the flaw or served to eliminate possible causes of the accident. See Stewart v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952, 955; Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576; cf. Burnham v. Lincoln, 225 Mass. 408, 114 N.E. 715; Gerber v. Faber, supra, 54 Cal.App.2d at pages 680, 682, 686, 129 P.2d at pages 488, 489, 491.

[6-8] The mere breaking of a bottle alone cannot give rise to an inference that defendant was negligent in failing to discover the defect. While the dairy may have had a duty to make an examination of all bottles, whether newly purchased or returned by prior customers, it is not responsible for defects that cannot be found by a reasonable, practicable inspection. Sheward v. Virtue, 20 Cal.2d 410, 414, 126 P.2d 345; O'Rourke v. Day & Night Water Heater Co., 31 Cal.App.2d 364, 369, 88 P.2d 191; Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576. In the present case there is no evidence that a feasible means of discovering the defect or flaw was available to this defendant. The language of the court in Loebig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124, 81 S.W.2d 910, is particularly appropriate. In holding that res ipsa loquitur was not applicable to the explosion of a coca-cola bottle, the court said (81 S.W.2d at pages 911, 912): "The defendant was not, under the circumstances, an insurer, and it was not shown that there was any more reasonably practicable method of inspection used in the industry than the method of inspection admittedly adopted by the defendant. Suppose the bottle *was* defective. A conclusion of negligence could not arise without some showing that

the defect could have been discovered by the exercise of ordinary care. * * * In the instant case, we are still left to conjecture as to the cause of the defect in the bottle and its contents or whether it was such a defect as might have been discovered by a more thorough inspection. Unless we were prepared to hold defendant as an insurer, it is hard to see how else it could be held responsible without some showing that its opportunity to exercise care was in some measure proportionate to the duty imposed—without some showing that a more thorough inspection would have been effective. Plaintiff's experts suggest various methods of testing bottles which might be applied, but it is not shown that these tests are commercially practicable or that they would have disclosed the complained-of defect. * * * We must measure the duty by ordinary standards and by consequences reasonably to be anticipated. Subject to these criteria, it is clear that the proof falls short of raising any inference of negligence."

In Licari v. Markotos, 110 Misc. 334, 180 N.Y.S. 278, the court held a bottler not liable for injuries caused by breaking of a bottle of a non-explosive cleaning and dyeing preparation, saying (180 N.Y.S. at page 280): "Nor is there any force in respondent's contention, strenuously urged upon this appeal, that the defendant failed in his duty to inspect the bottles before filling them; this for the reason that there is no proof that any examination or inspecton would have found the existence of any defect. If such had been the case, it was the plaintiff's duty to give evidence thereof. Bruckel v. [J.] Milhau's Son, 116 App.Div. [832], 836, 102 N.Y.S. 395. In the absence of such evidence, the learned trial justice had no foundation upon which to predicate any finding of negligence on defendant's part, and a judgment for plaintiff could be based on none other than speculation and pure guesswork." In the Bruckel case, 102 N.Y.S. 398, the court said: "There is no proof that inspection or examination of the bottle would have made its defect known to the most careful vender or even to an expert in his employ. It does not appear that either one or the other could have ascertained the defect by any test short of those made by the expert witness of the plaintiff. If the fact were otherwise, it was the duty of the plaintiff to give evidence thereof; and in the absence of all evidence the jury cannot grope in speculation for a test or assume that there was one."

[9] In the Peerless Glass Co. case, supra, the court, in affirming a judgment against a manufacturer but reversing that against a bottler, relied upon expert testimony as to the existence of practicable and customary tests which the respective defendants could or should have employed in the exercise of due care. In a case such as this, where the court cannot take judicial notice of the technical practices and information available to the bottling industry for discovering defective bottles, there must be some evidence thereof, in the absence of which the trier of fact is not justified in concluding that all defects in bottles will ordinarily be found by a bottler if he exercises due care.

[10, 11] Nor can the court take judicial notice that glass bottles are not ordinarily damaged or that defects will not ordinarily occur unless the bottler is negligent, for the subject is not a matter of common knowledge. Many of the courts have received expert testimony to determine the possible or probable causes of bottle-breakage. See, for example, Gerber v. Faber, supra, 54 Cal.App.2d 680-683, 129 P.2d 488, 490; Smith v. Peerless Glass Co., supra; Burnham v. Lincoln, 225 Mass. 408, 114 N.E. 715; Loebig's Guardian v. Coca-Cola Bottling Co., 259 Ky. 124, 81 S.W.2d 910; Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352, 353. An analogy may be found in Judson v. Giant Powder Co., 107 Cal. 549, 561, 40 P. 1020, 20 L.R.A. 718, 48 Am.St.Rep. 146, where this court held relevant and material expert evidence that dynamite would not explode if the correct process of manufacturing and handling were carefully carried out. While it may often be a matter of common knowledge that certain articles or substances are not ordinarily rendered defective in the absence of negligence, we cannot say that this is true of glass containers. It has been held that because of the physical characteristics of glass an inference of negligence cannot be drawn from breaking alone. Slack v. Premier-Pabst Corp., 1939, 1 Terry 97, 40 Del. 97, 5 A.2d 516, 519; cf. Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743, L.R.A.1916E, 1074; Stewart v. Crystal Coca-Cola Bottling Co., supra. The reason for this conclusion is indicated in Piehl v. Albany Ry., 30 App.Div. 166, 51

N.Y.S. 755, affirmed 162 N.Y. 617, 57 N.E. 1122, where the court, holding that no inference of negligence arose from the bursting of a flywheel, said (51 N.Y.S. at pages 757, 758): "* * * such is the nature of steam and electricity, and of the engines by or upon which they operate, that, when such an explosion as this occurs, our experience, or even expert experience, is not sufficiently uniform to justify us in presuming that negligence is the cause. The explosion does not, in fact, speak for itself and tell us its cause." Cf. Brymer v. Southern Pac. Co., 90 Cal. 496, 27 P. 371—breaking of chain. In the absence of appropriate evidence, therefore, it cannot be held that defects in glass bottles are ordinarily caused by the negligence of the bottler. It should be noted that the probabilities of negligence on the part of the defendant in this case are greatly reduced by the fact that the defect in the bottle might well have been caused either by the manufacturer or by some third person.

[12] Other courts have held that the doctrine of res ipsa loquitur is not applicable to the breaking of glass vessels containing non-carbonated liquids. Directly in point is Coralnick v. Abbotts Dairies, 337 Pa. 344, 11 A.2d 143, the court stating: "The plaintiff, a grocer, sold milk produced by defendant. Shortly before the accident defendant's driver delivered a case of bottled milk in a partitioned box. While plaintiff was removing a bottle from the container to place it in his refrigerator, the bottle broke cutting his hand. No proof was attempted to show what caused the bottle to break. The defendant did not manufacture the bottle nor warrant that it was free from defects. The limit of its duty was to provide against defects discernible upon reasonable inspection and to handle the bottles with reasonable care. There is not anything to show it failed of its duty in these respects. We cannot conjecture that it may have done so. The mere happening of the accident did not establish negligence, and that only was shown. The proof offered by plaintiff clearly failed to support the burden imposed upon him. As was said by the learned court below: 'Under the evidence the only reasonable inference that can be deduced is that the accident was due to a latent unsuspected defect. McSorley v. Katz, 53 Pa. Super. 243.' There being causes apparent, other than those within defendant's control, to which the accident might with equal fairness be attributed, the doctrine of res ipsa loquitur does not apply. Norris v. Philadelphia Electric Co., 334 Pa. 161, 5 A.2d 114. The direction of a verdict for defendant was necessary."

[13] In Burnham v. Lincoln, supra, it was held that a supplier of spring water was not liable for injuries received by a bottle breaking in a customer's hand, the accident alone not giving rise to an inference of negligence. Cf. Simons v. Sun Ray Water Co., Sup.App.T., 162 N.Y.S. 968. Further, it has been stated broadly that the "decided weight of authority" is that res ipsa loquitur does not apply to the breaking or exploding of a container in which an ordinarily harmless commodity is sold. See 22 Am.Jur. 214-215; Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27, 4 A.L.R. 1094.

We need not determine at this time whether the rule applies to the explosion of a bottle of carbonated liquid, although a large number of courts have refused to permit an inference of negligence in such cases. Gerber v. Faber, supra; Stewart v. Crystal Coca-Cola Bottling Co., supra; Loebig's Guardian v. Coca-Cola Bottling Co., supra; Glaser v. Seitz, 35 Misc. 341, 71 N.Y.S. 942; cf. Berkens v. Denver Coca-Cola Bottling Co., 109 Colo. 140, 122 P.2d 884; Ruffin v. Coca Cola Bottling Co., 311 Mass. 514, 42 N.E.2d 259; Slack v. Premier-Pabst Corp., supra; Wheeler v. Laurel Bottling Works, supra. Some courts reject the inference in the absence of evidence of other instances of explosions. See Dail v. Taylor, 151 N.C. 284, 66 S.E. 135, 28 L.R.A.,N.S., 949; Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818; Coca-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778. Other jurisdictions have permitted recovery under the doctrine where injuries have resulted from exploding bottles of carbonated beverages. Payne v. Rome Coca-Cola Bottling Co., 10 Ga.App. 762, 73 S.E. 1087; Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; Ortego v. Nehi Bottling Works, 199 La. 599, 6 So.2d 677; Stolle v. Anheuser-Busch, 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A. 2d 868.

[14] Plaintiff contends, finally, that the defendant was negligent in delivering the bottles without packaging or wrapping them. No evidence was offered tending to show either that due care required wrapping or

that failure to wrap caused the bottle to break or that wrapping would have prevented either the breaking of the bottle or the injury to plaintiff. It is not claimed that plaintiff was of such tender age that any special precautions were necessary. An analysis of the argument in support of this point indicates that plaintiff's contention is that defendant was negligent in delivering a defective bottle without wrapping it. This is answered by our conclusion that there is no basis for an inference that defendant knew or should have known that the bottle was defective.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice (dissenting.)

I dissent. The facts in this case are clear. Plaintiff purchased milk from a dairy which bottled and sold it. The bottle broke in her hand without any act or omission on her part that could have been the cause of it. The doctrine of res ipsa loquitur is clearly applicable to such a case.

The majority opinion concedes the factors necessary for the application of that rule. First, that the control of the defendant must be present when the alleged negligent act occurs, but need not be present when the injury occurs. Second, that "glass milk bottles, unless defective, do not ordinarily break." Third, that the dairy was under a duty to inspect the bottles for defects. With those requirements satisfied there can be no doubt that the doctrine was properly invoked by the trial court. If bottles do not ordinarily break if they are not defective, the inference follows by virtue of the doctrine that they were defective. If they were defective, it was the duty of defendant bottler to inspect the bottles and discover the defect. The failure to do so or the doing of it in a negligent manner may be inferred from the fact that the bottle was defective. Hence, we have the inference that defendant was negligent in either wholly failing to inspect the bottles or in failing to make a reasonable and careful inspection. Defendants' evidence clearly shows that a defect would be discoverable by reasonable inspection. Its employee who had charge of the bottling testified:

"The Court: You never let one that could see was chipped or cracked; is that it? A. I never let any of them go through.

"Q. That you could see was chipped or cracked? A. *Well, we could see them.*

"Q. You could see them? A. Oh, sure."

Once it is established that bottles do not ordinarily break unless defective, a duty to inspect exists, and the bottle breaks, the inference arises that defendant bottler was negligent in failing to inspect or in making an improper inspection. The burden of going forward then shifts to the defendant to convince the trier of fact that he made a proper inspection. If he is successful he prevails in the action; if not, the inference of negligence stands unimpeached and cannot be disregarded by the trier of fact. See Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53.

One of the primary policies underlying the doctrine of res ipsa loquitur is that it is made available because the defendant is in a better position than plaintiff to explain how and why the event transpired and that he exercised due care. 19 Cal.Jur. 705, 706. In the instant case the defendant was in such a superior position. It knew whether or not it had made an inspection, and if so the character and extent thereof. It was the bottler of the milk and had control of the bottles and the bottling process. It had the burden of explaining how a defective bottle escaped its inspection, if any. The trier of fact may well have believed that defendant either failed to make any inspection, or was careless in doing so, resulting in a cracked or chipped bottle being delivered to plaintiff.

It is no answer to that reasoning to assert, as does the majority opinion, that plaintiff must show that reasonable inspection would have revealed the defect. The bottle would not have broken except for a defect. The inference follows that it was defective. The defendant being in the superior position as the bottler and handler of the bottles, was required to assume the burden of convincing the trier of fact that it had done all that was required of it to discover that defect, or that a reasonable inspection would not have revealed it. If plaintiff were compelled to make that proof she would deprive herself of the doctrine because she would be proving specific negligence, namely, the particular character of the defect and what must be done to discover it. If plaintiff relies upon specific acts of negligence he cannot avail himself of the doctrine. 19 Cal.Jur. 713. Res ipsa loquitur is based upon probabilities. This court may from common knowledge assume that the probabilities point to a chip or crack in the bottles as being the cause of the breaking rather than some other defect. It cannot be doubted that a reasonable inspection would reveal such a defect. Defendant bottler was obligated to proceed with its explanation such as that the bottle was not cracked or chipped, a careful inspection had been made, or the defect was latent and not discoverable by a reasonable inspection. It was a bottler and handler of the bottles and was in a superior position to produce evidence on those subjects.

This court may say as a matter of common knowledge that it is negligence for a bottler to use and distribute defective bottles. No opinion evidence on the part of plaintiff concerning the nature of defects in bottles and their discoverability is necessary. This is plain from the analogy of malpractice cases where ordinarily expert testimony is necessary to establish liability of the physician. But where the act is such as leaving a sponge in a patient following an operation, which clearly would not be done by a prudent person, res ipsa loquitur applies and expert testimony is unnecessary to establish negligent conduct. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409.

It has been held that the doctrine applies to breaking of bottles containing pressure generating liquids. Bradley v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; Ortego v. Nehi Bottling Works, 199 La. 599, 6 So.2d 677; Lanza v. De Ridder Coca Cola Bottling Co., La.App., 3 So.2d 217; Auzene v. Gulf Public Service Co., La.App., 188 So. 512; Stolle v. Anheuser-Busch, 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001; Benkendorfer v. Garrett, Tex.Civ.App., 143 S.W.2d 1020; Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. App. 573, 190 S.E. 879; MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868; Macres v. Coca-Cola Bottling Co., 290 Mich. 567, 287 N.W. 922; Healey v. Trodd, 124 N.J.L. 64, 11 A.2d 88, affirming 122 N.J.L. 603, 7 A.2d 640; Middlesboro Coca-Cola Bottling Works v. Campbell, 179 Va. 693, 20 S.E.2d 479; Ashkenazi v. Nehi Bottling Co., 217 N.C. 552, 8 S.E.2d 818; Georgia-Alabama Coca-Cola Bottling Co. v. White, 55 Ga.App. 706, 191 S.E. 265; Atlanta Coca-Cola Bottling Co. v. Danneman, 25 Ga.App. 43, 102 S.E. 542.

In Meyers v. Alexandria Coca-Cola Bottling Co., Ltd., La.App., 8 So.2d 737, the court, although not expressly discussing the necessity of evidence on the discoverability of defects in the bottle, in effect holds that the bottler was negligent in not perceiving the defects in the bottle. The court stated at page 739 of 8 So.2d:

"The manager stated that the bottles are inspected twice before they are filled and once after they are filled to determine any defect in the container, or bottle, or any foreign matter that might possibly have been in the bottle. If a bottle is found to be defective in either of the two first inspections and prior to its being filled, it is thrown aside and not used and at the end of the day such bottles are destroyed or broken. This indicates that defects are sometimes found in the bottles. It is reasonable to visualize how a defect in a bottle could escape the notice of the inspector. After the bottles are filled, they are again inspected for defects in the bottle, but principally to ascertain if there are any foreign substances in the contents.

"The defendant's bottler testified that the gas pressure is tested every hour or so to see that the volume of gas is not excessive; that if the volume of gas becomes too great then the regulator is adjusted and reset; that occasionally a bottle explodes while in the process of being filled or immediately thereafter. He did not testify or seek to explain the cause of these explosions. *As a bottle will not explode unless there are defects in the bottle or unless it has been improperly filled and charged, it stands to reason that there was negligence in not perceiving the defects in the bottle or in the bottling process.*" (Emphasis added.) Although the majority opinion expressly states that it is not deciding the issue in cases with the above-mentioned factual background, nevertheless such cases holding the doctrine not applicable are cited in support of its conclusion. The opinion thus gives implied sanction to these authorities because the reasoning there employed would defeat recovery in the exploding bottle cases.

Great reliance is placed upon Licari v. Markotos, 110 Misc. 334, 180 N.Y.S. 278, and Bruckel v. J. Milhau's Son, 116 App. Div. 832, 836, 102 N.Y.S. 395. The applicability of res ipsa loquitur or the absence or presence of an inference of negligence as such was neither considered nor discussed by the court in those cases.

The duty of a bottler of milk in regard to containers is established by statute. Section 694, of the Agricultural Code, St.1933, p. 166, provides in part: "All containers of *any kind* in which *milk* * * * is kept, stored, transported or delivered *shall be sound,* smooth, free from rust or open seams * * *." (Emphasis added.) A mandatory duty is placed upon the bottler of milk to use *sound* containers. Certainly a defective bottle is not a sound one. It has been held that the mere failure of a brake on a train to properly function is sufficient to give rise to an inference of inefficiency in violation of a statute requiring efficient brakes, and hence recovery by the injured person. Newkirk v. Los Angeles Junction R. Co., 21 Cal.2d 308, 131 P.2d 535. In the instant case the breaking of the bottle without cause raises an inference that it was not sound. Recovery should therefore follow.

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22 Cal.2d 627

SHEFFIELD v. STATE BAR OF CALIFORNIA.

L. A. 18639.

Supreme Court of California.

Aug. 3, 1943.

1. Attorney and client 🔑54

Findings of fact and conclusions of law of state bar committee, forming basis of committee's recommendation that an attorney be suspended for three months, were not subject to objection that the findings and conclusions were not based upon the charges against attorney as stated in the notice to show cause. Rules of Professional Conduct of the State Bar of California, Rule 5; St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

2. Attorney and client 🔑21

Professional conduct rule suggests that the subsequent representation of another against a former client is forbidden not merely when the attorney will be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he may be called upon to use such confidential information. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

3. Attorney and client 🔑21

Under Professional Conduct Rule an attorney may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may the attorney at any time use against his former client knowledge or information acquired by virtue of the previous relationship. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

4. Attorney and client 🔑21

Attorney's conduct in appearing as counsel in action for breach of contract, and for injunction, against former client, was a violation of professional conduct rule, where second action could not have been filed without obtaining from former client information concerning the contract sued upon and the facts relating to the conduct of the parties in connection with the subject matter. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

5. Attorney and client 🔑21, 46

That an employee of the state bar gave an attorney permission to appear as counsel in action against attorney's former client would not give attorney permission to violate the Business or Professions Code or the Rules of Professional Conduct, nor would the opinion of a fellow attorney be a defense to a charge of unprofessional conduct. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

6. Attorney and client 🔑44(1), 58

Attorney's conduct in appearing as counsel, in action for breach of contract and for injunction, against former client, sustained finding of professional misconduct warranting three months' suspension. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

CARTER, J., dissenting.

◆

In Bank.

Proceeding by John Foster Sheffield against the State Bar of California to review an order of the board of governors of the state bar recommending that petitioner be suspended from the practice of law for a period of three months.

Petitioner suspended for three months.

William Roy Ives, of Los Angeles, for petitioner.

Paul J. Fritz and Jerold E. Weil, both of Los Angeles, for respondent.

PER CURIAM.

By a notice to show cause, the State Bar charged John Foster Sheffield with: "Violating your oath and duties as an attorney and counselor at law within the meaning of Section 6103 of Article 6 of the Business and Professions Code of the State of California, St.1939, p. 357 as the same are prescribed by Sections 6067 and 6068 of Article 4 of the Business and Professions Code of the State of California; and violating Rule 5 and 7 of the Rules of Professional Conduct of the State Bar of California; and the commission of acts involving moral turpitude and dishonesty within the meaning of Section 6106 of Article 6 of the Business and Professions Code of the State of California. * * *" Following a hearing upon these charges, the Board of Governors recommended that Sheffield be suspended from practice for a period of three months. In response to a writ of review issued by this court upon Sheffield's petition, the record of the proceeding has been presented for consideration.

It appears that in 1941, H. L. Blake retained the petitioner in connection with a dispute over premises which were the subject of a contract between him and Grace S. Cornwell. As attorney for Blake, who paid him $50, the petitioner filed in the Superior Court a complaint in which there was demanded from Mrs. Cornwell an accounting under the contract and damages for its breach; the plaintiff also asked the court for an injunction and declaratory relief. Sheffield later filed an amended complaint. Upon these complaints, a restraining order was issued.

Shortly afterward, Blake obtained other counsel who was substituted for the petitioner. The action was then prosecuted to a judgment by which Mrs. Cornwell was enjoined from taking possession of the premises in controversy and was ordered to account for money which had been received by her. The plaintiff was also awarded damages.

Five months later, the petitioner, as attorney for Mrs. Cornwell, filed a complaint against his former client in which she sought damages for a breach of the same contract which was the subject of the prior action. Soon after this complaint was filed, according to the findings of fact made by the Local Administrative Committee, the attorney for Blake demanded that Sheffield withdraw from the action upon the ground that he had represented Blake in the same matter. Sheffield refused to do so. Blake's counsel then moved the court to require Sheffield's withdrawal from the case. On the day of and shortly before the hearing of this motion, petitioner served on Blake's attorney a copy of a substitution of attorneys in which another attorney was substituted for him. The motion was nevertheless pressed, and the court ordered that Sheffield "be excluded * * * from taking any part in the trial of the * * * action as attorney of record for plaintiff, or as an attorney assisting or cooperating with any other attorney of record of said plaintiff, or at all."

Notwithstanding this order, at the time the action was set for trial Sheffield appeared on behalf of counsel of record for Mrs. Cornwell and requested a continuance. Following several continuances, Blake's counsel moved for a dismissal of the action upon the ground that Mrs. Cornwell's rights had been concluded by the judgment in the former litigation. This motion was granted.

Upon these facts the Committee determined that the petitioner had violated his oath and the duties of an attorney at law. In making this determination, the Committee stated that the members "are of the opinion that respondent has violated one of the most important and fundamental rules governing the relationship between attorney and client. * * * We can imagine certain instances where there might be a reasonable doubt as to the propriety of an attorney occupying a position adverse to a former client, but the present one certainly does not fall within such a zone of doubt. There would appear to be no question but that the subject matter of the two actions involved was exactly the same. The pleadings and judgment of dismissal in the second action would seem to be conclusive in this regard." The Committee recommended that Sheffield be suspended from the practice of law for a period of three months.

When the matter came before the Board of Governors, the petitioner appeared with his counsel who made a statement. By unanimous vote the findings of fact of the Committee were adopted. Two members of the Board voted against the Committee's recommendation of suspension for three months upon the ground that it is insufficient; all of the other members present adopted that recommendation.

[1] The first point urged by the petitioner is that the findings of fact and conclusions of law made by the Committee are not based upon the charges against him as stated in the notice to show cause. He asserts that he was charged with unethical conduct in representing conflicting interests and that the Committee found that he had not done so. But the findings follow exactly the wording of the notice to show cause except that they omit any mention of Rule 7 which the Committee found had not been violated.

Sheffield also asserts that the evidence is insufficient to support the findings and recommendations of the State Bar and that they are contrary to it. He calls attention to the fact that no complaining witness testified, and relies upon the testimony of Blake's attorney, who volunteered the opinion to the Committee that the petitioner "was guilty of no act that could be worthy of punishment by the State Bar." He also relies upon the fact that the transcript shows no evidence of any confidential information received by him from Blake.

[2, 3] The Rules of Professional Conduct adopted by the State Bar provide: "A member of the State Bar shall not accept employment adverse to a client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the courts of his employment by such client or former client". Rule 5. A reasonable construction of it, said this court in Galbraith v. State Bar, 218 Cal. 329, 23 P.2d 291, 292, "suggests that the subsequent representation of another against a former client is forbidden not merely when the attorney will be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he may be called upon to use such confidential information." And the court also declared, adopting its statement in Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P.2d 505, 509, that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship."

[4] The evidence against the petitioner shows a disregard of this rule and also of the elementary principles of good faith and fair dealing upon which it rests. He could not have filed the complaint against Mrs. Cornwell without obtaining from Blake information concerning the contract sued upon and the facts relating to the conduct of the parties in connection with the premises since that time. Yet five months later he represented Mrs. Cornwell in an action brought by her to secure damages on account of her eviction from the premises which were the subject of the same contract and ignored the order of court which excluded him from further participation in the case.

Sheffield's defense, as set forth in his answer to the notice to show cause and as related in his testimony, is that when Mrs. Cornwell consulted him he informed her that he did not know whether, with propriety, he could represent her. He then telephoned to the Los Angeles office of the State Bar and asked for E. W. Hendrick, an assistant secretary. To the person who represented himself to be Hendrick, he stated the facts and inquired whether he could ethically act as attorney for Mrs. Cornwell. Petitioner was informed, he declared as a witness in his own behalf, that if he had not received any confidential information from Blake, which could be used against him in the second action, there was no reason why he could not represent Mrs. Cornwell. An employee of the State Bar testified, however, that at the time of this asserted telephone call Hendrick was no longer in its employ. This witness also stated that, after Hendrick left the employ of the State Bar, two or three persons acted in his place and a telephone call concerning a question of ethics was placed with another one of the secretaries. And although the petitioner testified that he had asked for and spoken with Hendrick, the conversation, he later stated, might have been had with someone else.

The petitioner also testified that before undertaking to represent Mrs. Cornwell, he discussed the proprieties of the matter with three attorneys with whom he had an office association. According to his testimony, they told him they knew of no reason why he might not do so. The statements of these attorneys was repeated to Blake's attorney, said Sheffield in his testimony, when the propriety of filing the action on behalf of Mrs. Cornwell was being discussed, and the petitioner offered to submit the question to the trial judge in chambers and abide by his ruling.

[5] But this testimony did not impress the Committee as being entitled to any great weight. If Sheffield discussed the matter with any employee of the State Bar qualified to give an opinion, the Committee concluded, it appears improbable that he disclosed all of the essential factors. It may also be observed that no employee of the State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct. An opinion of a fellow attorney is likewise no defense to wrongdoing, although the leniency of the Committee's recommendation indicates that it gave some consideration to this evidence.

[6] It is ordered that John Foster Sheffield be suspended from the practice of law for a period of three months, effective thirty days after the date of the filing of this opinion.

CARTER, Justice (dissenting).

I dissent. From my examination of the record of this case I am persuaded that the majority opinion does not contain a fair statement of the facts and resolves all intendments against petitioner contrary to the settled rule in cases of this character. Hildebrand v. State Bar, 18 Cal.2d 816, 117 P.2d 860; Golden v. State Bar, 213 Cal. 237, 2 P.2d 325; Aydelotte v. State Bar, 209 Cal. 737, 290 P. 41; Furman v. State Bar, 12 Cal.2d 212, 83 P.2d 12.

The majority opinion states that "Five months later, the petitioner, as attorney for Mrs. Cornwell, filed a complaint against his former client in which she sought damages for a breach of the same contract which was the subject of the prior action. Soon after this complaint was filed, according to the findings of fact made by the Local Administrative Committee, the attorney for Blake demanded that Sheffield withdraw from the action upon the ground that he had represented Blake in the same matter. Sheffield refused to do so." However, the record discloses that at the time Blake's attorney suggested that petitioner withdraw as attorney for Mrs. Cornwell, petitioner advised him that he had sought advice from a secretary of The State Bar and three attorneys who were associates in his office as to whether or not it would be a violation of legal ethics for him to represent Mrs. Cornwell in said action, and that he had been advised by each of them that such conduct would not be unethical. He further offered to submit the matter to the trial judge at chambers and abide by his decision as to whether or not he should continue to represent Mrs. Cornwell in said action. This the attorney for Blake refused to do, and thereafter gave notice of motion to have petitioner excluded as attorney for Mrs. Cornwell, but before said motion was heard, petitioner served and filed a substitution of attorneys pursuant to which another attorney was substituted in his place. Petitioner did not thereafter participate in the case except to appear and request a continuance of the trial of the action upon the ground that the attorney substituted in his place was ill.

The attorney for Blake objected to a continuance and moved for judgment in favor of the defendant which was granted by the trial court. At the hearing before the Local Administrative Committee in this proceeding, said attorney testified "It suddenly occurred to me I had what I might call a long shot and I could throw the case out of court by taking the position that Mr. Sheffield had no business in the case either physically or as attorney of record. * * * The plaintiff not being there in person or by an attorney, [the] judge thought it over a few minutes and finally ordered a default judgment, and that ended the case."

In explanation of filing the second action for Mrs. Cornwell against his former client Blake, petitioner testified herein that "I have always taken the position, it was a different matter and wasn't related in so far as one was a conflicting interest with the other. I took the position, and the other attorneys did likewise, that the injunction suit would lie regardless of whether there was a breach of contract. In other words, I believe the decisions are clear * * * that regardless of a contract of employment that you have with an employer that an employer in spite of that contract can enjoin you from coming on to his premises even during the life of that contract." It is worthy of note, too, that adversary counsel testified herein that after he had been substituted for petitioner as counsel for the plaintiff Blake in the first action, he there argued that any claim by Mrs. Cornwell against Blake for damages would have to be brought in a subsequent action.

Petitioner's testimony that he talked with some one at the State Bar office prior to filing the action for Mrs. Cornwell against his former client is confirmed by the adversary counsel in that action who, when called by the State Bar as a witness in this proceeding, testified, "I do believe in good faith he [petitioner] came here" to The State Bar and made inquiry as to the propriety of his filing the action "because he told me that right in the beginning." This witness further testified "I don't think his intention was injurious, in effect to hurt Mr. and Mrs. Blake by reason of the prior employment. * * * I don't think Mr. Sheffield at any time was guilty of any conduct that would be worthy of any punishment from The State Bar. I feel I know as much about the case as anyone here."

In challenging the sufficiency of the evidence to support the finding that in filing the first action he had acquired confidential information from Blake concerning matters litigated in the second action, petitioner refers to his undisputed testimony that he had not acquired such information and that the factual basis for each action rested on matters of record, the first being a possessory action predicated on title to the property, and the second being based on the employment contract which also had been recorded. Neither Blake, petitioner's former client, nor Mrs. Cornwell, his client in the second action, was called by the State Bar. Adversary counsel was called and, as indicated above, he stated he did not believe petitioner had been guilty of any conduct warranting punishment.

The majority opinion quotes from the decision in Galbraith v. State Bar, 218 Cal. 329, 23 P.2d 291, as stating the applicable rule of law. It is there said, 218 Cal. at page 333, 23 P.2d at page 292, that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." Petitioner does not challenge this rule but contends that under all the facts disclosed by the record he should not be disciplined for representing Mrs. Cornwell against Blake, his former client. His representation of Blake in the first action extended no further than the filing of the complaint and other than the fact that both actions trace their origin to Blake's ownership of the property and Mrs. Cornwell's operation of a beauty parlor thereon under contract with him, the evidence herein fails to disclose that petitioner obtained any confidential information during his relations with Blake which he could have used or did use to Blake's disadvantage. In addition, according to petitioner's uncontradicted testimony, he filed the complaint in the second action for Mrs. Cornwell only after he had made inquiry at the State Bar office and of his office associates as to the propriety of his proceeding in the matter. When challenged by Blake's counsel prior to trial of the second action, petitioner immediately informed him that he had cleared the matter through the State Bar office and then offered to submit it to the trial judge in chambers before trial. The latter offer having been declined and a motion having been made by adversary counsel to exclude him from the case, petitioner substituted himself out.

In my opinion the record in this case fails to establish a violation of rule 5 of the Rules of Professional Conduct, and is therefore insufficient to sustain the findings and recommendation of the Local Administrative Committee and Board of Governors. A reasonable and common sense application of this rule would not bar an attorney from accepting employment adverse to a former client unless such employment related "to a matter in reference to which he had obtained confidential information by reason of or in the course of his employment by such * * * former client." The evidence is without conflict that no "confidential information" was obtained by petitioner from Blake. The latter did not testify in this proceeding, and his attorney testified positively that petitioner was not guilty of any misconduct whatsoever.

Obviously, rule 5 was adopted for the purpose of protecting a client against the use by his former attorney of confidential information obtained while the relationship of attorney and client existed between them. As so construed it has a highly salutary purpose. Those who have been engaged in the practice of law for a decade or more are cognizant of the fact that an attorney may accept employment against a former client in many matters without committing a violation of the above-mentioned rule.

In Golden v. State Bar, 213 Cal. 237, 247, 2 P.2d 325, 329, it is stated that charges against an attorney "must be sustained by convincing proof to a reasonable certainty, and any reasonable doubts should be resolved in favor of the accused." Aside from any question as to the soundness of petitioner's judgment in filing the second action against his former client, I find nothing in the record indicating that he intended thereby to take any advantage of such former client and the disciplinary proceeding should therefore be dismissed.

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22 Cal.2d 677

PEOPLE v. GODLEWSKI et al.

Cr. 4480.

Supreme Court of California.

Aug. 3, 1943.

Rehearing Denied Aug. 26, 1943.

1. Criminal law 🔑178

Where new section 1381 of Penal Code providing that within ninety days after demand by prisoner in state prison, any pending charge against prisoner must be brought to trial or be dismissed was given number next preceding first section of chapter 8 of the Code dealing with dismissal of actions for failure to prosecute, and section 1382 dealt generally with dismissals for failure to prosecute section 1381 was controlled by section 1387 of chapter 8, providing that an order for dismissal of a felony charge as provided for in the chapter is not a bar to another prosecution for the same felony, and hence dismissal of a felony charge under section 1381, is not a bar to another prosecution for the same offense. Pen.Code, §§ 681a, 686, 1379, 1381, 1382, 1387.

2. Criminal law 🔑178

Under statutes providing that within ninety days after demand by a prisoner in state prison, any pending charge against prisoner must be brought to trial or be dismissed and that such an order for dismissal is not a bar to any other prosecution for same offense, if offense is a felony, dismissal of justice court complaint was not a bar to subsequent filing of superior court information charging prisoner in state prison with commission of a felony based upon same facts charged in complaint. Pen. Code, §§ 1381, 1387.

3. Constitutional law 🔑33

The constitutional provision that accused in criminal actions are entitled to "speedy trials" establishes a fundamental right and is self-executing. Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Speedy Trial".

4. Criminal law 🔑576(1)

The enactments of the legislature with respect to a speedy trial and the time within which a trial must be had are supplementary to and a construction of constitutional provision that accused in criminal actions are entitled to a speedy trial and an inexcused delay beyond the time fixed by statute without accused's consent entitles him to dismissal of the prosecution. Pen. Code, § 1382; Const. art. 1, § 13.

5. Criminal law 🔑573, 575

What constitutes a "speedy trial" within constitutional provision that accused are entitled to speedy trials must be determined in the light of all the circumstances, and the point of beginning of the time for bringing accused to trial is the commencement of the prosecution against him. Const. art. 1, § 13.

6. Criminal law 🔑573

The basic policy underlying constitutional provision that accused are entitled to speedy trials is to protect accused from having criminal charges pending against them an undue length of time, and even though accused are not imprisoned on the charges, they are entitled to a speedy trial. Const. art. 1, § 13.

7. Criminal law 🔑573, 575

Under statute providing that within ninety days after demand by a prisoner in state prison, any pending charge against prisoner must be brought to trial or be dismissed, time commences when prisoner delivers his demand to district attorney, and when that charge has been dismissed against him because of failure to bring him to trial, the charge is no longer pending against him, and therefore another information may be filed against him without depriving him of a "speedy trial" and filing of a new information for the same offense commences a new period of time. Pen.Code, § 1381; Const. art. 1, § 13.

8. Criminal law ⚷573

Under statute providing that a prisoner in a state prison has right to have any prosecution pending against him brought to trial within ninety days after demand or to have such charges dismissed, where justice court felony complaint against prisoner in state prison was dismissed, subsequent superior court felony information for the same offense filed within the statutory time did not deprive accused of his constitutional right to a "speedy trial." Pen.Code, § 1381; Const. art. 1, § 13.

9. Criminal law ⚷576(8)

Where no warrant of arrest was served upon prisoner in state prison and he did not make demand upon the district attorney that he be brought to trial, prisoner did not comply with statute providing that within ninety days after demand by a prisoner in state prison any pending charge against prisoner must be brought to trial or be dismissed. Pen.Code, § 1381.

10. Criminal law ⚷575

A complaint filed in justice's court against prisoner in state prison was not an "indictment" or an "information" within statute requiring trials to be had within sixty days after the finding of an indictment or the filing of an information, and hence where an information was filed against prisoner within sixty days after he had been held to answer, statute was not applicable to prisoner. Pen.Code, § 1382 (1, 2).

See Words and Phrases, Permanent Edition, for all other definitions of "Indictment" and "Information".

11. Criminal law ⚷576(8)

The requirement of a demand in statute providing that within ninety days after demand by a prisoner in state prison any pending charge against prisoner must be brought to trial or be dismissed is not unreasonable and does not abrogate constitutional guarantee of a "speedy trial", but is merely regulatory of the guarantee. Pen. Code, § 1381; Const. art. 1, § 13.

12. Burglary ⚷41(1)
Larceny ⚷65

Evidence that defendant possessed burglar tools shortly after commission of crime and failed to account therefor together with other circumstances sustained convictions of burglary and of grand theft.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

John S. Godlewski and another were convicted of burglary and of grand theft, and they appeal.

Affirmed.

Prior opinion, 132 P.2d 540.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Appellants, Godlewski and Taranski, appeal from a judgment of conviction of burglary and grand theft, felonies, committed in Los Angeles County.

On April 2, 1941, a complaint was filed in a justice's court in Los Angeles County charging appellants with the offenses involved upon this appeal. On the same day warrants for their arrest were issued. On April 17, 1941, both appellants were sentenced to a state prison for an offense, not here involved, and commenced to serve their terms. On August 15, 1941, a peace officer in Los Angeles County filed an order with the warden of the prison to "hold" appellant, Godlewski. On November 3, 1941, appellant Godlewski, in accordance with section 1381 of the Penal Code, demanded of the District Attorney of Los Angeles County a hearing and trial on the complaint filed against him on April 2, 1941. On February 16, 1942, more than ninety days after the demand, and no hearing having been had, appellant moved the justice of the peace under said section 1381 to dismiss the charges made against him in the last-mentioned complaint. The motion was granted on February 18, 1942. Thereafter, apparently, a new complaint was filed against both defendants containing the same charges as set forth in the first complaint. The transcript of the justice's court docket where the dismissal was granted contains no mention of a preliminary hearing or order holding the defendants to answer, but a preliminary hearing was had before another justice of the peace on the new complaint, and an order was made holding the defendants to answer. Thereafter, on April 21, 1942, the District Attorney of Los Angeles County filed in the superior court of that county, an information charging both defendants with the offenses set forth in the order holding them to answer, which were the same offenses as those set forth in the first complaint. A motion to dismiss the information was denied and the trial followed resulting in the above-mentioned convictions.

Appellant Godlewski urges that the dismissal by the justice of the peace of the first complaint barred the later prosecution for the same offense resulting in his conviction, and, if it did not, his constitutional right to a speedy trial was impaired because the time within which he is entitled to a trial may not be indefinitely extended by successive new prosecutions for the same offense where prior proceedings have been dismissed for failure to prosecute.

[1, 2] Section 1381 of the Penal Code provides that: "Whenever a defendant has been convicted, in any court of this State, of the commission of a felony or indictable misdemeanor and has been sentenced to and has entered upon a term of imprisonment in a State prison and at the time of the entry upon such term of imprisonment there is pending, in any court of this State, any other indictment, information, or complaint charging the defendant with the commission of any crime it is hereby made mandatory upon the district attorney of the county in which such charge is pending to bring the same to trial within ninety days after such defendant shall have delivered to said district attorney written notice of the place of his imprisonment and his desire to be brought to trial upon said charge unless a continuance beyond said ninety days is requested or consented to by the defendant, in open court, and such request or consent entered upon the minutes of the court in which event the ninety day period herein provided for shall commence to run anew from the date to which such consent or request continued the trial.

"In the event such action is not brought to trial within the ninety days as herein provided the court in which such charge is pending must, on motion or suggestion of the district attorney, or of the defendant or his counsel, or of the State Board of Prison Directors, or on its own motion, dismiss such charge.

"If a charge is filed against a person during the time such person is serving a sentence in any State prison of this State it is hereby made mandatory upon the district attorney of the county in which such charge is filed to bring the same to trial within ninety days after said person shall have delivered to said district attorney written notice of the place of his imprisonment and his desire to be brought to trial upon said charge, unless a continuance is requested or consented to by the defendant, in open court, and such request or consent entered upon the minutes of the court, in which event the ninety day period herein provided for shall commence to run anew from the date to which such request or consent continued the trial.

"In the event such action is not brought to trial within the ninety days as herein provided the court in which such action is pending must, on motion or suggestion of the district attorney, or of the defendant or his counsel, or of the State Board of Prison Directors, or on its own motion, dismiss the charge." The Constitution provides that in a criminal action defendant is entitled to a "speedy and public trial". Cal. Const. art. I, sec. 13.

To the same effect are sections 686 and 681a of the Penal Code. Section 1387 of the Penal Code provides that an order for a dismissal as provided for in this chapter is a bar to any other prosecution for the same offense if the offense is a misdemeanor, but is not a bar if the offense is a felony. That section was in the original Penal Code as adopted in 1872 in the same form as at present insofar as applicable to the instant case. It was amended in 1905, Stats.1905, p. 724. It has always been in chapter 8 of title 10, part 2 of the Penal Code. The heading of that chapter in the original code reads: "Dismissal of Action, Before or After Indictment, for Want of Prosecution or Otherwise." The first section in chapter 8 in the original code was 1382. The last section in the preceding chapter 7, which deals with compromising certain public offenses, is section 1379. Section 1381, supra, was added to the Penal Code in 1931, Stats. 1931, p. 1060, and amended in 1933. Stats. 1933, p. 1689. Although nothing was said by the Legislature in the act of 1931, adding section 1381 concerning its being a part of chapter 8, it is quite apparent that such was the Legislature's intention, inasmuch as that chapter deals with the dismissal of actions for failure to prosecute, the same subject embraced in section 1381, and the number given to it the one next preceding the first section in that chapter (section 1382), and not the next succeeding number following the last section in chapter 7 (section 1379). Furthermore, it is to be noted that section 1382 deals generally with dismissals for failure to prosecute. Section 1381 is concerned particularly with such dismissals where the defendant is confined in a state prison for another offense. We believe it is clear, therefore, that the Legislature intended that section 1381 was to be controlled by section 1387. Hence, a dismissal under section 1381, where the offense is a felony, as in the instant case, is not a bar to any other prosecution for the same offense. The filing and prosecution of the information against appellant Godlewski was not therefore barred by the prior dismissal of the complaint for the same offenses in the justice's court.

[3-8] Contrary to appellant Godlewski's contention, the foregoing effect given to section 1381 did not deprive him of his constitutional right to a speedy trial. Cal. Const. art. I, sec. 13. True, that constitutional provision establishes a fundamental right and is self-executing. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500; Harris v. Municipal Court, 209 Cal. 55, 285 P. 699; In re Begerow, 133 Cal. 349, 65 P. 828, 85 Am.St.Rep. 178, 56 L.R.A. 513; People v. Molinari, 23 Cal.App.2d Supp. 761, 67 P.2d 767; People v. Romero, 13 Cal. App.2d 667, 57 P.2d 557. The enactments of the Legislature with respect to a speedy trial and the time within which a trial must be had are supplementary to and a construction of the Constitution, and an inexcused delay beyond the time fixed in section 1382 of the Penal Code without defendant's consent entitles the defendant to a dismissal. People v. Romero, supra; People v. Angelopoulos, 30 Cal.App.2d 538, 86 P.2d 873; People v. Molinari, supra; In re Alpine, supra; Harris v. Municipal Court, supra; In re Begerow, supra; In re Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882, Ann.Cas. 1912D, 1267; Ford v. Superior Court, 17 Cal.App. 1, 118 P. 96; People v. Walker, 76 Cal.App. 192, 244 P. 94. What constitutes a speedy trial must be determined in the light of all the circumstances. People v. Brock, 87 Cal.App. 601, 262 P. 369, 263 P. 544; In re Alpine, supra; People v. Molinari, supra. The point of beginning of the time for bringing the accused to trial is the commencement of the prosecution against the accused. Harris v. Municipal Court, supra. The basic policy underlying the constitutional provision is to protect the accused from having criminal charges pending against him an undue length of time. Even though defendant is not imprisoned on the charge, he is still entitled to a speedy trial. Harris v. Municipal Court, supra; Rice v. Superior Court, 40 Cal.App.2d 391, 104 P.2d 874; Ford v. Superior Court, supra. Under section 1381, the time commences when the defendant delivers his demand to the district attorney. When that charge has been dismissed against him as was done in the instant case because of failure to bring him to trial, the charge is no longer pending against him. We see no reason therefore why another information may not be filed against him after such dismissal. He has had the first charge dismissed and thus his right to a speedy trial protected. The filing of a new information for the same offense commences a new period of time. From the time the complaint in the justice's court was dismissed on February 18, 1942, until another charge was made against him, no charge was pending against him. In Re Begerow, 136 Cal. 293, 68 P. 773, 56 L.R.A. 528, the defendant was tried five times for murder, each trial resulting in a disagreement of the jury. More than sixty days after the discharge of the last jury, the defendant was released on a writ of habeas corpus upon the ground that he was being held in violation of section 1382(2) of the Penal Code providing for a dismissal of the charge if no trial is had within sixty days after the filing of the information. In re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 513, 85 Am.St.Rep. 178. A complaint was thereafter filed against him for the same charge. His application for discharge on habeas corpus on the ground that his constitutional right to a speedy trial had been invaded, was denied under section 1387 of the Penal Code. See also Ex parte Clarke, 54 Cal. 412; People v. Dawson, 210 Cal. 366, 371, 292 P. 267; People v. Palassou, 14 Cal.App. 123, 111 P. 109; People v. Grace, 88 Cal.App. 222, 263 P. 306; In re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 522, 85 Am.St.Rep. 178; Ex parte Warrenburg, 63 Okl.Cr. 125, 73 P.2d 476.

There may be circumstances justifying relief from an abuse of criminal process by the commencement of successive prosecutions, but those circumstances are not present in the instant case.

[9-11] Apparently no warrant of arrest was served upon appellant Taranski although he was serving a prison term in the same prison as Godlewski. He did not make any demand upon the district attorney that he be brought to trial, hence did not comply with section 1381 of the Penal Code. Section 1382 of the Penal Code is not applicable to him inasmuch as his case does not fall within its terms. It requires that an information must be filed against the defendant within fifteen days after he has been held to answer. Penal Code, § 1382(1). As far as appears that was done. It also requires the trial must be had within sixty days after *the finding of the indictment or filing of the information.* Penal Code, sec. 1382(2). That section was not violated inasmuch as the complaint filed against him in the justice's court was neither an indictment nor an information. It may be that he is entitled to invoke the constitutional provision independently of any statute (see Harris v. Municipal Court, supra), but as we have seen, he falls squarely within the provisions of section 1382, relating to the trial of defendants confined in a state prison. He made no demand as there required. We find nothing unreasonable in the requirement for a demand. It does not abrogate the constitutional guarantee. It is merely regulatory of it. Persons already incarcerated in prison will not suffer imprisonment during delay.

Appellant Taranski contends the evidence is insufficient to sustain the judgment of conviction against him. On March 11, 1941, the State Department of Motor Vehicles had a safe in its office in Pasadena containing over $400 in cash and some checks. It was locked by an employee when she left work shortly after 5 p. m. on that day. A few minutes before midnight that night it was discovered that the rear door of the office had been broken open and the safe removed. There were marks on the office floor from dragging the safe. The safe was discovered about four miles from its original location with its door having been forceably removed. The checks it contained and its door were lying on the ground near the safe. The cash was not found. Some time later an automobile registered in appellant Godlewski's name was found in Nevada. The imprint of its tires was the same as marks found at the rear of the office which was burglarized. Godlewski was residing in an apartment in Los Angeles until a few days prior to March 11, 1941, the date of the burglary, and was frequently visited by appellant Taranski. The latter was seen in the office of the department several days prior to the time of the crime. Godlewski was seen walking along the street in the vicinity of the office the evening of the crime. The metal strip on the sill of the car door contained paint identified as the same as that on the safe. Godlewski and Taranski were together and were arrested in Fresno five days after the day of the crime. Taranski was carrying a suit case containing a pinch bar, a cold chisel, a hacksaw, a sledge hammer and flashlight. The chisel and pinch bar contained remnants of the fire clay used as insulation in the safe and marks on the safe indicated that they had been made by the chisel and pinch bar. Taranski first denied and later admitted to the officers he had lived in Los Angeles. When asked why he denied he had been there he replied: "Well, what would you do?" At the time of their arrest both appellants were carrying pistols. Neither of the appellants testified or produced any evidence.

[12] The evidence is sufficient to sustain the conviction of Taranski. Assuming, as argued by Taranski, that the possession by defendant of burglar tools shortly after the commission of the crime, like the possession of stolen property, standing alone is not sufficient to prove the defendant's guilt of the offense of burglary, when that factor is combined with other circumstances such as are present in the instant case, there is sufficient evidence. That is especially true where the defendant has failed to account for the possession upon a theory inconsistent with his guilt of the offense charged. See People v. Parkinson, 138 Cal.App. 599, 33 P.2d 18; People v. Russell, 120 Cal.App. 622, 8 P.2d 209; People v. Golembiewski, 25 Cal.App.2d 115, 76 P.2d 717; People v. Shaw, 46 Cal.App.2d 768, 117 P.2d 34; People v. Ellis, 33 Cal.App.2d 616, 92 P.2d 431.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concur.

22 Cal.2d 540

STRONG v. STRONG.

S. F. 16249.

Supreme Court of California.
July 22, 1943.

Rehearing Denied Aug. 19, 1943.

1. Husband and wife 🔑247

The rights of husband and wife in realty conveyed to husband during marriage in 1925 and by them conveyed in 1932, were required to be measured by the statutes in effect when the property was acquired. Civ.Code, § 172a.

2. Husband and wife 🔑267(1)

Where property conveyed to husband was acquired before the adoption in 1927 of the Code section giving the wife a present and equal interest in community property, the wife adequately signified her consent to a transfer by the husband of the property in 1932 by signing the deed and it was not necessary that she be named therein as grantor. Civ.Code, §§ 161(a), 172.

3. Husband and wife 🔑267(1)

The purpose of code section providing that wife must join with the husband in executing instrument conveying community property was to give a wife a legal power over conveyances of community property disadvantageous to her, and since she can exercise this power effectively by refusing to sign the deed, there is no need for more elaborate procedure. Civ.Code, § 172a.

4. Limitation of actions 🔑41

Where deed was recorded several years before commencement of action to quiet title thereto, as against defendant wife who was one of the grantors, wife was barred from asserting plea of the one-year statute of limitations, notwithstanding she brought no action to avoid deed but invoked the statute as a defendant, since statutes of limitation apply also to causes of action raised by defendants. Civ.Code, § 172a; Code Civ.Proc. § 335 et seq.

5. Husband and wife 🔑267(1)

The Code section as it existed in 1925, that no action to avoid a conveyance of community real property in which wife has not joined, shall be commenced after the expiration of one year from the filing for record of such instrument, does not manifest a legislative intent that the section should be construed more strictly than the usual statute of limitations. Civ.Code, § 172a.

6. Limitation of actions 🔑182(2)

A party relying on defense of statute of limitations must plead it.

7. Adverse possession 🔑110(4)

Where plaintiff in suit to quiet title pleaded ownership, plea was sufficient to permit proof of title acquired as result of running of statute of limitations. Civ. Code, § 172a.

8. Deeds 🔑190

In action to quiet title to property against wife who joined in a conveyance thereof, judgment for wife could not be sustained on ground that she was induced to execute conveyance by her husband's false representations, where wife did not plead fraud.

9. Pleading 🔑8(15)

General rule that fraud must be specifically pleaded applies particularly in quiet title actions.

10. Quieting title 🔑43

In action to quiet title to property, against defendant wife who joined in conveyance thereof with her husband, judgment for defendant could not be sustained on ground that she had been induced to execute deed by her husband's false representations, since any such right she might have had to cancellation, or to declaration of a constructive trust were entirely equitable and could not be asserted in a quiet title action containing mere general allegations asserting defendant's ownership but denying that of plaintiff.

11. Trial 🔑397(1)

A judgment is not supported by proof of fraud if there is no finding of fraud. Code Civ.Proc. § 632.

12. Trial 🔑404(1)

Where findings are made substantially in the language of the pleadings, they do not include issues not raised by the pleadings.

13. Deeds 🔑188

In an action to quiet title to property against defendant wife who joined in conveyance thereof, where wife sought to avoid conveyance on ground of her husband's false representations in signing the deed, rules of pleading governing cases of conveyances in fraud of creditors were inapplicable. Civ.Code, §§ 3439.04, 3439.09, 3440.

14. Fraudulent conveyances ⊂⇒230
Sheriffs and constables ⊂⇒137(4)

Where a conveyance has been made in fraud of creditors, a creditor may levy execution upon the property as if there had been no conveyance, and the sheriff who is sued for conversion by virtue of such an execution may prove under a denial of the grantee's title that the conveyance was fraudulent. Civ.Code, § 3439.09.

15. Fraudulent conveyances ⊂⇒57(1), 64(1), 137(1)

A conveyance may be in fraud of creditors because it was a gift by an insolvent donor, or was designed to put the property beyond reach of creditors, or in the case of personal property because it was not followed by immediate delivery. Civ.Code, §§ 3439.04, 3440.

SHENK and CARTER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Blanche Hadley Strong against Muriel F. Strong to quiet title to real property. From a judgment for defendant, plaintiff appeals.

Reversed.

Kenneth J. Carey, of Oakland, and Henderson & Henderson, of San Francisco, for appellant.

Snook & Snook & Chase and Samuel J. Chase, all of Oakland, for respondent.

TRAYNOR, Justice.

This action was brought by plaintiff Blanche Hadley Strong against defendant Muriel F. Strong to quiet title to a house and lot in the city of Oakland. The property was conveyed on December 16, 1925, by June Wadey to Lester H. Strong, at that time the husband of defendant Muriel F. Strong, and the deed was recorded on January 6, 1926. The purchase was made at least in part with community funds. In 1932 a grant deed was executed and delivered to plaintiff Blanche Hadley Strong, mother of Lester H. Strong. Both Lester H. Strong and Muriel F. Strong signed and acknowledged the deed, but only Lester H. Strong was named therein as grantor. Muriel F. Strong was induced to sign the deed by her husband's representations that he was in financial difficulty, that the conveyance was made for the protection of their home, and that there would shortly be a reconveyance to them. The deed was recorded on April 14, 1932. On January 14, 1938, Muriel F. Strong was granted a divorce and was awarded the house and lot, formerly the home of the family and subsequently the home of her two children and herself. Plaintiff appeals from the judgment in favor of the defendant.

The divorce decree could pass no interest to defendant unless the deed could not be enforced against her, so inquiry must first be directed at the effectiveness of the conveyance to plaintiff in 1932. Defendant invokes section 172a of the Civil Code, providing that the wife must join with the husband in executing any instrument by which "community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered. * * *" Defendant contends that in order to join in executing the deed, the wife must be named therein as grantor.

[1, 2] Two early cases, Ingoldsby v. Juan, 12 Cal. 564, and Dentzel v. Waldie, 30 Cal. 138, involved legislation providing that a conveyance of the wife's separate property must be signed by the husband, that such a conveyance must be by joint deed, and that it must be executed by husband and wife. Hittel General Laws of California, (1872) pp. 103, 105, 516. This court held that the husband complied with these statutes by signing the deed, on the ground that it would be unreasonable to expect a husband who had no interest to convey to be a formal grantor. It declared that the husband was required to join merely to give or withhold his assent to the transfer and that he gave his assent by signing the deed. The same reasoning applies to Civil Code, section 172a. When that section was adopted in 1917, a wife had no legal interest in the community property (Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537; In re Estate of Dargie, 179 Cal. 418, 177 P. 165; Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Stewart v. Stewart, 199 Cal. 318, 249 P. 197), and since she could grant no interest, the Legislature could hardly have intended her to act as grantor. The rights of the husband and wife must be measured by the statutes in effect when the property was acquired (McKay v. Lauriston, supra; Lahaney v. Lahaney, supra), and as the property in this

case was acquired before the adoption in 1927 of Civil Code, section 161(a) providing that the wife has a "present, existing and equal" interest in community property, the wife adequately signified her consent to the transfer by the husband by signing the deed. Riley v. Gordon, 137 Cal.App. 311, 30 P.2d 617; see 3 Cal.Jur. Ten Yr. Supp. 593. Since the provisions of section 172a were the same in 1927 as in 1917 with respect to a wife's joining in a conveyance of community property, it is unlikely that any alteration in this meaning was intended in 1927.

[3] Defendant relies on Cordano v. Wright, 159 Cal. 610, 115 P. 227, Ann.Cas. 1912C, 1044, Roberts v. Abbott, 48 Cal.App. 779, 192 P. 345, and Childs v. Newfield, 136 Cal.App. 217, 28 P.2d 924, holding that if several persons sign a deed, some of whom are not named therein as grantors, only those so named convey their interest in the property granted. In distinguishing Ingoldsby v. Juan, and Dentzel v. Waldie, however, the court in Cordano v. Wright made it clear that those cases were correctly decided, and that a person without any legal interest in the property granted could by signing a deed comply with a statute requiring that he join in its execution. The rule in Cordano v. Wright had its origin in the fact that at common law deeds were not signed but sealed, and identification of the grantor was therefore required in the body of the deed. Even after seals were replaced by signatures and the rule became unnecessary it was still applied mechanically. Elliot v. Sleeper, 2 N.H. 525. Several courts, however, have refused to adhere to the rule now that it has lost its reason for being. Sterling v. Park, 129 Ga. 309, 58 S.E. 828, 13 L.R.A.,N.S., 298, 12 Ann.Cas. 201, 121 Am.St.Rep. 224; Agar v. Streeter, 183 Mich. 600, 150 N.W. 160, L.R.A.1915D, 196, Ann.Cas.1916E, 518; Hrouska v. Janke, 66 Wis. 252, 28 N.W. 166; Elliot v. Sleeper, supra. See Blake v. Hedrick, 94 W.Va. 761, 120 S.E. 906; Runyan v. Snyder, 45 Colo. 156, 100 P. 420. Certainly it should not be applied where there is no occasion for even its mechanical application. The purpose of section 172a was to give a wife a veto power over conveyances of community property disadvantageous to her (Stewart v. Stewart, supra) and since she can exercise this power effectively by refusing to sign the deed, there is no need for more elaborate procedure.

[4] Defendant, moreover, asserts her rights under section 172a too late. At the time the property was acquired this section provided that no action to avoid a conveyance of community real property in which the wife had not joined "shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate." St.1917, p. 829. The deed to plaintiff was recorded several years before the commencement of this action. It is immaterial that the wife has brought no action to avoid plaintiff's deed but invokes section 172a as defendant in a quiet title suit, for statutes of limitation, although commonly phrased in terms restricting only the commencement of actions (Cal.Code Civ.Proc. sec. 335 et seq.), apply to causes of action raised by the defendant. Hermosa Beach, etc., Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Bliss v. Sneath, 119 Cal. 526, 51 P. 848. "A title which will not sustain a declaration will not sustain a plea." Holmes, J., in Chapin v. Freeland, 142 Mass. 383, 8 N.E. 128, 129, 56 Am.Rep. 701. Defendant, despite her plea of ownership, seeks in fact to prevail on the basis of a cause of action to avoid plaintiff's deed, a cause of action on which the statute has run.

[5] Defendant's argument that the statute should not bar this cause necessitates the assumption that 172a should be construed more strictly than the usual statute of limitations. The reverse is true. The recipient of a deed executed by the husband alone obtains a voidable interest. The object of the one year limitation in section 172a is to make that interest absolute after that time just as statutes barring actions for the recovery of real property are usually construed to create a new title in the adverse possessor and to terminate the interest of the paper titleholder. See Ballantine, Title by Adverse Possession, 32 Harv. L.Rev. 135; Tiffany on Real Property, 3rd Ed., section 1133, et seq.; Restatement: Property, Introductory Note to chapter 15. It is not reasonable to suppose that the Legislature intended to make the grantee's right to the property dependent on the chance of the wife's appearing as plaintiff rather than defendant.

[6, 7] It is also contended that plaintiff waived the limitation under 172a on defendant's cause of action. It is true that a party relying on the defense of the statute of limitations must plead it. See Union

Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. Plaintiff, however, pleaded that she owned the property, and a plea of ownership is sufficient to permit proof of a title acquired as a result of the running of the statute of limitations. Jordan v. Beale, 172 Cal. 226, 155 P. 990; Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433; Myers v. Berven, 166 Cal. 484, 137 P. 260; Gray v. Walker, 157 Cal. 381, 108 P. 278; Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Merrill v. Hooper, 125 Cal.App. 80, 13 P.2d 786; Rowe v. Wurster, 50 Cal.App. 196, 194 P. 725.

[8-10] Defendant contends that the judgment quieting title in her should be affirmed on the ground that she was induced by her husband's false representations to sign the deed. Defendant did not plead fraud, however, although the general rule that fraud must be specifically pleaded (see cases cited in 12 Cal.Jur. 800, et seq.) applies particularly to quiet title actions. Thompson v. Moore, 8 Cal.2d 367, 372, 65 P.2d 800, 109 A.L.R. 1027; Maison v. Puntenney, 212 Cal. 134, 137–139, 298 P. 33; Carpenter v. Smallpage, 220 Cal. 129, 133, 29 P.2d 841; Id., Cal.Sup., 30 P.2d 995; Burris v. Adams, 96 Cal. 664, 667, 668, 31 P. 565; Davies v. Symmes, 49 Cal.App.2d 433, 445, 446, 122 P.2d 102. Defendant, moreover, is not the legal owner, for title passed on execution of the deed. See cases cited in 12 Cal.Jur. 723. Any rights that she might have to the cancellation of the deed or to the declaration of a constructive trust are entirely equitable (Rocha v. Rocha, 197 Cal. 396, 240 P. 1010; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707; Freligh v. McGrew, 95 Cal.App. 251, 272 P. 791; Walsh, Equity, 492), and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff. Aalwyn's Law Institute v. Martin, 173 Cal. 21, 26, 159 P. 158; Robinson v. Muir, 151 Cal. 118, 124, 90 P. 521; County of Los Angeles v. Hannon, 159 Cal. 37, 48, 112 P. 878, Ann.Cas.1912B, 1065; Reilly v. Wright, 117 Cal. 77, 80, 48 P. 970.

[11, 12] In the present case there was not only no pleading, but no finding of fraud, and a judgment is not supported by proof of fraud if there is no finding of fraud. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; Floyd v. Tierra Grande Dev. Co., 51 Cal.App. 654, 197 P. 684; Code Civ.Proc. § 632; see cases cited in 24 Cal.Jur. 935 et seq. Any issue of fraud in this lawsuit entered through the evidence admitted, not through the pleadings. The findings are made substantially in the language of the pleadings and do not include issues not raised by them. Taylor v. Taylor, 192 Cal. 71, 81, 218 P. 756, 51 A.L.R. 1074.

[13-15] The rules of pleading governing cases of conveyances in fraud of creditors have no bearing on the present case, which does not involve such a conveyance. Cf. Howe v. Johnson, 107 Cal. 67, 40 P. 42; Banning v. Marleau, 121 Cal. 240, 53 P. 692; Mason v. Vestal, 88 Cal. 396, 26 P. 213, 22 Am.St.Rep. 310; Grum v. Barney, 55 Cal. 254; Bird v. Murphy, 72 Cal.App. 39, 236 P. 154; Sellers v. Neil, 47 Cal.App.2d 128, 117 P.2d 390. Such conveyances are void as against creditors, under the express terms of Civil Code, section 3439, et seq. in effect when the Uniform Fraudulent Conveyance Act was adopted in 1939, and of Civil Code, section 3439.09, in effect thereafter. A creditor may levy execution on the property as if there had been no conveyance (Grum v. Barney, supra; Mason v. Vestal, supra; see Bird v. Murphy, supra), and a sheriff who is sued for conversion by virtue of such an execution may prove, under a denial of the grantee's title, that the conveyance was fraudulent. Howe v. Johnson, supra; Banning v. Marleau, supra; Mason v. Vestal, supra; Grum v. Barney, supra. A conveyance may be in fraud of creditors because it was a gift by an insolvent donor, Civil Code, § 3439.04, or was designed to put the property beyond the reach of creditors, Civil Code § 3439.04, or, in the case of personal property, because it was not followed by immediate delivery. Civil Code, § 3440. The fraud that entitles a party to rescind a transfer, however, is altogether different, for it is based on false representations inducing reliance, and thus involves different considerations of policy and different legal consequences.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and SCHAUER, JJ., concurred.

CURTIS, Justice (dissenting).

I dissent. As a preliminary point of discussion it is necessary to advert briefly to the presentation and disposition of this litigation in the trial court. The pleadings are in the usual short form appropriate to quiet title actions. The complaint alleges the plaintiff's ownership of certain described real property and the defendant's assertion of an interest therein adverse to the plaintiff. The defendant in her answer denies all the averments of the complaint except as to her adverse claim, which she admits, but she denies that such claim is without right; in this connection defendant alleges that she is the owner and rightfully in possession of the property and prays that title be quieted in her. The case was tried by the court sitting without a jury. Following the general form of the allegations contained in the parties' respective pleadings, the trial court in its findings resolved the adverse claims of ownership in favor of the defendant and judgment was entered in accordance with that adjudication of the title to the property. Such determination rests upon the inefficacy of the deed of 1932 to sustain the plaintiff's cause of action.

The following review of the record will demonstrate the propriety of the trial court's decision: While the defendant admitted signing the deed in question, she consistently maintained that she had no intention of "passing the title" or giving away [her] home" or "passing any interest" to the plaintiff. It appears that the defendant knew the instrument was drafted in favor of her mother-in-law, but that because of her ill health the defendant did not read the document and relied solely on her husband's statement that the transaction was "merely for convenience" and a reconveyance by his mother would immediately follow. Illustrative of the defendant's understanding of the matter are these excerpts from her testimony: In answer to the question "What did your husband tell you" when the deed was executed, the defendant upon direct examination testified: "That he wanted me to sign this deed to his mother merely for a convenience; that very shortly it would be put back in my name, and the other paper I signed [at the same time] he told me that was the deed giving it back to us. I did not read either document due to my condition." On cross-examination when queried as to the identity of the two documents she claimed to have signed contemporaneously the defendant stated: "One he told me was giving the house to his mother and the other was his mother giving it back to me." When asked as to what reason her husband gave her for negotiating the transfer, the defendant answered: "He said he was in some business difficulty and he didn't want the home taken from his two children and his wife—he wanted to safeguard us." Confirmatory of the defendant's understanding of the affair is the fact that her possession and enjoyment of the property was in nowise disturbed as the result of this deed. At the trial the defendant's husband, Lester H. Strong, admitted that he told the defendant when she signed the deed that such transfer was necessary because of financial difficulties.

Also of some pertinency in this connection is the evidence relating to the matter of consideration in support of the disputed conveyance. At the trial the plaintiff attempted to correlate the transaction here involved with her action some eight weeks later in deeding two pieces of real estate to her son, Lester H. Strong. Although the latter was called to testify on behalf of the plaintiff, he was not asked to corroborate his mother's claim as to the issue of consideration. It appears that the defendant did not know of these later conveyances to her husband, and she, therefore, was unable to testify as to their purpose. However, she did state that at the time in question the plaintiff was financially interested in certain business ventures of Lester H. Strong and concerned with their successful outcome. On cross-examination the plaintiff admitted that she frequently gave her son money or property on which he might obtain loans to relieve pressing financial obligations. In view of the significant discrepancy between the respective dates of the mentioned deeds, the natural as well as business relationship between the plaintiff and Lester H. Strong, and the conflicting possibilities as to the object of the plaintiff's transfer of realty to her son, the trial court, having the advantage of observing the demeanor of the parties on the witness-stand, apparently elected to discredit the plaintiff's claim as to the existence of any connection between the successive conveyances and concluded that they were independent transactions, not intended as consideration one for the other. In accord with the settled rule that it is within the exclusive province of the trial court to pass upon the credibility of the witnesses and the weight of the evidence, the implied finding against the plaintiff on the issue of consideration would not be disturbed on appeal.

From this state of the record it can readily be inferred that the defendant was induced to sign the deed of 1932 solely by reason of the persuasion and misleading explanation of her husband as to the feigned nature of the transfer; that she never realized the full significance or import of the instrument, but that she had implicit trust in her husband's management of their business affairs and accepted what he said without question; and that the confidence she reposed in him was betrayed in an attempt to consummate a conveyance of their community real property to her detriment. Thus, there was an absence of actual consent to the transfer on the part of the defendant, and under the prevailing circumstances the plaintiff is not in a position to urge the binding force of the defendant's signature to the deed as an unchallengeable manifestation of assent to the conveyance. While it does not appear that the plaintiff took part in the procurement of the deed the equities of the case support the defendant's claim to relief upon the basis of her husband's breach of his fiduciary duty to protect her interests and the want of consideration in support of the transfer. From this aspect the present situation is akin in principle to those cases wherein a gift, grant or bequest obtained by undue influence of a third person is vitiated thereby, and it is held immaterial that in the procurement thereof the immediate beneficiary did not participate. Moore v. Moore, 81 Cal. 195, 22 P. 589, 874; see cases collected in 96 A.L.R. 613–615.

The majority opinion holds that these evidentiary matters would have no bearing upon the determination of this appeal because the defendant did not plead the fraudulent character of the deed nor did the trial court make a finding based thereon. However, such omissions in the record do not militate against the propriety of the judgment nullifying the operative effect of the conveyance to the plaintiff in 1932. In a quiet title suit, unlike other actions generally, a defendant under a general denial may raise the issue that the plaintiff acquired title in whole or in part through a fraudulent transfer affecting her claim of title thereto. 12 Cal.Jur. § 95, p. 1056; Howe v. Johnson, 107 Cal. 67, 40 P. 42; Banning v. Marleau, 121 Cal. 240, 53 P. 692; Bird v. Murphy, 72 Cal.App. 39, 236 P. 154; Sellers v. Neil, 47 Cal.App.2d 128, 117 P.2d 390. Nor after consideration of this point was the trial court required to make a special finding thereon. As previously stated, the complaint and answer are in the conventional style suitable to this type of litigation, and the findings are responsive to the general form of the pleadings. The issue as to the fraudulent nature of the conveyance arose merely in the evidence at the trial. Findings of fact are sufficient if they follow the language of the pleadings. Dam v. Zink, 112 Cal. 91, 44 P. 331; Vasey v. Campbell, 4 Cal.App. 451, 88 P. 509; Biurrun v. Elizalde, 75 Cal.App. 44, 242 P. 109; also, see cases collected in 24 Cal.Jur. § 213, p. 984. Ownership of the property by the defendant was the ultimate fact which was alleged in the answer and which was set forth in the findings. Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; Hannah v. Canty, 175 Cal. 763, 167 P. 373. In reviewing the sufficiency of the findings to support a judgment, regard will be had to the ultimate facts and not to mere probative facts. 2 Cal.Jur. 872, and cases cited in Ten Year Supp.

The majority opinion further holds that the defendant is not now in a position to question the validity of the deed to the plaintiff because the time limit of one year from the date of recordation of the instrument, the period specified in section 172a as available for the wife's exercise of her right to avoid an unauthorized conveyance, had expired several years before the commencement of this quiet title action. However, this statement of the law has no application when the validity of the deed is questioned on the ground of fraud rather than non-compliance with the terms of section 172a. A statute of limitations is a special defense which may be either relied on or waived at the election of a party entitled to avail herself of it, and, if not specially made, it will be deemed to have been waived. 16 Cal.Jur. § 232, p. 640; In re Estate of Garcelon, 104 Cal. 570, 38 P. 414, 32 L.R.A. 595, 43 Am.St.Rep. 134; Bliss v. Sneath, 119 Cal. 526, 51 P. 848. Conceding that the general form of the pleadings in this action did not permit the plaintiff's assertion of a time limitation by formal plea and that without such preliminary foundation she could have urged such bar in the trial court in avoidance of the defendant's claim to relief, it does not appear from the record that the plaintiff did in fact present the point there. Consequently such matter should not be considered for the first time on appeal. In re Estate of Garcelon, supra; Moore v. Copp, 119 Cal. 429, 51 P.

630; Bliss v. Sneath, supra. The rule governing such situation, where the formal plea of the statute of limitations is unnecessary in order to introduce evidence thereon at the trial, is stated in the case of Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 745, 47 P.2d 273, 276: "However, it has been held that unless the adverse party invokes the plea of the statute at the trial, and brings to the attention of the trial court his purpose to offer evidence in support of such plea, the court cannot assume that he desires to make any such defense, and he cannot invoke the plea for the first time on appeal. [Citing authorities.]"

Consistent with this review of the record herein, the defendant is entitled to relief from the operative effect of the disputed conveyance. In my opinion the judgment should be affirmed.

SHENK, J., and CARTER, J., concurred.

Rehearing denied; SHENK, CURTIS, and CARTER, JJ., dissenting.

22 Cal.2d 580

DENIO et al. v. CITY OF HUNTINGTON BEACH.

L. A. 18172.

Supreme Court of California.

Aug. 3, 1943.

Rehearing Denied Sept. 1, 1943.

1. Municipal corporations 🔑232

A contract made by municipal council, if apparently fair, just and reasonable and prompted by necessities of situation or advantageous to municipality at time of its execution, is neither void nor voidable merely because some of its executory features may extend beyond terms of council members, but is binding on municipality and may not be summarily canceled by successor council, in absence of some other ground of avoidance.

2. Municipal corporations 🔑80

A municipal corporation's council is continuing body and remains same council in legal contemplation, regardless of changes in its personnel.

3. Municipal corporations 🔑254

A city, as well as individual, must respond in damages for its failure to keep faith with those with whom it contracts.

4. Municipal corporations 🔑214(3)

A contract, made by city council's direction for employment of attorneys as special counsel for city in preparation of charter and all legal matters connected with city's efforts to obtain just returns from oil and gas in tide lands within city boundaries, *held* valid and binding on city, so as to entitle such attorneys to recover from city compensation specified in contract as damages for breach thereof by their wrongful discharge.

5. Municipal corporations 🔑220(8)

In action against city for attorneys' fees under written employment contract, plaintiffs' testimony held sufficient to show that they did not abandon contract, so that their discharge and cancellation of contract by city was improper.

6. Appeal and error 🔑1002

A jury's determination of fact issue on conflicting testimony is binding on Supreme Court on appeal.

7. Municipal corporations 🔑220(8)

In action against city to recover attorneys' fees under contract to act as special counsel for city in all legal matters connected with its efforts to obtain just returns from oil and gas in tide lands within city boundaries for stated percentages of moneys received by city as royalties or from sale of oil and gas, evidence held sufficient to show that payments made to city by oil and gas lessee were on account of oil produced only from lands specified in contract.

8. Contracts 🔑155

Any ambiguity in written contract, interpretation of which is otherwise uncertain, must be construed against parties who drew contract.

9. Municipal corporations 🔑220(4)

The word "royalties" in contract of employment of attorneys to act as special counsel for city in all suits and legal matters connected with its efforts to obtain just returns from oil and gas in tide lands within city boundaries, for certain percentages of moneys paid city as royalties or received by it from sale of oil and gas, if city recovered by either court decision or compromise of its claims, *held* not restricted in meaning, as matter of law, to shares or money equivalent of shares of oil and gas taken from such lands, but to include money recovered by city in compromise of its claims to such oil.

See Words and Phrases, Permanent Edition, for all other definitions of "Royalty".

10. Landlord and tenant ⚿181
Mines and minerals ⚿70(1)

The words "royalty" and "rent" are used interchangeably as meaning compensation paid landlord by occupier of land for species of occupation allowed by contract between them.

See Words and Phrases, Permanent Edition, for all other definitions of "Rent".

11. Municipal corporations ⚿220(8)

Whether compromise contract for corporation's payment to city of stated percentage of proceeds of sale of oil from city's tide lands, in which state had granted corporation an easement for taking of oil after city's execution of oil lease to corporation, was only for easement to drill for oil purchased by corporation from state, held for jury on conflicting evidence in action against city for attorneys' fees under contract providing for payment thereof from moneys recovered by city as oil royalties or proceeds of sale of oil under either court decision or compromise of city's claims.

12. Contracts ⚿169

In construing contract, jury has right to consider facts surrounding execution thereof.

13. Municipal corporations ⚿220(8)

In action against city for attorneys' fees payable under written contract from oil and gas royalties recovered by city under either court decision or compromise of its claims, evidence held sufficient to support jury's implied finding that all money paid city by corporation under agreement made between them within month after plaintiffs' discharge was by way of compromise of city's claims for oil and gas royalties out of lands specified in both contracts.

14. Municipal corporations ⚿220(4)

The fact that part of conditionally fixed amount, agreed to be paid city by corporation in compromise settlement of city's claims against corporation for royalties under oil and gas lease, was paid in one lump sum, did not preclude jury finding that it was paid as "royalty" within city's contract to pay attorneys stated percentages of moneys paid city as oil royalties for services in obtaining just returns to city from oil in its lands.

15. Municipal corporations ⚿220(8)

A city, deliberately causing or negligently permitting contract made by it for payment of specified sum to it by corporation to be so phrased as to confuse amount payable in compromise of oil royalty claims with other amounts payable thereunder, had burden of proving amount payable by way of royalties in action against city for attorneys' fees based on such royalties.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

* * *

In Bank.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by E. C. Denio and others against the City of Huntington Beach for attorneys' fees under a written contract. Judgment for plaintiffs, and defendant appeals.

Affirmed.

For prior opinion, see Cal.App., 124 P.2d 649.

Drumm, Tucker & Drumm, of Santa Ana, and Ray Overacker, City Atty., of Huntington Beach, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

SCHAUER, Justice.

Defendant City of Huntington Beach appeals from a judgment based on a jury verdict, awarding to plaintiffs $2,000 as attorneys' fees for services rendered to defendant under a written contract between the parties. After plaintiffs had partially performed the services called for by the contract, defendant city discharged them. The city now seeks to justify such discharge on the ground that the contract was ultra vires and void in its inception, and on the further ground that plaintiffs had abandoned the contract prior to such discharge. The city also asserts that plaintiffs have not shown that it has received the particular fund, or the precise amount thereof, from which plaintiffs were to be paid. We have concluded, however, that upon the record none of defendant's propositions is tenable and that the judgment must be affirmed.

The terms of the contract, set forth in a letter from plaintiffs to defendant, are in material part as follows:

"The firm of Denio, Hart, Taubman & Simpson will act as special counsel for the City of Huntington Beach in cooperation with your City Attorney in:

"(a) The preparation of a freeholders' charter for submission to the electors of the City of Huntington Beach for adoption or rejection as soon as reasonable possible.

"(b) In all suits and legal matters in connection with your proposed efforts to obtain the City's *just control and returns from the oil, gas or other hydrocarbon substances claimed by it* or to which it is entitled, in the tide or overflow lands within the City boundaries of the City of Huntington Beach.

"For the above services we are to receive the following compensation:

"1. A retainer of Twenty-five Hundred Dollars ($2500.00) in cash upon the execution hereof, which shall be, in case no recovery is had as hereinafter specified, in full for all legal services rendered or to be rendered in the above, exclusive of court costs, filing fees, printing, traveling and hotel expenses.

"2. If a recovery is had by the City of Huntington Beach, *either by a Court decision or by a compromise or settlement of the City's claims,* we are further to be paid out of all moneys paid to the City of Huntington Beach as royalties, or received by it out of the sale of its oil, gas or other hydrocarbon substances, if its royalties are paid to it in kind, the following:

"Ten Per Cent (10%) of the moneys so received by the City for the first two (2) years;

"Fifteen Per Cent (15%) of the moneys so received by the City for the next three (3) years;

"Twenty Per Cent (20%) of the moneys so received by the City for the next ten (10) years.

"The above payments to commence with the first returns paid to or received by the City of Huntington Beach on account of royalties, as above.

"In computing the above periods of percentage payments, the time during which the City does not receive royalty payments, directly or indirectly, either in money or in kind, shall be excluded.

"Payments to be made to this firm within ten (10) days after receipt by the City of its royalties.

"It is understood, of course, that your City Attorney will be in charge of all litigation, and that all compromises, if any, will be subject to his approval and to the approval of your Honorable body." (Italics added.)

The contract was executed on behalf of the city by its mayor and city clerk, by direction of its council, stated in its Resolution No. 769, adopted March 1, 1937, the $2500 retainer fee was paid to plaintiffs, and they entered upon the performance of their obligations under the contract.

The parties continued under their contractual relationship until August 29, 1938, when the defendant's city council adopted its Resolution No. 814, as follows:

"That that certain Resolution No. 769 entitled: 'Resolution of the City Council of the City of Huntington Beach, California, Employing Special Counsel', be and the same is repealed and the contract therein referred to is hereby cancelled and the said attorneys are hereby discharged."

By a letter to plaintiffs dated October 6, 1938, the city attorney of Huntington Beach notified plaintiffs of the adoption of the above resolution. Plaintiffs replied as follows, by a letter dated October 8, 1938:

"This day we received a letter from your City Attorney referring to the action taken August 29, 1938 by the City Council of the City of *Long Beach* by Resolution No. 814.

"This is to inform you that we remain, as at all times we have been, ready, able, and willing to proceed and perform all services under our contract of employment with the City of Huntington Beach, as special counsel for said city for the purposes, and upon the conditions and compensation set forth in our said contract of employment. *We do not concede your right to terminate our right to the compensation set forth in said contract,* and we do not consent to any purported termination of the contract or our rights thereunder. We will continue to hold ourselves ready to act as special counsel for the City of Huntington Beach in cooperation with your City Attorney in all suits and legal matters in connection with the matters and things referred to in said contract or relating thereto, *and will expect to receive the compensation therein provided.*" (Italics added.)

At the time of the execution of the contract here involved (March 1, 1937), Huntington Beach was a city of the sixth class; shortly thereafter its citizens adopted a charter which became operative on May 15, 1937 (Stats.1937, p. 2975). The city's uplands lie northeasterly of, and adjacent to, the line of mean high tide of the Pacific Ocean. Its southwest boundary parallels that line and is distant three miles (out in the ocean) from it (corresponding with the southwest boundary line of the State of California). (Carr v. Kingsbury, (1931) 111 Cal.App. 165, 295 P. 586.) The charter declares that the boundaries shall continue to be the same as before the charter was adopted. (Art. II, Charter, Stats.1937, pp. 2975, 2977.) A controversy had arisen between the city and the State of California as to their respective rights to extract oil from the so-called "tide and overflow lands" within the city boundaries, and over royalties from wells which might be whipstocked into such lands from surface locations on the uplands bordering the ocean. (See Carr v. Kingsbury, supra; Joyner v. Kingsbury, (1929), 97 Cal.App. 17, 275 P. 255.)

Defendant city, as one of the claimants to the oil, in 1934 had entered into an oil lease with the Southwest Exploration Company, whereby it was attempted to give that company the right to drill for and remove oil from the tide and overflow lands mentioned hereinabove. Such lease reserved a one-sixth royalty to the city. The area described in the lease is bounded on the northeast by the line of mean high tide, on the northwest by the northwest boundary of the city which extends three miles into or over the ocean, on the southwest by the southwest boundary of the city (which parallels the shore line, three miles out in the ocean), and on the southeast by the southeast line of Twenty-third Street extended over the ocean. However, apparently because the company doubted the city's right to the oil under this area, no development work was done under that lease.

Ocean Avenue is a public street of the City of Huntington Beach, 100 feet wide, and parallels the shore line a few hundred feet distant from it. The city claims that it owns this street in fee (see Marshall v. Standard Oil Co., 1936, 17 Cal.App.2d 19, 61 P.2d 520), and that it therefore has the right to prevent the whipstocking of oil wells from the landward side of the street, under its surface and thus into the oil sands underlying the tidelands.

By a document entitled "Agreement for Easement No. 392," dated September 26, 1938, the State of California purported to grant to the Southwest Exploration Company the right to drill into the tidelands area hereinabove described, from surface locations on uplands in the city of Huntington Beach lying northeasterly of the described area; i. e., northeasterly of the mean high tide line.

Under date of November 3, 1938, the City of Huntington Beach and the Southwest Exploration Company entered into a contract entitled "Agreement and Easement for Right of Ways." This contract reads, in part, as follows:

"Whereas, * * * under date of the 26th day of September, 1938, the State of California * * * did by * * * 'Agreement for Easement No. 392 * * *' grant to Southwest an easement through, in and under certain lands * * * together with the right to * * * take * * * oil, gas, and other hydrocarbon substances through oil wells to be drilled * * * from the uplands, and

"Whereas, Southwest is now drilling certain oil wells into the lands described in said Agreement * * *, and

"Whereas, Huntington Beach has claimed and now claims to be entitled to the payment of certain monies from Southwest and to certain royalties by reason of any operations of Southwest under * * * said Agreement for Easement No. 392 * * *, which said claim is disputed and denied by Southwest, and,

"Whereas * * * under date of the 4th day of October, 1934, the parties hereto did enter into a certain agreement in writing entitled 'Oil and Gas Lease' * * *, the lands described in said Oil and Gas Lease being *generally coextensive with the lands described in said above* *mentioned Agreement for Easement No. 392,* and Southwest has questioned and now questions the right, power and authority of Huntington Beach to enter into said Oil and Gas Lease, and

"Whereas, the parties hereto have never operated under said Oil and Gas Lease, and do not now contemplate operations thereunder, except as hereinafter provided,

"Now Therefore, *in order to settle and compromise the claims of Huntington Beach to the payment of monies and royalties to it by Southwest,* and in full settlement and satisfaction thereof, it is understood and agreed as follows:

"1. Upon the due execution and delivery of this agreement, Southwest agrees to and has herewith paid to Huntington Beach the sum of Twenty-five Thousand Dollars ($25,000.00) lawful money of the United States, receipt of which is hereby acknowledged.

"2. Southwest further agrees to pay to Huntington Beach monthly a sum equal to two per cent (2%) of one hundred per cent (100%) of the gross amount received by Southwest from the sale of one hundred per cent (100%) of all the oil, gas and other hydrocarbons produced, saved and sold by Southwest during the preceding calendar month from the lands described in the above mentioned Agreement, said payments to be made on the 20th day of each month until, in addition to the monies provided for in paragraph 1 hereof, there has been paid to Huntington Beach the further sum of One Hundred Fifty Thousand Dollars ($150,000.00).

"3. After Southwest shall have paid to Huntington Beach the total sum of One Hundred Seventy-five Thousand ($175,000.00) Dollars, in the manner and at the times provided in paragraphs 1 and 2 hereof, Southwest shall pay to Huntington Beach monthly a sum equal to two per cent (2%) of the total royalties paid to the State of California by Southwest pursuant to the provisions of the above mentioned Agreement for Easement No. 392 * * *.

"4. * * * Notwithstanding anything to the contrary herein contained, it is expressly understood and agreed that payments of monies provided for in paragraphs 2 and 3 hereof shall apply only to wells, the producing intervals of which are located in whole or in part in lands within the confines of the city limits of Huntington Beach, extended vertically downward, regardless of the location of the derrick or other surface structures.

"5. In so far as Huntington Beach has any interest in or to that certain * * * parcel of land * * * which lands are generally known as Ocean Avenue * * * Huntington Beach does hereby grant to Southwest any and all easements and right of ways into, under and through said lands necessary or convenient or deemed by Southwest to be necessary or convenient to its operations under the provisions of the above mentioned Agreement for Easement No. 392.

"6. It is specifically understood and agreed that the payment of monies made by Southwest to Huntington Beach pursuant to paragraphs 1, 2, 3 and 4 hereunder shall not be considered or regarded as being made pursuant to any obligations imposed upon Southwest by the provisions, terms, covenants and conditions of the above mentioned Oil and Gas Lease dated the 4th day of October, 1934, between the parties hereto, or any other agreements heretofore made with said City, * * *.

"7. In the event that either by the final decision of a court of competent jurisdiction or by the terms of a compromise agreement it shall be determined that Huntington Beach is the owner of the oil, gas and other hydrocarbon substances within and underlying the tide and submerged lands lying within the city limits of the City of Huntington Beach, including the above mentioned lands, then the Oil and Gas Lease dated October 4, 1934, shall become effective and the parties hereto shall thereafter operate thereunder and in accordance with the provisions thereof, and Southwest shall pay to Huntington Beach the royalties therein contained, provided further that any monies paid to Huntington Beach by Southwest hereunder shall be applied in partial or total payment and satisfaction of the monies provided for in paragraph 11 of said Oil and Gas Lease. * * *" (Italics added.)

Upon the execution of the above agreement of November 3, 1938, Southwest Exploration Company paid to defendant city the sum of $25,000. Production was obtained from wells drilled under such agreement and prior to the commencement of this action defendant had received from the company the additional sum of $2,794.09, representing the two per cent payment provided for in paragraph numbered

2 of the agreement. Plaintiffs claim in this action that under the terms of their contract of employment with the city they are entitled to ten per cent of all the moneys received by the city under its contract with the Southwest Exploration Company. Defendants, however, contend:

1. That the contract between plaintiffs and defendant city is "ultra vires, is contrary to public policy, and is void."

2. That the evidence shows that plaintiffs abandoned the contract, and that therefore "the city was within its legal rights in cancelling said contract."

3. That there is no evidence showing that any of the oil produced by Southwest Exploration Company came from beneath the tide and overflow lands within the boundaries of the City of Huntington Beach, as contemplated by paragraph (b) of the contract between plaintiffs and defendant city.

4. That plaintiffs failed to show what portion, if any, of the money received by the city from Southwest Exploration Company constituted royalties as distinguished from payments for "easements and matters compromised."

5. That in any event the initial $25,000 payment to the city constituted a bonus rather than a royalty, and therefore plaintiffs are not entitled to a share thereof.

In support of its first contention defendant argues that the contract between plaintiffs and defendant "extends beyond the term of office of the members of the City Council which created it and attempts to bind their successors," and that therefore such contract cannot be upheld. The right of a municipality to employ special counsel is conceded.

The terms of the contract, above quoted, do not themselves directly specify the period of time over which plaintiffs were to render services to defendant. However, Mr. Denio, one of the plaintiffs, testified that it was "understood" that plaintiffs would "attend to all * * * matters, under the City Attorney, of course" which might arise "during the time of * * * employment," including "Anything arising protecting Huntington Beach and its oil rights, what they conceived to be their rights." He further testified that during the fifteen-year period designated in paragraph numbered 2 of the employment contract plaintiffs were "whenever called upon," to protect whatever rights the city had, "Or assist in protecting them because we were under orders always of the City Attorney." It thus appears that the plaintiffs' services were to be available to defendant city for the full term during which they were to receive compensation.

[1-4] It is our opinion, however, that the law is settled in California that a contract made by the council or other governing body of a municipality, which contract appears to have been fair, just, and reasonable at the time of its execution, and prompted by the necessities of the situation or in its nature advantageous to the municipality at the time it was entered into, is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of such body. In the absence of some other ground of avoidance, such a contract is binding upon the municipality and may not be summarily canceled by a successor council. See McBean v. City of Fresno, (1896), 112 Cal. 159, 169, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; Higgins v. San Diego Water Co., (1897), 118 Cal. 524, 554, 45 P. 824, 50 P. 670; Marin Water, etc., Co. v. Town of Sausalito, (1914), 168 Cal. 587, 143 P. 767; Williams v. City of Stockton, (1925), 195 Cal. 743, 235 P. 986; Cope v. County of Sutter, (1929), 206 Cal. 445, 454, 274 P. 750; Skidmore v. County of Alameda, (1939), 13 Cal.2d 534, 537, 90 P.2d 577; San Francisco v. Boyd, (1941), 17 Cal.2d 606, 110 P.2d 1036; Pacific Finance Corp. v. City of Lynwood, (1941), 114 Cal.App. 509, 300 P. 50, 1 P.2d 520; King City Union H. S. Dist. v. Waibel, (1934), 2 Cal.App.2d 65, 37 P.2d 861; Skidmore v. Dambacher, (1935), 6 Cal.App.2d 83, 87, 43 P.2d 1110. The council of a municipal corporation is a continuing body and in legal contemplation remains the same council regardless of changes in its personnel (see Cope v. County of Sutter, supra; King City Union H. S. Dist. v. Waibel, supra, 2 Cal.App.2d at page 68, 37 P.2d 861). As was stated by the District Court of Appeal in Pacific Finance Corp. v. City of Lynwood, supra, at pages 518, 519 of 114 Cal.App., 1 P.2d at page 521: "* * * we know of no reason why a city, as well as an individual, should not be expected to keep faith with those with whom it contracts, or else respond in damages for its failure." We conclude that the contract of employ-

ment here involved is valid, and binding upon defendant city, and that for the breach of that contract by defendant, i. e., the discharge of plaintiffs if such discharge was wrongful, plaintiffs are, under the long-established rule in California, entitled to recover the compensation specified by the terms of such contract of employment. See Baldwin v. Bennett, (1854), 4 Cal. 392; Cole v. Superior Court, (1883), 63 Cal. 86, 88, 49 Am.Rep. 78; Webb v. Trescony, (1888), 76 Cal. 621, 623, 18 P. 796; Bartlett v. Odd Fellows Savings Bank, (1889) 79 Cal. 218, 222, 21 P. 743, 12 Am.St.Rep. 139; Carter v. Baldwin, (1892), 95 Cal. 475, 30 P. 595; Kirk v. Culley, (1927), 202 Cal. 501, 506, 261 P. 994; Elconin v. Yalen, (1929), 208 Cal. 546, 549, 282 P. 791; Zurich G. A. & L. Ins. Co., Ltd. v. Kinsler, (1938), 12 Cal.2d 98, 100, 101, 81 P.2d 913; Echlin v. Superior Court, (1939), 13 Cal.2d 368, 375, 90 P.2d 63, 124 A.L.R. 719; Countryman v. California Trona Co., (1917), 35 Cal.App. 728, 736, 170 P. 1069; McCully v. Gano, (1931), 116 Cal.App. 695, 698, 699, 3 P.2d 348; Green v. Sherritt, (1936), 17 Cal.App.2d 732, 736, 737, 62 P.2d 769.

[5, 6] Defendant contends, however, in effect (as its second ground for reversal), that the evidence requires a finding that plaintiffs had abandoned the contract and hence that its action declaring the plaintiffs discharged and their contract canceled was proper. A survey of the record discloses that defendant's position on this point is not tenable.

It is undisputed that plaintiffs performed a large volume of work for defendant after the execution of the contract of employment. They drafted the charter which was adopted, conferred numerous times with officers of the city, carried out extensive legal research on the problems presented, and prepared a suggested new zoning ordinance for the city with a view to preventing the drilling of oil wells on certain uplands that would tap the oil sands under the ocean. Certain members of plaintiffs' firm made two trips to the State Capitol during a legislative session to attempt to secure legislation giving defendant city title to the oil in controversy. It appears that the bulk of these services was performed during 1937, and that plaintiffs' activity lessened somewhat during the first half of 1938. Mr. Simpson, one of plaintiffs, testified, however, that he continued research for defendant city "to a more or less extent right up to the time when they [the city] attempted to terminate our employment." He also testified as follows concerning a conversation he had with the City Attorney of Huntington Beach in January, 1938: "We discussed generally the fact of the pending—of the condition of the legislation then pending concerning the Huntington Beach oil. In other words, we talked back and forth to the effect that the Legislature before its adjournment in 1937 had passed several bills affecting the Huntington Beach tideland oil matters. Two of these had been signed by the Governor. Both of those bills that had been signed by the Governor had been held up by referendum, and as I recall, I think there was also litigation filed trying to invalidate the referendum on the two. * * *

"* * * we discussed the fact that everything was held in abeyance at this time because no one knew what the law would be, the statute would be that might be passed concerning the Huntington Beach tidelands proposition as a matter of legislation.

"Yes, I told [the city attorney] * * * that we should not do anything on any of the other propositions we had pending, other programs, except we should go ahead with our zoning set-up. I told him that I had checked over as carefully as I could all of the zoning ordinances, restrictive ordinances of the City of Huntington Beach * * * and I had done considerable research into the legal angles involved and that I had come to the conclusion that their zoning ordinances were invalid and void."

Mr. Taubman, another of plaintiffs, gave the following testimony concerning a conversation he had with the Mayor of Huntington Beach in the late summer or early fall of 1938: "I don't know how the subject matter came up. The substance of it was that [the mayor] * * * told me—I rather imagine I made inquiry of him as to the status, and he stated that the Southwest Exploration Company, he thought, was in a position to negotiate concerning the matter of the City securing some of the proceeds from the oil production, that the time had arrived when they were ripe, so to speak, for such negotiations. * * *

"Q. I will ask you, Mr. Taubman, whether or not you ever refused to furnish any advice or to do anything which was requested of you by the City of Huntington Beach, or any of its officers, in connection with procuring returns from oil on behalf of the City? Witness: A. I did not. In fact, I think on one of these occasions, I offered, when [the mayor] * * * told me he was negotiating with these gentlemen, one of whom I told him I had known for many years, *I offered to aid if I could and discuss the matter with him and he said no, he had the thing well in hand and he was going to get what the City was entitled to, either that, or no one else would get it.*" (Italics added.)

This testimony of plaintiffs Simpson and Taubman was apparently accepted by the jury as true and is sufficient to support plaintiffs' assertion that they did not abandon the contract. A conflict created by certain testimony of the city attorney and mayor simply presented an issue of fact which the jury resolved in favor of plaintiffs. Such determination is binding on us.

[7] Defendant's third contention—that the oil produced by Southwest Exploration Company is not shown to have been drawn from lands included in plaintiffs' contract; i. e., from "the tide[1] or overflow lands *within the City boundaries*"—is answered by the terms of the pertinent documents and by the inferences reasonably deducible from them and from the circumstances shown. Such documents are the lease of October 4, 1934, and the contract of November 3, 1938, between the City of Huntington Beach and the Southwest Exploration Company. The lease described the land from which oil was proposed to be extracted as lying within the boundaries of the city and between the line of mean high tide and the southwest boundary of the city. The compromise contract of November 3, under which the city has received the moneys here involved, referred to the lease and provided for its revivor upon the happening of certain contingencies. The same contract also referred to the "Agreement for Easement No. 392," between the State of California and the Southwest Exploration Company, under which the company proposed to extract oil from certain described lands within the defendant city *lying along and seaward from the line of mean high tide,* and recited the fact that such lands were "generally coextensive with the lands" described in the lease of October 4, 1934. It is specifically provided in paragraphs 2 and 3 of the contract of November 3 that the payments by Southwest Exploration Company to the city shall be measured by income from oil taken from beneath the lands described in the "Agreement for Easement No. 392." Therefore, it appears to be amply established that the payments made to the city by the company were on account of oil produced, or contemplated to be produced, only from the tide or overflow lands within the city limits hereinabove specified.

Defendant's remaining points—that the evidence fails to show what portion, if any, of the money received by the city from the operating company constituted royalties as distinguished from payments for "easements and matters compromised," and that in any event the initial $25,000 payment to the city was a bonus rather than a royalty—are also disposed of by a consideration of the documents involved, which include the lease of October 4, 1934, the plaintiffs' contract for legal services, and the subsequent contract of November 3, 1938, between the city and the Southwest Exploration Company. Defendant argues that at least a portion of the payments made to the city by the operating company constituted rentals for the use of the easement under Ocean Avenue rather than royalties on the oil produced.

[8, 9] It is to be noted that the contract between plaintiffs and the defendant city was drawn by plaintiffs and hence any ambiguity therein, the interpretation of which is otherwise uncertain, must be construed against plaintiffs. But the same situation does not exist as to the contract of November 3, 1938, insofar as it purports to determine the character of the compensation paid by the Southwest Exploration Company to the city. The plaintiffs are not parties to that contract and did not draft it. The question on this point, which was before the trial court and jury for original determination, was as to the meaning which the plaintiffs and defendant ascribed to the word "royalties" in their use of it in the contract for

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[1] The word "tidelands" is used in the lease of October 4, 1934, to denote the area extending from the mean high tide line seaward for a distance of three miles, to the city's southwest boundary.

attorneys' fees. Defendant seeks to have us rule that as a matter of law the word must be construed in a narrow and limited sense as meaning a share, or the money equivalent of a share, of the "oil, gas or other hydrocarbon substances taken from the tide or overflow lands" within the city boundaries. But we find nothing in the contract which requires us, or which required the trial court or jury, to limit the word to such a restricted meaning.

The contractual provision for the percentage payment which is in controversy is conditioned upon this statement: "If a recovery is had by the City of Huntington Beach, either by a Court decision or by a compromise or settlement of the City's claims. * * *" This condition clearly has been met. The agreement then continues "we are further to be paid out of all moneys paid to the City of Huntington Beach *as royalties,* or received by it out of the sale of its oil, gas or other hydrocarbon substances, if its royalties are paid to it in kind, the following * * *" (italics added) and then sets forth certain percentages ranging from ten to twenty per cent over a period of fifteen years. The primary purpose of this provision is to specify the fund *in relation to which* the amounts to accrue to plaintiffs shall be determined. While the contractual provision is that plaintiffs are "to be paid *out of all moneys*" so received by the city, it is obvious from other provisions that the parties do not intend to imply that money shall not be treated in its fungible sense or that the payments to plaintiffs must be made out of the same coins or currency which defendant may receive. Rather, it appears to be the intention to identify the fund *as an account* which is to constitute the basis for determination of the amount of plaintiffs' compensation. Thus it seems to be a fair conclusion that the plaintiffs in writing their letter to the city, which letter by acceptance of the city became the contract of employment, used language in its general or loose sense, rather than in its strictly limited or technical sense, and that such usage was understood by the city. The very fact, self-evident from the contract, that the parties contemplated that the city's recovery of royalties might be accomplished by compromise of its claims, suggests that they understood and used that word (royalties) in its general or loose sense and not in its strictly limited sense. Manifestly, money received *in compromise of a claim* for royalties would not be directly a "share of the oil" or its proceeds; yet obviously it was not unreasonable for the jury to conclude that the parties understood the word "royalties," as they used it, to include money which the city might recover by way of compromise or settlement of its claim to the oil in the so-called tidelands. It is entirely within reason that the parties may even have contemplated that the city's recovery might consist of a single payment. If one single cash payment in compromise and full settlement of the city's claim for royalties had been made, that fact alone would not support a claim that in the contemplation of plaintiffs' contract no royalty had been received by defendant and therefore no percentage thereof was due plaintiffs.

[10] The words "royalty" and "rent," it has been held, "are used interchangeably to convey the same meaning"; i. e., "the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows" (Nelson v. Republic Iron & Steel Co., 8 Cir., (1917), 240 F. 285, 291, 293, 153 C.C.A. 211; Elsinore Oil Co. v. Signal Oil etc. Co., (1935), 3 Cal.App.2d 570, 573, 40 P.2d 523.) Defendant, in a statement in its brief hereinafter quoted, seems to imply that "royalty" is, or includes, the price paid by the operator to the landowner for the oil. It is obvious, from a consideration of the terms of the documents described above, and from other evidence in the record, that there was a conflict between the claims of defendant city and those of the State of California as to the ownership of the oil in the described lands. It is also obvious that the Southwest Exploration Company was desirous of exploiting those lands for oil and gas production and that *it was willing to pay compensation to both the defendant city and to the state for the use of those lands to the end stated.* It is a fair conclusion that all of the money it paid to the defendant city was paid for the purpose of enabling it to so exploit such lands. Apparently it had no other usage for such lands and contemplated no income from them except that to be derived from the production of oil, gas, and other hydrocarbon substances, and had no occasion to seek any easement over or through any of defendant's property except for the purpose of using that easement in the

extraction of oil from the disputed property.

[11] Continuing on this phase of its attack on the judgment, defendant makes the assertion that "the contract between Southwest Exploration Company and the City shows on its face that it is for easements and other privileges and that Southwest Exploration Company expressly denies that the City of Huntington Beach has any rights to the oil or gas under the tidelands. *The facts surrounding the execution of this agreement* between the City and Southwest Exploration Company show clearly that *Southwest Exploration Company had bought the oil under the tidelands from the State of California* and that *what it was buying from the City of Huntington Beach was a right to drill from the uplands into that oil*." (Italics added.) The foregoing argument is one which properly should have been addressed to the jury. Indubitably it was not based upon unconflicting evidence. The contract referred to by defendant, itself tends to refute the conclusion of fact for which defendant argues. It recites the fact as to the execution of the lease of 1934 by and between the Southwest Exploration Company and the city, the fact that such company had not operated under that lease, that it had procured the agreement of September 26, 1938, from the State of California, that it had proceeded *thereunder* to drill for oil in the same lands as were described in the lease, and that "*Huntington Beach* has claimed and now claims to be entitled to the payment of certain monies from Southwest *and to certain royalties by reason of any operations of Southwest* under and pursuant to said Agreement for Easement No. 392, and it is understood that Huntington Beach *claims for itself* the oil, gas and other hydrocarbon substances underlying said lands, which said claim is disputed and denied by Southwest * * *.

"Now Therefore, *in order to settle and compromise the claims of Huntington Beach to the payment of monies and royalties to it by Southwest*, * * * it is * * * agreed," etc. (Italics added.)

[12, 13] Coupled with the above-quoted declaration of the claim of the city to the oil and gas in the disputed lands, the jury (as asserted by defendant in its argument above quoted) had a right to consider the "facts surrounding the execution of this agreement." Among the surrounding circumstances which the jury may have considered significant is the fact that the compromise agreement with the Southwest Exploration Company was entered into by defendant city at a date *less than one month after* plaintiffs had been notified of their discharge and only two months and five days after adoption by the city council of the resolution (No. 814) by which it was sought to *cancel* plaintiffs' contract. In the light of all the evidence, and viewing it in aspects most favorable to sustaining the verdict, we cannot hold that as a matter of law it fails to support an implied finding that all of the money paid by the Southwest Exploration Company to the defendant was *by way of compromise of defendant city's claims for oil and gas royalties out of the disputed lands*. This was a *compromise* agreement. It purports to be based on the city's claims to the oil. We cannot sever such compromise agreement into parts and hold that any portion of the consideration was not grounded on the city's claim to the oil and royalties therefrom.

[14] The fact that $25,000 of the $175,000-conditionally-fixed amount was paid in one payment does not preclude the finding that it was paid as royalty. In Work v. United States ex rel. Mosier, (1923), 261 U.S. 352, 357, 43 S.Ct. 389, 391, 67 L.Ed. 693, 696, the United States Supreme Court said: "The bonus which was the result of bidding for desirable and profitable oil and gas leases secured for the members of the Osage Tribe the just value of the use of their property which the fixing of royalties in advance by the President was not adapted to give them. It was in effect a supplement to the royalties already determined. *It was really part of the royalty or rental in a lump sum or down payment.* We do not see how it can be classified as anything else. It was income from the use of the mineral resources of the land." (Italics added.) The fact that the verdict rendered awards plaintiffs less than they might be entitled to recover does not prejudice defendant.

[15] It is to be observed that the defendant is in a poor position to urge that the evidence does not show what portion of the money paid it by the Southwest Exploration Company is by way of royalty and what portion is by way of compromise of some other claim. The city made the contract with the company. *It was in the*

power of the city, when that contract was made, to specify therein exactly what amount was to be paid in compromise of the royalty claims and what amounts, if any, were to be paid for other considerations. It knew at that time that plaintiffs claimed the right to compensation on the percentage basis fixed in their contract and that the amounts to be paid plaintiffs depended on the royalties to be recovered *by compromise or otherwise,* by the city. If the defendant city, knowing such facts, deliberately caused or negligently permitted the contract with the Southwest Exploration Company to be so phrased as to confuse the amount to be paid it for compromise of royalty claims with other amounts, the city, unless it is chargeable on the whole amount received, should bear the burden of proving segregation. This would follow upon principles akin to those attendant upon willful or negligent confusion of goods. See 11 Am.Jur., pp. 529-530, §§ 3, 4; pp. 535-536, § 11; and pp. 537-538, § 13; see, also, 5 Cal.Jur. 488-489, § 4; 15 C.J.S., Confusion of Goods, pages 961-964, §§ 4-6.

We conclude that the evidence is not insufficient to support any essential implied finding, and that no prejudicial error has been shown.

The judgment is affirmed.

SHENK, CURTIS, and CARTER, JJ., concurred.

EDMONDS, Justice (dissenting).

The conclusion of my associates that the contract sued upon in this case "is binding upon the municipality and may not be summarily canceled by a successor council" is rested upon decisions which, in my opinion, are not determinative of the question. Generally speaking, in the exercise of its business or proprietary power, the power of a board to make a contract binding over a term of years depends upon the subject matter, and the courts and text writers recognize, as being in a special category, those relating to personal services, particularly those of a confidential nature. No case has been cited in the majority opinion, or by counsel, upholding a contract with an attorney for a period of time beyond the terms of office of the members of the employing board, and the only decision in this state, except one in which the authority of a school board to employ a superintendent was challenged, concerned the right of an engineer to recover from a county upon a contract to extend a bridge. (Cope v. County of Sutter, 206 Cal. 445, 274 P. 750.)

In most jurisdictions, the rule has been adopted that where a contract of employment, by its terms extends beyond the term of the appointing municipal body, and the services to be rendered are subject to the supervision of that body, the contract is invalid. The courts of a few states follow the so-called minority rule, holding that, in legal contemplation, the new board is the one that entered into the contract. Under these decisions, unless the agreement is unreasonable it cannot be rescinded except for cause. (See cases collected in 70 A.L.R. 794, 802.) But the courts which follow the minority rule do not apply it to contracts providing for the employment of an attorney. They recognize the confidential relationship of attorney and client and hold that a municipal board should be free to select its counsel.

There are many reasons of public policy why an attorney's contract for professional services to be rendered beyond the term of the board which selected him should not be enforced against a successor body which is dissatisfied with his efforts. Subsequently elected public officers are directly responsible to the people for the conduct of the municipal affairs, and in performing their duties, it is of the utmost importance that they should have the right to select the lawyer who is to carry out their plans and purposes. The very reason for a change in personnel of a city council may be the electors' dissatisfaction with the manner in which the person employed to perform such special services has conducted the municipal business. To hold that the new council is required to retain that person because of the action of its predecessor in entering into a contract with him, may seriously interfere with the exercise of a discretion which the members of the governing body should be permitted to employ in its conduct of the city's affairs. Moreover, if the attorney was engaged on a contingent basis, the subsequently elected officials may decide to allow him to continue representation of the city's interests, regardless of their lack of confidence in him, rather than risk criticism by incurring an obligation to pay fees for services not completed.

It should also be kept in mind that, under circumstances such as are shown in the present case, although the city council is the immediate employer, the client for whom the legal services are to be rendered is the city. The members of the council are in a sense, trustees of the public welfare, and they may well insist upon the benefit of advice from counsel in whose capacity and judgment they have the fullest confidence. The assertion of public rights which are not entirely clear usually requires the expenditure of large sums of money as well as the determination of particular policies, and the decision as to action in a particular way should not be affected by either friction or distrust in the relations of attorney and client.

Recognizing these principles as controlling, although the Supreme Court of Indiana, following the minority rule, has held that contract extending beyond the terms of office of the members of a governing body are valid if made in good faith, it places in a different category one providing for the employment of an attorney beyond the time when a change will occur in the membership of the employing board. (Board, etc., v. Shields, 130 Ind. 6, 29 N.E. 385). Such a contract, said the court, is contrary to public policy and void, because it "deprives the board, as reorganized from year to year, of the right to employ its attorney for the next following year. If such contracts are binding, then, no [matter] how distasteful an attorney may be to the members of the board, or how little confidence they may have in his ability, legal learning, or honesty, so long as he performs the conditions of the contract on his part they are bound to recognize him, accept his services, and assume the responsibility; and if the contract in question, extending, as it does, over a period of three years, is valid, why may not a like contract, covering a period of six, nine, or a dozen years, be upheld?" Jay County v. Taylor, 123 Ind. 148, 23 N.E. 752, 753, 7 L.R.A. 160.

More recently, the Appellate Court of Indiana held that "a board, in order to dispense with the services of an attorney, employed while organized in part at least with a different membership, and thereby be free to select one of its own choosing, [should not] be compelled to prefer charges against an attorney so employed, or alleged and prove dishonesty or a lack of ability on his part, or that he was distasteful to its members, or that they had no confidence in him, as appellee's contention would imply." Jessup v. Hinchman, 77 Ind. App. 460, 133 N.E. 853, 855. And the Supreme Court of Alabama declared that a contract with an attorney to act as counsel for a board of revenue beyond the term of the board as it existed when the services were authorized was contrary to public policy. In effect, said the court, such a contract ties the hands of the succeeding board which "should at all times be free to select its own confidential legal advisor. Such has been the ruling in New York, Ohio, New Jersey, Indiana, Illinois, Kansas, Iowa, and Colorado." Willett & Willett v. Calhoun County, 217 Ala. 687, 117 So. 311. And see Ferkin v. Board of Education, 253 App.Div. 751, 300 N.Y.S. 885; Light v. Lebanon County, 292 Pa. 494, 141 A. 291; McCormick v. Hanover Township, 246 Pa. 169, 92 A. 195; Wilmington v. Bryan, 141 N.C. 666, 54 S.E. 543; and annotation, 70 A.L.R. 794, 799-802.

Considering the California decisions, although King City Union H. S. Dist. v. Waibel, 2 Cal.App.2d 65, 37 P.2d 861, approves the minority rule, the true basis for its holdings is the universally recognized authority of a school board to contract with a superintendent or teacher for a period extending beyond the terms of the members of the board. Also, a contrary conclusion would nullify sections 2.90 and 2.92 of the School Code, which authorize a school district to employ a district superintendent for a period of four years. But in New York, it was recently held that a contract made in July, 1933, by a school board, purporting to employ an attorney at law for a period of two years, was an attempt to impinge upon the functions of members of that body elected in 1934 and was void. Ferkin v. Board of Education, supra.

McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; upheld a contract for the maintenance of a sewer farm. In Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670, the court considered the validity of a contract leasing a water plant for a term of 20 years. A contract to supply water for 10 years was before the court in Marin Water, etc., Co. v. Town of

Sausalito, 168 Cal. 587, 143 P. 767. Williams v. City of Stockton, 195 Cal. 743, 235 P. 986, concerned a contract for building a city hall. A later-elected city council rejected the contractor's bid which had been accepted by its predecessor. This court held that the city was bound by its original action. In Skidmore v. County of Alameda, 13 Cal.2d 534, 90 P.2d 577, the question for decision was whether the plaintiffs' claim was an account or the statement of several causes of action, some of which were barred by lapse of time. And the contract ordered executed in San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036, was one providing for a survey of traffic conditions to be completed in five years by the contractor and a staff of his own selection; the question now before the court was not presented or considered.

Nor does Pacific Finance Corp. v. City of Lynwood, 114 Cal.App. 509, 300 P. 50, 1 P.2d 520, have any bearing upon the present problem, for the recovery upheld in that case was upon a contract to prepare plans and other writings required to carry through a street improvement project, compensation to be paid on the basis of a stated percentage of the construction cost. Skidmore v. Dambacher, 6 Cal.App.2d 83, 43 P.2d 1110, held valid a contract to secure certain information during an unspecified period of time. The court decided that the services had been performed within a reasonable period.

It requires no departure from the principles stated and applied in any of these cases to classify the contract now before the court as a valid one, but subject to an implied in law agreement that it may be terminated by the successor body with the obligation to pay only the reasonable value of the services rendered to the date of cancellation. Very evidently, the jury's verdict for $2,000 was rendered in the belief that the sum awarded, plus the retainer paid by the city, is a reasonable amount of compensation for the services which the respondents performed. For the verdict was not responsive to any issue laid down by the pleadings, nor can it be justified under the theory of the conclusion reached by a majority of the court. As the city asserts, obviously if the contract is valid and not subject to cancellation, the respondents are entitled to $2,794, not $2,000. Under these circumstances, the applicable rule is stated in Gundry v. Atchison, T. & S. F. R. Co., 104 Cal.App. 753, 286 P. 718, 722, as follows: "While the defendant cannot ordinarily complain that the verdict is for an amount less than it might have been, if there is any evidence at all to sustain the verdict, a verdict may not be sustained which attempts generally to somewhat equalize financial conditions." The Gundry and other cases which reach the same conclusion are controlling, this court has said, and require a reversal if the jury renders a verdict for a different amount than the only sum which the plaintiff could recover under the issues framed by the pleadings. (American States Pub. Service Co. v. Rath, 2 Cal. 2d 670, 42 P.2d 1010.)

For these reasons, I am of the opinion that the judgment should be reversed.

GIBSON, Chief Justice, and TRAYNOR, Justice (dissenting).

We dissent. While we agree with the conclusions reached in that portion of the majority opinion which holds that plaintiffs were wrongfully discharged from their employment, we cannot concur in the view that plaintiffs are entitled to recover the compensation specified in the contract of employment. When an attorney employed under a contingent fee contract is discharged without cause, he should be entitled to recover the reasonable value of the services performed by him prior to his discharge. See concurring opinion in Salopek v. Schoemann, 20 Cal.2d 150, 156, 124 P.2d 21; Cole v. Myers, 128 Conn. 223, 21 A.2d 396, 136 A.L.R. 226; Hubbard v. Goffinett, 253 Ky. 779, 70 S.W.2d 671; Pye v. Diebold, 204 Minn. 319, 283 N.W. 487; Martin v. Camp, 219 N.Y. 170, 14 N.E. 46, L.R.A. 1917F 402; Cavers v. Old Nat. Bank & Union Trust Co., 166 Wash. 449, 7 P.2d 23; see also cases in 136 A.L.R. 254. He should not be permitted to recover the fees fixed in the contract, however, for the reasons stated in the concurring opinion in Salopek v. Schoemann, 20 Cal.2d 150, 156, 124 P.2d 21. The present case was tried and submitted to the jury upon the theory that the proper measure of damages for breach of an employment contract of this nature is the compensation fixed by the terms of the contract. In our opinion, there should be a retrial of the issue of damages for that reason. While it is true that the verdict does not award plaintiffs a sum commensurate with that provided for in the contract, it is impossible to determine how the jury arrived at its verdict in view of the theory upon which the case was tried.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

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22 Cal.2d 604

GOODRICH et al. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18601.

Supreme Court of California.

Aug. 3, 1943.

Rehearing Denied Sept. 1, 1943.

1. Workmen's compensation 🔑723

Even though an employee may be going to or from his place of employment on a mission personal to himself, if he is also on a substantial mission of his employer which is the major factor in the movement, he is within the "course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

2. Workmen's compensation 🔑723

Where drilling superintendent in his discretion conducted some of employer's business by telephone from his home and was on call 24 hours a day and his duties included use of automobile transportation, evidence authorized compensation for superintendent's accidental death when he was returning home in another's automobile to inform his wife that he was to work all night and to telephone with regard to delivery of a cutting tool, on ground that his death "arose out of and in course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arose out of and in Course of Employment".

3. Workmen's compensation 🔑615

Any reasonable doubt as to whether an employee's act is contemplated by the employment should be resolved in his favor.

4. Workmen's compensation 🔑1803

In compensation proceedings, generally, if a party does not prevail on the original hearing and his petition for a rehearing is denied, he may not again petition for a rehearing but must seek relief in the courts. St. 1937, p. 304, § 5950.

5. Workmen's compensation 🔑1803

In compensation proceedings, if one party prevails in the original hearing and on rehearing the other party prevails, the first party may petition for rehearing of the order made on rehearing because he has for the first time become the "aggrieved party" within the statute. St. 1937, p. 302, § 5900.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

6. Workmen's compensation 🔑1794

Application for rehearing may be made from an order denying relief under statute authorizing petitions to reopen compensation proceedings because it is a final order of the Industrial Commission in which the petitioner is aggrieved. St. 1937, p. 301, § 5803.

7. Workmen's compensation 🔑1803

Where compensation was awarded to claimants and insurance carrier's petition for rehearing was granted and award was made for employer and claimants' petition to reopen the case to produce new evidence was denied and claimants' petition for rehearing based on newly discovered evidence was granted and additional evidence was taken and further evidence was produced on claimants' petition for further hearing and such petition was denied, order denying claimants' petition to reopen was rescinded, and decision on rehearing for employer was amended, Industrial Commission had jurisdiction to entertain claimants' subsequent petition for rehearing. St. 1937, pp. 301, 302, 304, §§ 5803, 5900, 5950.

8. Workmen's compensation 🔑1795

In compensation proceedings, the purpose of a rehearing is to have a reconsideration of a matter which has been theretofore considered on only one occasion. St. 1937, pp. 302, 304, §§ 5900, 5950.

9. Workmen's compensation 🔑1803

Where losing party obtains rehearing of a compensation proceeding on ground of newly discovered evidence, which evidence is produced and results in the same conclusion, losing party is entitled to another rehearing but where no new evidence is produced, and the losing party's application for rehearing is denied, he cannot again petition for rehearing. St. 1937, pp. 302, 304, §§ 5900, 5950.

TRAYNOR and EDMONDS, JJ., dissenting.

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In Bank.

Proceeding by Ruby Idele Goodrich and others against the Industrial Accident Commission and others to review an award denying compensation for death of Claude E. Goodrich, employer.

Award annulled.

Harold A. McCabe, of Fullerton, for petitioners.

Everett A. Corten, J. Gould, and Fred G. Goldsworthy, all of San Francisco, for respondent.

CARTER, Justice.

Petitioners, dependents of Claude E. Goodrich, deceased, seek annulment of an award of the Industrial Accident Commission denying compensation for his death as the result of an injury which they assert arose out of and occurred in the course of his employment.

Goodrich was employed on a monthly basis by the H. L. Whiston Drilling Company, engaged in drilling oil wells, as drilling superintendent. The commission found that drilling operations of the employer were being conducted at a place six-tenths of a mile from the employer's office and one and seven-tenths miles in the same direction from Goodrich's home; that Goodrich had no regular hours of duty and was subject to call at all hours of the day and night; that Goodrich "carried on much of the business of the employer from said employee's home by means of the telephone there located," and he was authorized by the employer in the discretion of the employee to conduct the employer's business at "any place where the same could be conveniently conducted and was authorized to conduct the business of said employer from and at either the office of said employer or the home of said employee among other places"; that there was a telephone in the office; that at the time of the injury to Goodrich which resulted in his death he "was on his way from said oil well to his said home, having proceeded past said employer's office enroute. Said employee's sole purpose in said journey was to inform his wife of the probability that he would work at said oil well throughout the night and it was said employee's intention at said time and place after completing said errand to return to said oil well."

Goodrich left his home about 7 p.m. the day of the injury in the car furnished by his employer to go to the above-mentioned place of work on a "fishing" job, stating to his wife that he would possibly be gone all night and that she should not worry. The work in progress required the removal of a casing from the well being drilled. A cutting tool for that purpose had been ordered between 7 and 8 p.m., and was supposed to arrive at the well in one to one and one-half hours. Goodrich had remained at the office of Owens, the man from whom the tool was ordered, for about one and one-half hours waiting for it. When he left for the well it was understood that Owens would bring the tool there when it arrived. Shortly before 10 p.m. Goodrich and the workmen under him were waiting at the well for the tool to arrive. Mr. Gieck, who was observing the operations, testified that Goodrich said he wished to go home and inform his wife that he would be working all night; that he did not want to telephone her as it would frighten her and awaken his minor child who had had a tooth pulled. The night was cold and Gieck, having a heater in his car, offered to take Goodrich home. His offer was accepted and they proceeded directly toward Goodrich's home. About a half a block therefrom the accident occurred which resulted in the death of Goodrich.

The employer, who was at the well shortly before 10 p.m., testified that Goodrich said to him that he was going home for the above-mentioned purpose and expected to be back by the time the tool arrived. To the employer's suggestion that because of the cold weather Goodrich go to the office and wait for the cutting tool and telephone his wife from there, Goodrich made no reply. Several of the employees at the well in Goodrich's charge testified that when he left he said he was going to telephone to ascertain why the tool had not arrived.

Goodrich had no regular hours, came and went as he pleased and exercised considerable discretion in the performance of his duties. He transacted some of his employer's business from his home and used his telephone there for that purpose.

There are many acts of an employee for his personal convenience, comfort or welfare, the doing of which do not necessarily take him out of the course of his employment, even though done away from the premises of the employer. (California Cas. Ind. Exch. v. Industrial Acc. Comm., 21 Cal.2d 751, 135 P.2d 158. Various instances of that character have been considered by the appellate courts: Drinking wine because of indisposition (Elliott v. Industrial Acc. Comm., 21 Cal.2d 281, 131 P.2d 521; smoking (Whiting-Mead Com. Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518); going to obtain a slicker to wear in the performance of his duty (Western Pacific R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754); going to obtain an overcoat (Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911); going into a hallway to obtain fresh air (F. W. Woolworth Co. v. Industrial Acc. Comm., 17 Cal. 2d 634, 111 P.2d 313); going to obtain water for a fellow employee who had fainted (County of Los Angeles v. Industrial Acc. Comm., 89 Cal.App. 736, 265 P. 362); returning from purchasing a package of cigarettes for employee's own use (Western Pipe, etc., Co. v. Industrial Acc. Comm., 49 Cal.App.2d 108, 121 P.2d 35); domestic servant sewing a hem on her dress (Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089).

[1] It has been said that even though an employee may be going to or from his place of employment on a mission personal to himself if he is also on a substantial mission of his employer which is the major factor in the movement, he may still be said to be within the course of his employment. Western States Gas & Elec. Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735; Ocean A. & G. Corp. v. Industrial Acc. Comm., 132 Cal.App. 207, 22 P.2d 538; Gagnebin v. Industrial Acc. Comm., 140 Cal.App. 80, 34 P.2d 1052; Fenton v. Industrial Acc. Comm., 44 Cal. App.2d 379, 112 P.2d 763.

[2, 3] If it be assumed that the instant case does not fall strictly within either one of the foregoing rules, when they are considered together in light of the facts established, it is clear that the death occurred in and arose out of the course of employment. Goodrich was on call twenty-four hours a day. He held a position where he exercised considerable discretion in the performance of his duties. He conducted some of the business of his employer from his home using the telephone there and was reimbursed for long distance calls. Working at night on the occasion in question, it was to be anticipated that he might return to his home which was only a short distance away to advise his wife that he was going to work all night, although he had previously advised her that he probably would be so engaged. Although his employer suggested he telephone his wife from the office, he did not forbid Goodrich to return home to speak to his wife. Several witnesses stated that Goodrich said he was going home to telephone with regard to the delivery of the cutting tool which was required before work could proceed. The making of such a call would be in the line of his duty, and the mere fact that he chose his home from which to call rather than the office was not an act in excess of his discretion in the matter. True, his employer and Gieck testified that Goodrich said he was returning home to advise his wife concerning the time he would be away, but that did not exclude the other purpose of telephoning in regard to the cutting tool. The trip had dual purposes. It cannot be doubted that if under the circumstances he had been returning home because operations were completed, the injury would have arisen out of and occurred in the course of employment. See State Compensation Ins. Fund v. Industrial Acc. Comm., 89 Cal.App. 197, 264 P. 514; California Casualty Idem. Exch. v. Industrial Acc. Comm., 5 Cal.2d 185, 53 P.2d 758. It was anticipated that Goodrich would be traveling on the streets in an automobile inasmuch as he continuously did that in the course of his duties and the employer furnished him a car which he kept at his home. The fact that he was riding in Gieck's car at the time is immaterial inasmuch as his duties included the use of automobile transportation. We conclude therefore that the only reasonable inference flowing from the evidence is that Goodrich's death arose out of and occurred in the course of his employment. This conclusion must

follow in light of the rule that any reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the employee in view of the policy of liberal construction of the workmen's compensation laws. Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089.

Goodrich's dependents filed their application for compensation on November 26, 1940. A hearing was thereafter had resulting on March 4, 1941, in an award to them. On March 20, 1941, the employer's insurance carrier petitioned for a rehearing which was granted on May 6, 1941. Apparently no other evidence was taken and a decision on rehearing was made on May 23, 1941, determining that the death did not occur in or arise out of the course of employment. On February 13, 1942, applicants filed a petition to reopen the case on the grounds that the death occurred in the course of employment and to produce new evidence that the decedent had stated that he was going home to telephone about the cutting tool. That petition was denied on March 17, 1942. On April 6, 1942, applicants filed a petition for a rehearing based upon the insufficiency of the evidence to support the award, and newly discovered evidence. On June 5, 1942, the commission granted that petition and the matter was set for further hearing. A further hearing was had at which additional evidence was taken. On July 22, 1942, applicants filed a petition for a further hearing to produce evidence requested by the referee. It was produced. On August 6, 1942, the commission made an order reciting that: "Rehearing having been granted herein, and all parties having appeared, and applicant having produced and offered new and additional evidence upon material issues herein, and newly-discovered evidence which could not with reasonable diligence have been produced and offered upon the original proceedings herein; and * * * It is ordered that the above-entitled matter be and the same hereby is reopened.

"Applicant having petitioned for further hearing herein, and having made an offer to prove at said further hearing the facts set forth in the signed statement of Charles M. Owens attached to said petition for further hearing as Exhibit 'A', and no good cause for said further hearing appearing, * * * It is ordered that said signed statement of Charles M. Owens be and the same is hereby admitted in evidence herein, and said petition for further hearing dated July 22, 1942, be and the same is hereby denied; and that the Order Denying Applicants' Petition to Reopen dated March 17, 1942, be and the same is hereby rescinded, and the Decision on Rehearing dated May 23, 1941, be and the same is hereby amended to read as follows." The amendment set forth the facts heretofore mentioned as found. On August 20, 1942, applicants petitioned for a rehearing which was denied on August 27, 1942. Petition for a review was filed on September 25, 1942.

Respondent commission contends that it was without jurisdiction to entertain or pass upon the petition for rehearing filed on August 20, 1942; that the final decision of the commission was made by its order of August 6, 1942, and petitioners were required to file their petition for review in the District Court of Appeal within 30 days thereafter, which they failed to do. They petitioned for a rehearing and filed their petition for a review within 30 days after its denial.

[4, 5] Generally, if a party does not prevail on the original hearing and his petition for a rehearing is denied, he may not again petition for a rehearing. He must seek relief in the courts. (See Labor Code, sec. 5950, St. 1937, p. 304; Crowe Glass Co. v. Industrial Acc. Comm., 84 Cal.App. 287, 258 P. 130; Campbell, Workmen's Compensation, vol. II, p. 1324; Harlan v. Industrial Acc. Comm., 194 Cal. 352, 228 P. 654; Mustain v. Industrial Acc. Comm., 130 Cal.App. 447, 19 P.2d 1031. However, if one party prevails in the original hearing and on rehearing the other party prevails, the first party may petition for rehearing of the order made on rehearing because he has for the first time become the aggrieved party under section 5900 of the Labor Code, St. 1937, p. 302 (Dalsheim v. Industrial Acc. Comm., 215 Cal. 107, 8 P.2d 840, dictum; Brunau v. Industrial Acc. Comm., 135 Cal.App. 277, 26 P.2d 672), though it may be that such petition is not a condition precedent to court review. Dalsheim v. Industrial Acc. Comm., supra.

[6] Under the foregoing rules petitioners could have petitioned for a rehearing within twenty days after the decision of May 23, 1941. However, rather than doing that, on March 17, 1942, they filed a petition to reopen under section 5803 of the Labor Code, St. 1937, p. 301, which provides:

"The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter or amend any such order, decision, or award, good cause appearing therefor.

"Such power includes the right to review, grant or regrant, diminish, increase or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor such award was made has either recurred, increased, diminished, or terminated." Their petition was denied, whereupon petitioners petitioned for a rehearing and it may fairly be said that such petition was for a rehearing of the denial of the petition to reopen inasmuch as in its decision on August 6, 1942, it rescinded that order of denial. Application for rehearing may be made from an order denying relief under section 5803 because it is a final order of the commission in which the petitioner is aggrieved. See Ingram v. Department of Industrial Relations, 208 Cal. 633, 637, 284 P. 212.

After granting the petition of April 6, 1942, new evidence consisting chiefly of the testimony of the witnesses that Goodrich left with Gieck to telephone with regard to the cutting tool, was received. Thereafter, the order of August 6, 1942, was made amending the order of May 23, 1941, to make the more explicit findings heretofore set forth with respect to Goodrich's powers and duties, but denying compensation.

[7-9] It is true that that order of August 6, 1942, purported to affirm the order of May 23, 1941, but the commission could not in this manner deprive itself of jurisdiction to entertain a petition for a rehearing if it had such jurisdiction. The question is, therefore, whether the commission may entertain a petition for rehearing after making an order reopening a case and receiving and considering new evidence, which petition for rehearing is presented by the party upon whose petition the matter was reopened and further evidence taken, but comes to the same conclusion originally reached. It has power to entertain such a petition because it considered new and additional evidence, the decision therein is in effect a new decision on new facts, and the party although failing to prevail on the last occasion as he had on the first is entitled to a reconsideration by the commission of its opinion on the new evidence. The very purpose of a rehearing is to have a reconsideration of a matter which has been theretofore considered only on one occasion. The right to have a reconsideration of the case where new facts and evidence were produced on the rehearing was not considered in Crowe Glass Co. v. Industrial Acc. Comm., supra. That case proceeded upon the theory that there would be no end to the proceedings before the commission if successive rehearings could be entertained. Such situation does not exist where a losing party petitions for and obtains a rehearing on the ground of newly discovered evidence, which evidence is produced and considered by the commission but results in the same conclusion. If the losing party again petitions for a rehearing, that is, a reconsideration of the evidence before the commission, in a case where no new evidence is presented, and it is denied, he cannot again petition for a rehearing, because the commission in such a case is not requested to reconsider new and different evidence. In Harlan v. Industrial Acc. Comm., supra, the court, as pointed out in the dictum in Dalsheim v. Industrial Acc. Comm., supra, merely held that where on granting a petition for a rehearing the commission reverses itself, the losing party on rehearing need not petition for a rehearing before seeking relief in the courts, but nevertheless, the commission has jurisdiction to entertain a petition for a rehearing. Beronio v. Industrial Acc. Comm., 86 Cal.App. 588, 260 P. 1104, involved a second petition for a rehearing on the ground of newly discovered evidence which had not been mentioned in the first petition for a rehearing which was denied, and petitioner had sought relief in the courts before a ruling was made on his second petition for a rehearing, and hence the court had acquired jurisdiction. Mustain v. Industrial Acc. Comm., supra, did

not concern a situation in which a petition for rehearing was filed after a second denial of compensation on rehearing where new evidence was considered.

The award is annulled.

SHENK, CURTIS, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. The decision of the commission on August 6, 1942, which in effect reaffirmed its decision of May 23, 1941, was on the rehearing granted petitioners on June 5, 1942. Section 5950 of the Labor Code provides. "Within thirty days after the petition for a rehearing is denied, or, *if the petition is granted, within thirty days after the rendition of the decision on the rehearing,* any person affected thereby may apply to the Supreme Court or to the district court of appeal of the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award, or of the order, decision, or award on rehearing." (Italics added.) Under this provision the final decision of the commission was made on August 6, 1942. Ingram v. Dept. of Industrial Relations, 208 Cal. 633, 636, 284 P. 212; Harlan v. Industrial Acc. Comm., 194 Cal. 352, 365, 228 P. 654; Crowe Glass Co. v. Industrial Acc. Comm., 84 Cal.App. 287, 293, 258 P. 130; Beronio v. Industrial Acc. Comm., 86 Cal.App. 588, 590, 260 P. 1104; Mustain v. Industrial Acc. Comm., 130 Cal.App. 447, 448, 19 P.2d 1031. The petition for writ of review was not filed within thirty days thereafter and for that reason should not be considered. Neal v. Industrial Acc. Comm., 36 Cal.App. 40, 171 P. 696; North Pacific Steamship Co. v. Industrial Acc. Comm., 34 Cal. App. 488, 168 P. 30. Since the decision on rehearing made no change in the award there was no basis for further reconsideration by the commission. Cf. Dalsheim v. Industrial Acc. Comm., 215 Cal. 107, 8 P.2d 840; Brunau v. Industrial Acc. Comm., 135 Cal.App. 277, 26 P.2d 672.

EDMONDS, J., concurred.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

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22 Cal.2d 636

TINGEY v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18655.

Supreme Court of California.

Aug. 3, 1943.

1. Workmen's compensation ⚷768

Where merchandiser's display manager, who had discretion to and was impliedly authorized to conduct merchandiser's business while having lunch, was injured while stepping from automobile bumper to sidewalk at entrance to merchandiser's store after crossing flooded street to return to the office from lunch, and display manager and merchandiser's branch store manager had discussed merchandiser's business through the lunch period, the injury "arose out of and in course of employment" and was compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Arose Out of and in Course of Employment".

2. Workmen's compensation ⚷617

Where an employee holds a position which carries authority to exercise considerable discretion in the performance of his duties, the scope of his operations which may come within the compensation laws is enlarged.

3. Workmen's compensation ⚷768

Where display manager was acting with his employer's implied permission in eating lunch at the same time that he was performing his duties, compensation for injuries sustained as manager was returning from lunch to the office was not barred by the "going and coming" rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Going and Coming".

4. Workmen's compensation ⚷661

The mere fact that an employee is performing a personal act when injured does not per se determine that the injury did not "arise out of employment", and he may be acting within the "course of employment" when combining personal acts with his employer's business where the employment contemplates that he shall.

See Words and Phrases, Permanent Edition, for all other definitions of "Arise Out of Employment" and "Course of Employment".

5. Workmen's compensation ⚷617

An injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.

6. Workmen's compensation ⚷768

Where display manager was performing his duties while having lunch as contemplated by his employment and restaurant chosen for continuing his conference with his employer's branch store manager was close to their office, compensation for injuries sustained by display manager while returning to the office from lunch was not barred under the "special mission" rule and display manager's major purpose, and facts that he had not been expressly directed to transact business during lunch, and that branch manager had asked him to lunch and paid for it, were immaterial.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Mission".

7. Workmen's compensation ⚷615

Any reasonable doubt as to whether an employee's act is contemplated by the employment should be resolved in the employee's favor.

◆

In Bank.

Proceeding under the Workmen's Compensation Law by Clarence E. Tingey claimant against the Industrial Accident Commission and others to review an order denying compensation for personal injuries.

Award annulled.

Benjamin, Lieberman & Elmore, of Los Angeles, for petitioner.

Charles A. Son, of Los Angeles, amicus curiae for petitioner.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondent.

CARTER, Justice.

After making an award of compensation to petitioner Clarence E. Tingey, the Industrial Accident Commission granted a rehearing and then found that petitioner was employed by Eastern-Columbia, Inc., but that he did not receive any injury arising out of or occurring in the course of his employment.

The employer is in the merchandising business and has branch stores throughout southern California. Tingey had been its display manager for all of its stores for fifteen years. His immediate superior was J. M. Sieroty, the vice-president and general manager of the employer corporation. Sieroty testified that Tingey's duties were "complete charge of our window displays, interior displays, our cabinet shop, that is a shop for the manufacture and maintenance of fixtures and equipment, as well as designing improvements for the general store operation. In addition to that Mr. Tingey helped us with lay-out of offices and practically all material pertinent to construction. Mr. Tingey also worked very closely with our architect on various building projects, from the smallest project that we have undertaken to the Ninth and Broadway building." Tingey had no office hours and was authorized to establish his own.

During the early part of December, 1941, a Mr. Weinsten who was manager of one of the employer's branch stores discussed with Tingey plans for a new branch store to be opened by the employer of which Weinsten was to be the manager. Sieroty had discussed these plans with Tingey and Weinsten and had instructed Tingey "to lay out the store, allocate space for various departments according to Mr. Weinsten's program, and to develop the store windows."

On December 10, 1941, while carrying out that project Weinsten called at Tingey's office at 10 a. m. pursuant to an appointment he had made to discuss plans for the store. The office was located in the employer's building, on the lower floor of which it maintained its main store. The discussion continued until noon, the subject being about three-quarters covered, when the two men left the office to look at the show windows of the store in the building. At Weinsten's suggestion they proceeded across the street to a restaurant to have lunch where they continued the discussion for about one hour while they were having lunch. They left the restaurant to cross the street to Tingey's office. It was raining and the street next to the curb was flooded. They reached the center of the street by stepping on the bumper of a parked car. The other side of the street being flooded also, they were transported at their request to the curb on the bumper of a passing motorist. Tingey was injured while stepping from the bumper to the sidewalk at the entrance to the employer's store. Weinsten paid for the lunch.

The employer maintains a restaurant in the building in which Tingey had his office, but no privacy could be had there. Tingey commonly discussed business with fellow employees while at lunch. Sieroty testified that it did not make any difference to him whether the discussion between Weinsten and Tingey was at lunch, and if he had known they were going to do so he would have approved it, and that it was common practice for key employees like Tingey to discuss matters relating to the employer's business at lunch. Tingey's usual time for lunch was from 11 a. m. to 2 p. m. They left plans and papers which they had been discussing at Tingey's office when they went to lunch. Sieroty testified that Tingey was a "key" executive and "is regarded as such in the group, and also in regard to our time, we have none; he didn't punch a time clock and he was not regarded as an average employee. Q. Did it make any difference to you whether he discussed these plans or any business at his office or during lunch time? A. No, sir. Q. Did his discussion of these plans with Mr. Weinsten at lunch meet with your approval? A. Well, specifically I didn't know they were discussing anything, I didn't know they were even there. If I may answer the question this way: it is not unusual for any of our executives to go out or for us to go out sometimes enmasse to discuss our problems at lunch time; quite a common occurrence to carry your business to the lunch table. Q. That is, it is more of a common occurrence with key employees as you mention, as Mr. Tingey, than it is with others, is that correct? A. Certainly. Q. And that met with your approval, did it? A. Had I known it, it would have met with my approval."

[1,2] The only reasonable conclusion from the foregoing evidence, which is without substantial conflict, is, that the injury arose out of and occurred in the course of employment. Both Tingey and Weinsten held positions in which they were vested with a large amount of discretion as to their hours of work and the manner of performing it. The evidence unerringly points to the conclusion that that discretion extended to the performance by Tingey of his duties during his lunch hour. It was the practice of Tingey and other employees in the managerial classification to conduct the business of the employer at luncheon conferences. The only reasonable conclusion is that Tingey was impliedly authorized to conduct his employer's business while having lunch. Performing the duties in that manner would reasonably authorize the employee to be on the street. The place chosen for lunch was immediately across the street and near Tingey's office. When Tingey was injured he was returning from lunch to continue with his duties at his office. The means chosen for crossing the flooded street did not take them out of the course of their employment. The employer's business was discussed all through the lunch period; the only other discussion had to do with the weather. It is significant that Tingey's immediate superior testified that although he did not know that Weinsten and Tingey were conducting their employer's business during lunch, he would have approved such conduct had he known of it. That was in harmony with the practice of having conferences and discussing business at lunch periods common with employees holding positions similar to Tingey's. Where an employee holds a position which carries authority to exercise considerable discretion in the performance of his duties, the scope of his operations which may come within the workmen's compensation laws is enlarged. Campbell, Workmen's Compensation, sec. 142; Stumar v. Industrial Acc. Comm., 16 Cal.App.2d 429, 60 P.2d 557; Wiley v. Industrial Acc. Comm., 16 Cal.App.2d 756, 60 P.2d 558; Associated Indem. Corp. v. Industrial Acc. Comm., 18 Cal.2d 40, 112 P.2d 615; Federal Mut. Liability Ins. Co. v. Industrial Acc. Comm., 94 Cal.App. 251, 270 P. 992. It may be said in this instance that rather than acting out of the course of his employment, Tingey was showing considerable diligence in furthering his employer's interests.

[3-5] Respondent asserts that the going and coming rule bars recovery by Tingey; that the test to be applied is, what was the controlling reason for the employee being in the place he was at the time of the injury; that if the controlling reason was a purpose of his own, then he may not recover although he was also incidentally performing a service for his master; that Tingey's conduct in going to lunch falls within the latter category. The fallacy of that contention is plain. Here Tingey was acting with the implied permission of his employer in eating his lunch

at the same time that he was performing his duties. While so acting the injury clearly arose out of and occurred in the course of his employment. Under those circumstances the test urged by respondent is not applicable. It has been held that the eating of lunch may be done as a part of and while performing a duty for the employer and while so doing the employee is acting in the scope of his employment. Krause v. Swartwood, 174 Minn. 147, 218 N.W. 555, 57 A.L.R. 611, involved a physician's office assistant directed to eat lunch near the office to enable her to answer telephone calls. The mere fact that an employee is performing a personal act when injured does not per se determine that the injury did not arise out of the employment, and he may be acting within the course of his employment when combining personal acts with the business of his employer where the employment contemplates that he shall. See Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911; Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal. App.2d 567, 99 P.2d 1089; Associated Oil Co. v. Industrial Acc. Comm., 191 Cal. 557, 217 P. 744; Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; State Comp. Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 P. 168. The test is stated in Employers', etc., Corp. v. Industrial Acc. Comm., supra, 37 Cal.App.2d at page 573, 99 P.2d at page 1092:

> "The true rule to be derived from the cases is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do."

In the instant case the only reasonable conclusion is that it was not only contemplated by the employment that Tingey would eat lunch while performing his duties, but he was impliedly authorized to do so.

[6] Respondent relies upon such cases as London Guarantee & Accident Co., Ltd. v. Industrial Acc. Comm., 190 Cal. 587, 213 P. 977, involving a discussion of the so-called special mission rule as an exception to the going and coming rule. But here we do not have involved a special mission for the employer, nor the question of which was the major purpose of the employee at the time. Furthermore, in the last cited case, the employee was not performing services for his employer while eating his lunch. In the instant case the employee was performing his duties while having lunch as contemplated by the employment, and as a part of such act it was necessary for Tingey to go to and from the restaurant. The place chosen was close to Tingey's office. It is not important that Tingey was not expressly directed by his superior to transact business during lunch in view of his discretion in performing his duties, and the implied authorization of the employer. For the same reason it is not significant that Weinsten asked Tingey to have lunch and paid for it, or that it was not paid for by the employer.

[7] It must be remembered that any reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the employee in view of the policy of liberal construction of the workmen's compensation laws. Goodrich v. Industrial Acc. Comm., Cal.Sup., 140 P.2d 405, this day filed; Employers', etc., Corp. v. Industrial Acc. Comm., supra.

The award is annulled.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

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22 Cal.2d 708

In re GEHRING.

S. F. 16896.

Supreme Court of California.

Aug. 13, 1943.

1. Attorney and client 🔑61

Disbarred attorney's failure, in compliance with rules of procedure of state bar, to disclose in petition for reinstatement that he had been twice arrested, disclosed either a deliberate attempt to conceal material facts or lack of that high quality of intellectual discernment and integrity which is required of attorneys at law, though charges were dismissed or not prosecuted, and justified denial of reinstatement. Pol.Code § 633a30; Insurance

Code § 1680, St.1935, p. 582; Rules of Procedure of the State Bar, rule 39.

2. Attorney and client ⚷61

An applicant for readmission to practice law has absolute duty to make full disclosure of any charges preferred against him irrespective of outcome thereof, and advice of a person in high office or fact that charges or disbarment proceedings were dismissed will not excuse failure to perform such duty. Rules of Procedure of the State Bar, rule 39.

In Bank.

Proceeding in the matter of the petition of Edward E. Gehring for reinstatement as an attorney at law.

Petition denied.

Gardiner Johnson, of San Francisco, and Arthur W. Carlson, of Oakland, for petitioner.

Benj. R. Aiken, Jr., of Oakland, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

Petitioner seeks reinstatement as an attorney at law. He was disbarred by order of this court on November 1, 1932, made upon recommendation of the Board of Governors of The State Bar, approximately twenty-seven years after his admission to practice. No review of the board's decision was sought at that time. The grounds for the disbarment were that petitioner admittedly commingled certain estate funds with funds of his own and converted a portion of the estate funds to his own use. The disbarment record also discloses two companion proceedings in which suspension was recommended on the ground that petitioner received attorney's fees and costs in two separate divorce matters but failed to file suit or to return the money in either instance.

Petitioner, now approximately 68 years of age, practiced law in Alameda County, and has continued to reside there since he was disbarred. The State Bar Local Administrative Committee of that county, appointed by the Board of Governors to investigate, hear evidence, and make findings in connection with petitioner's application for readmission, reported that by reason of his failure to include in his petition certain information required by rule 39 of the Rules of Procedure of The State Bar, they felt that petitioner had not acted in good faith in submitting the petition. Consequently they recommended against reinstating him. A minority report, with favorable recommendation, was also presented. After a further hearing before the Board of Governors, that body voted nine to four against recommending that petitioner be readmitted. Petitioner now seeks a review by this court and an order of readmission notwithstanding the adverse recommendation. The record, however, impels us to the conclusion that the position of the examining committee and the Board of Governors is well taken and that the petition for reinstatement should be denied.

Rule 39 of the Rules of Procedure of The State Bar requires that a petition for reinstatement shall contain, among other things, "(3) * * * (i) a statement, for the period of rehabilitation, showing dates, general nature and ultimate disposition of every matter involving the arrest or prosecution of petitioner for any crime, whether felony or misdemeanor * * *; (j) a statement stating whether or not any applications were made during said period for a license requiring proof of good character for its procurement * * *, and the disposition thereof."

As first presented to The State Bar for filing, petitioner's petition contained no statement as to "whether or not" during the period following his disbarment he had applied for a license "requiring proof of good character for its procurement." He was informed that his petition could not be filed until this omission was supplied. Either on this occasion or at a preceding time, he was given a copy of the Rules of Procedure governing such applications, which rules contained a form calling for a "statement of any arrest" and a direct statement as to "whether or not" any application for a license of the type mentioned had been made. Petitioner added to the petition the statement that he had, in about May, 1941, applied for a license as a real estate broker in this state, but that by reason of his disbarment the application had been denied. The petition was then, on April 14, 1942, accepted for filing, but it contained no statement concerning any "matter involving the arrest or prosecution of petitioner for any crime," as required by subdivision (3) (i) of rule 39, quoted hereinabove, and as said to be suggested in the supplied form. In this respect the petition did not on its face appear to be defective, because the form in calling for a "statement of any arrest" did not require an express negation of arrest if in fact none had occurred.

On June 19, 1942, petitioner called at the office of the examiner appointed by The State Bar in this proceeding, and discussed the application with him. The examiner, who in the performance of his duty had written petitioner suggesting an interview, testified at the hearing before the Board of Governors that he informed petitioner that "it wasn't necessary for him to give me any information; that I was representing the State Bar and would use any information I could obtain in this matter. After discussing his petition with me, I asked Mr. Gehring the flat question, 'Have you even been arrested?' The answer was 'No.'" The examiner further testified that at the time of such interview he had no knowledge that petitioner had been arrested at any time following his disbarment.

At the hearing before the local administrative committee (on July 21, 1942), petitioner made no mention of the arrests in his direct testimony but on cross-examination testified as follows:

"Q. Mr. Gehring, have you ever been arrested? A. Once.

"Q. When was that? A. Quite a few years ago.

"The Chairman: Q. Approximately when? A. Five or six or seven years ago.

"Mr. Aiken [the Examiner]: Q. What was the nature of the arrest? A. I had written a policy of insurance. The company refused to accept it and I returned the premium, sent it back, either a money order or cashier's check and somehow he didn't get it and he had a warrant issued. The money was there long before the arrest was made, or anything of that kind. Then I told him where the money was.

"Q. What happened after that? A. That is all.

"Q. The case was dismissed? A. Yes. Q. Is that the only time you have been arrested? A. I was arrested in San Francisco. * * *"

It appears further that the first of the two arrests thus finally admitted by petitioner occurred on February 5, 1934, pursuant to an indictment for grand theft (a felony), returned by the Grand Jury of the City and County of San Francisco on December 8, 1933. On April 5, 1934, the case was dismissed by the superior court upon motion of the district attorney after hearing the evidence of the complaining witness. Petitioner, in a letter to the local administrative committee, dated September 5, 1942,—several weeks after the hearing of July 21—stated that he spent six days in the county jail in connection with that arrest. The second arrest was on November 30, 1934, on misdemeanor charges of petty theft and of a technical violation of section 633a30 of the Political Code (now sec. 1680 of the Insurance Code, St.1935, p. 582). Petitioner posted $50 bail and appeared in the justice's court on five different occasions during December, 1934, and January, 1935, on this matter, but upon his failure to appear on February 11, 1935, —the day finally set for trial—his bail was ordered forfeited and the cause was dropped from the trial calendar, to be reset on motion of the district attorney. Apparently no further proceedings have since been taken in the case.

Petitioner admits that he read and "followed" the rules of The State Bar in preparing his petition for reinstatement, but in attempted explanation of his failure to include in the petition a statement concerning these arrests he testified before the committee that:

"I figured that as long as the matters had been disposed of there was nothing at all. There was no record. I am willing to amend the petition.

"Q. You figured at the time that there was no need because we wouldn't be able to find them? A. No. Where the matter was dismissed and a man has had a complaint filed against him, he would be in the same position he was before the complaint was filed.

"Q. Don't these records indicate that you were arrested? A. I am not trying to argue about the proposition. That wasn't my idea. I had no fear because I had no fear of it. I figure what I did was nothing particularly wrong."

[1, 2] That explanation apparently depicts Mr. Gehring's estimate of his duty in the premises. His conduct, including such appraisal of his duty, appears to manifest one or the other or both of two things: 1. He sought, deliberately, to conceal material facts from the examiner and from the committee. 2. If he failed to recognize the materiality of such facts he disclosed thereby a lack of that high quality of in-

tellectual discernment and integrity which is required of attorneys at law. We may appropriately repeat here what we said in Spears v. State Bar, 211 Cal. 183, 187, 294 P. 697, 698, 72 A.L.R. 923: "At the threshold of the discussion it should be stated as definitely settled in this state that, irrespective of the outcome of any charges preferred against an applicant for admission to practice law in this state, whether he be convicted, acquitted, or the charges dismissed, a duty rests upon said applicant to make a full disclosure of such charges to the committee charged with the duty and the responsibility of investigating his fitness to practice law in this state. We are aware that this requirement calls for a high degree of frankness and truthfulness on the part of the attorney making application for admission to practice law in this state, but no good reason presents itself why such a high standard of integrity should not be required. This duty to make a full disclosure is an absolute duty, and a justification for a failure to perform it is not to be found in the excuse that an applicant has been advised by some person, no matter how high in official position that person may stand, that such disclosure is not necessary, nor by the sophistic argument that the charges having been dismissed or the disbarment proceedings dropped, in effect no charges were preferred or proceedings instituted, and applicant is therefore justified in stating under oath that no charges were in fact preferred or proceedings for disbarment instituted." See, also, In re Kepler, 79 Cal.App. 639, 640, 250 P. 701. The above-quoted statement relative to an application for original admission applies with at least equal force to a motion for readmission. See Kepler v. State Bar, 216 Cal. 52, 55, 13 P.2d 509.

From what has been said it appears that the recommendation of the Board of Governors against the readmission of petitioner is supported by the evidence. Petitioner's showing on this application for review and readmission notwithstanding the adverse recommendation is not "a convincing showing" that "such adverse recommendation is not based upon sound premises and valid reasoning." See Spears v. State Bar, supra, 211 Cal. at pages 191, 192, 294 P. at page 700, 72 A.L.R. 923; see, also, Salot v. State Bar, 3 Cal.2d 615, 618, 45 P.2d 203.

The motion for readmission is denied.

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60 Cal.App.2d 241

McLAUGHLIN v. CITY OF LOS ANGELES.

Civ. 13944.

District Court of Appeal, Second District,
Division 3, California.

Aug. 20, 1943.

Rehearing Denied Sept. 8, 1943.

Hearing Denied Oct. 18, 1943.

1. Municipal corporations 🔑759(5)

Under statute, a city is liable for injuries resulting from the dangerous and defective condition of a public street, whether it is improved or unimproved. Gen.Laws 1937, Act No. 5619.

2. Municipal corporations 🔑757(1)

A city is under no obligation to improve its streets but it is bound to keep them all in a reasonably safe condition, subject to statutory conditions. Gen.Laws 1937, Act No. 5619.

3. Municipal corporations 🔑821(23)

In action against city for injuries sustained by pedestrian in fall into hole in street, where pedestrian knew that street generally was in a dangerous condition but that there was a strip which could be walked on with safety, pedestrian was not guilty of contributory negligence as a matter of law in using street.

4. Negligence 🔑136(14)

Negligence is usually a "question of fact", not a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

5. Municipal corporations 🔑821(26)

In action against city for injuries sustained by pedestrian in fall into hole in street, whether pedestrian walking on safe path adjacent to street in dangerous condition failed to exercise due care in stepping into street to pass around automobile blocking path instead of retracing steps, was for jury.

6. Highways 🔑168
Municipal corporations 🔑757(1)

A pedestrian is entitled to use every part of the street or highway subject to proper regulations, and the city's duty to repair is co-extensive with that right. Gen. Laws 1937, Act 5619.

7. Municipal corporations 🔑800(6)

In action against city for injuries sustained by fall into hole in street, presence of parked automobile barring pedestrian's safe path, and causing her to use dangerous section of street was not "proximate cause" of injury so as to relieve city of liability therefor, where city had duty to make whole street safe and had reason to anticipate such parking. Gen.Laws 1937, Act No. 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Thomas H. McLaughlin against the City of Los Angeles, a municipal corporation, for injuries sustained in fall into hole in city street. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Ray L. Chesebro, City Atty., and Leonard Husar, Deputy City Atty., both of Los Angeles, for appellant.

William E. Empey, of North Hollywood, for respondent.

SHAW, Justice pro tem.

Plaintiff, who was approximately 70 years old, was walking along Fair Avenue, an unimproved street in the San Fernando Valley section of the City of Los Angeles, slipped on the edge of a hole in the street and fell, receiving the injuries for which he brings this action against the city. The jury returned a verdict in his favor and from the ensuing judgment the defendant appeals.

[1, 2] Defendant states as its first proposition in support of its appeal: "As a matter of law, it is not unreasonable for the City of Los Angeles to maintain an unimproved dirt road without a sidewalk in an outlying undeveloped industrial district which is also devoted to some residential use." This proposition is irrelevant to the present case. Plaintiff does not complain of the absence of a sidewalk, but of the presence of a hole. His action is to be sustained, if at all, upon the Statute of 1923, Deering's Gen.Laws, 1937 Ed., Act 5619, providing that "municipalities * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, * * *" on conditions of notice, etc., which we do not quote because no contention is made here in regard to them. Under this statute a city is liable for injuries resulting from the dangerous or defective condition of a public street whether it is improved or unimproved. A city is under no obligation to improve its streets, but it is bound to keep them all in a reasonably safe condition, subject to the conditions stated in the statute. Of course the impact of this duty may vary with the nature and location of the street, the traffic upon it and the character of its improvements. No claim is made by defendant that Fair Avenue was not, at the time and place of plaintiff's accident, in a dangerous condition. It was an unimproved dirt road, on which there was a considerable amount of travel by loaded trucks, its surface was rutted and full of holes, many of which were a foot or more in depth, and after a rain these holes were full of water and so remained for some time. It had rained the day before plaintiff's accident and there was water in the hole in which he fell.

The only other contention made by defendant is that plaintiff was guilty of contributory negligence as a matter of law. It appears without dispute that plaintiff had lived for several years on Fair Avenue about three blocks from the place where the accident occurred, that he had often passed this place during that time and was quite familiar with the conditions there. At the time of the accident he was on his way home from work and was carrying some groceries which he had bought at a market on the way. He could have gone from the market to his home by another route along improved streets on which there were sidewalks, but he says this other route was longer. His usual route home lay over Fair Avenue and he followed it at the time of the accident. Fair Avenue runs north and south and at the place where plaintiff fell it is bordered by a fence on the east side. Along this fence there is, according to plaintiff's testimony, a strip of ground which is higher than the rest of the street and along which he could walk without any trouble even in time of rain. The accident occurred about 8:30 p. m., there were no street lights in the vicinity, and it was dark, but clear. As plaintiff came by the fence he found an automobile parked where he could not pass between it and the fence and so could not stay no the high ground. Looking to the left of the automobile he saw what appeared to him to be a path wide enough for him to pass between the automobile and a hole on its left. He started to go around on this side, but his foot slipped on the edge of this hole, which was about 14 inches deep and filled with water, and he fell, breaking his left wrist and thus receiving the injuries for which he sues.

[3, 4] Defendant contends that the danger confronting plaintiff was obvious, that he knew the dangerous condition of the street, and that he was therefore guilty of negligence in using it at all, and particularly in using it in preference to another, safer route which was open to him. It may be that had the jury returned a verdict against plaintiff, we would have been required to sustain it on these grounds, but it does not necessarily follow that on the same grounds we must reverse a verdict in his favor. Negligence is usually a matter of fact, not of law, and we think this is true in the present case. As we said in Sommerfield v. Miratti, (1942) 49 Cal. App.2d 450, 455, 121 P.2d 746, in reference to a claim of contributory negligence of the plaintiff there in using a stairway known to be somewhat slippery, "* * * if to a man of ordinary prudence it would appear that in spite of the danger he can by taking available precautions safely use the passageway, he is not negligent in using it with those precautions." In the case at bar the plaintiff, while he knew that the street in general was in a dangerous condition, also knew that there was a strip of ground next to the fence on which he had been able to walk safely under similar conditions. Hence he was not necessarily negligent in undertaking to traverse this part of the street.

[5] When he found the automobile which prevented him from using this safe path, it appears to be defendant's contention that he should have stopped, retraced his steps to the improved streets and gone to his home by the alternate route above mentioned. But he says that he looked and saw what appeared to be a safe route around the automobile. Only a short detour would be necessary before he could return to the higher ground along the fence. The event, it is true, proved plaintiff's course around the automobile to be unsafe, but negligence is not to be judged exclusively by hindsight. The question whether plaintiff exercised due care in attempting to pass around the automobile instead of retracing his steps, was, under the circumstances, one of fact for the jury.

[6, 7] In an attempt to escape the effect of the conclusion last stated, defendant contends that the proximate cause of plaintiff's fall was not the dangerous condition of the street, but the presence of the parked automobile barring plaintiff's safe path, and that it should not have been expected to anticipate such presence and hence was not required to make the center portion of the street safe for pedestrians. But a pedestrian is entitled to use every part of the street or highway, subject to proper regulations (none of which appear to exist in this case), and defendant's duty to repair is co-extensive with that right. There were places of business abutting on the part of the street where the automobile was parked, and no reason appears why defendant should not have anticipated such parking, if that were necessary to impose on it a duty to make the street as a whole safe for pedestrians. The jury could properly find that plaintiff's injury was proximately caused by the condition of the street.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

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60 Cal.App.2d 133

PEOPLE v. LYNCH.

Cr. 3716.

District Court of Appeal, Second District, Division 1, California.

Aug. 5, 1943.

1. Criminal law 🔑1159(5)

Where circumstances surrounding accused's entry into house and his statements to police justified conclusion that accused intended to steal, persuasive evidence that accused was too intoxicated to form such intent did not warrant reversal of burglary conviction.

2. Criminal law 🔑738

The question of felonious intent is for the jury and may be inferred from all of the circumstances present in the case.

3. Criminal law 🔑1159(5)

Court of appeal could not substitute its conclusion as to the existence of a felonious intent for that of jury where jury's conclusion did not do violence to reason.

4. Criminal law ⚷795(3), 823(17)

Trial court's statement after defining degrees of burglary that if jury found accused guilty, it must be of burglary or attempted burglary of the first degree amounted to a misstatement of a legal principle that jury was bound to follow and not a justifiable "comment on evidence" or credibility of witnesses, and such error was not cured by subsequent instructions that jury was sole judge of facts and credibility of witnesses and was not bound by any comment of court thereon. Const. art. 6, § 19, amended in 1934.

See Words and Phrases, Permanent Edition, for all other definitions of "Comment on Evidence".

5. Criminal law ⚷571

Where there was a possibility of a reasonable doubt as to whether accused was guilty of first or second degree burglary, he could only be convicted of the lesser offense. Pen.Code § 1097.

6. Criminal law ⚷1172(1), 1184

If accused was lawfully convicted of burglary, trial court's error in instructing that if found guilty it must be of first degree burglary resulted in a "miscarriage of justice" only as to improper fixing of the degree of crime and imposition of penalty therefor which may be righted by Court of Appeal without a new trial. Pen.Code, §§ 1097, 1181, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

7. Criminal law ⚷772(3)

Where trial court unequivocally informed jury that accused was charged in two counts with two distinct offenses, that he might be convicted upon either or both counts, and that each offense of which accused was convicted must be stated in the verdict, failure to charge specifically that fact that information contained two counts could not in itself add to weight of evidence against accused on either count and that each count should be considered as though separately tried was not error.

8. Criminal law ⚷723(1), 1037(1)

Prosecutor's cross-examination of accused concerning his previous appearances in court and as to why he chose to defend himself instead of availing himself of services of public defender insinuating that accused sought thus to enlist jury's sympathy constituted "misconduct" prejudicial to accused though not objected to during trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

9. Criminal law ⚷656(5), 1166½(12)

Trial court's statement during cross-examination of expert appointed to examine accused who had pleaded not guilty by reason of insanity that court considered witness competent to make examination and express an opinion and that his competency had never been challenged was improper and prejudicial effect was not eliminated by giving statutory instruction as to expert testimony. Pen.Code § 1127b.

10. Constitutional law ⚷268

It is court's duty to insist that accused be fairly convicted, and denial of that fair and impartial trial guaranteed by law amounts to a denial of "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

11. Criminal law ⚷1186(4)

Constitutional provision for disregarding harmless error is of no concern to trial courts except in proceedings on motion for new trial and so far as its application goes is of interest only to courts of review. Const. art. 6, § 4½.

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Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Charles James Lynch was convicted of burglary, and from the final judgment and the order denying his motion for a new trial, he appeals.

Judgment and order reversed.

Frederick H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Through an information filed by the District Attorney of Los Angeles County, defendant was accused in count 1 thereof with the crime of burglary, while count 2 charged the offense of attempted burglary, both crimes allegedly committed on the 26th of November, 1942. In connection with each count of the information, it was also alleged that prior to the date thereof, defendant had suffered four prior felony convictions and that for each of said prior felony convictions defendant served a term of imprisonment in the State prison.

To the aforesaid information defendant pleaded not guilty and not guilty by reason of insanity. Trial before a jury resulted in the conviction of the defendant of the crime of burglary as charged in count 1 and his acquittal of the offense alleged in count 2. The issue raised by the plea of not guilty by reason of insanity was subsequently tried before the same jury which returned a verdict that the defendant was sane. A motion for a new trial was made by the defendant and denied by the trial court. In all of the proceedings up to and including the denial of his motion for a new trial, the defendant appeared in propria persona. After denial of the motion for a new trial, the court appointed the public defender of Los Angeles County to represent the defendant, and thereafter, with the consent of the court, the motion for a new trial was renewed and, following argument thereon by counsel, was again denied. This appeal is from the final judgment and the order denying defendant's motion for a new trial.

The factual background surrounding this prosecution, as reflected by the record, may be thus epitomized. Mrs. Myrtle Keeney testified that she left her home in the city of Pasadena about 8:15 on the morning of November 26, 1942, and did not return home until 7:30 o'clock that evening. As she approached her home she observed a light burning in the front bedroom thereof. Entering her residence through the front door, Mrs. Keeney proceeded through the dining room and into the bedroom where she observed a man seated on the bed with his head in his hands. She first thought the man was her brother and inquired of him as to whether he was sick. Upon being addressed, the man looked up but made no reply, but Mrs. Keeney saw he was not her brother. To Mrs. Keeney the man appeared to be "either drunk or sick". The witness noticed that either one or two of the bureau drawers, which had been closed in the morning, were open but nothing was missing. Mrs. Keeney then went back through the dining room and left the house to telephone the police. She observed the man follow her from the bedroom to the dining room from which point he watched her leave the house, after which he went out the front door. After a few minutes absence Mrs. Keeney returned to her home with the police officers.

Investigation disclosed that the hook holding the back screen door of Mrs. Keeney's residence had been pulled out in order to open the door and two panes of glass about 8″ x 10″ in the back door had been broken out and the shattered glass had fallen upon the floor. There was also blood on the floor and a small fragment of flesh caught in the glass. When the panes of glass had been knocked out, it was easy to reach in and turn the key which unlocked the rear door. There was some tobacco scattered around in the kitchen, approximately enough with which to roll a cigarette. Burned matches were found on the screen porch, in the kitchen, dining room and bedroom, but in no other parts of the house. An empty pint wine bottle was also found in the home. The investigating police officer arrived at the Keeney residence about 8 p.m. After making an examination of the house, the officer returned to the police car, parked in the front of the premises, at about 8:30 o'clock. As he was getting into the automobile the officer observed the defendant walking south on Raymond Street. It is apparent, from the officer's testimony given at the preliminary examination, that his attention was attracted to the defendant by reason of the latter's apparent intoxication. After some conversation at the police car with the defendant, the officer took him before Mrs. Keeney who identified him as the man she had found in her home when she returned that evening. The police officer testified that the defendant "was very intoxicated"; that when first taken to Mrs. Keeney's home the defendant "wanted to know what it was all about". Regarding his conversation with the defendant, the officer stated that the former's answers were "fairly coherent and understandable though not entirely clear" but "he was able to answer questions to a certain extent". In the course of his interrogation of the defendant, the officer asked him "What were you doing in the house" to which the defendant, according to the officer, replied in substance "Well, you know as well as I do. I was trying to steal something". Upon his arrival at the police station, defendant was given a blood test for alcoholism. This reflected 3.06 of alcohol. According to the police officer, he had given this test on numerous occasions during his career as a police officer, and when asked as to the degree of defendant's intoxication as reflected by such test, the officer replied "that he was very intoxicated". According to the jail records, the defendant was booked for "investigation as to the burglary charge and for intoxication". When searched at the police station, defendant had no cash, and among his personal effects was no property belonging to the complaining witness. Either a day or two days after his arrest, the defendant was interviewed by another officer, who testified that at that time the defendant "showed that you had been under the influence of liquor previous to that time and you were very nervous until they took you down to the hospital and gave you some sedatives, but at the time I questioned you I think you were not quite so nervous". At this conversation, defendant told the officer that insofar as the alleged burglary of Mrs. Keeney's residence was concerned he, the defendant, was "so darned drunk that he didn't remember much about it". To various other questions the defendant reiterated his claim that he had but a very hazy recollection of the events which transpired on the evening of his arrest. At the trial the defendant took the witness stand in his own behalf and testified that he had some recollection of talking to a woman in a room on the night in question but that he had no recollection as to when he entered the house nor as to what was his purpose in so doing.

[1-3] Appellant first assails the judgment finding him guilty of burglary as being without support in either the evidence or the law. This challenge is grounded on the claim that the evidence as a matter of law fails to establish that at the time of the entry, or at any other time here pertinent, the defendant had or was mentally capable of forming a specific intent to steal, by reason of his aggravated state of intoxication. It is pointed out that he did not take any property or belongings from Mrs. Keeney's home; that while in the house he permitted a light to burn in the front room; that he made no effort to escape upon the approach of the home owner; and finally returned to the vicinity of the Keeney residence some thirty minutes after he had left. All these factors, argues appellant, negative the existence in his mind of the necessary and essential intent. On the other hand the record discloses circumstances which to us furnish grounds upon which the jury could have concluded that the necessary intent was present. We refer to the method resorted to for the purpose of affecting an entrance to the house; the opened bureau drawers which were closed when Mrs. Keeney departed in the morning, coupled with the defendant's statement in answer to the arresting officer's query as to what he was doing in the house "Well, you know as well as I do. I was trying to steal something". Whatever effect the wine, consumed by the defendant after he entered the house or before, may have had upon his actions while in the house and after leaving it, nevertheless we cannot say that the circumstances surrounding defendant's entry into the house are such as to amount to no evidence at all upon which the jury could predicate a finding that the essential intent was present. The authorities are legion in holding that the question of felonious intent is for the jury to decide, and may be inferred from all of the circumstances present in the case. While the circumstances alluded to by appellant undoubtedly afforded opportunity for a persuasive argument to the jury against the existence of a felonious intent, we cannot say that the determination of the jury in the instant case, that such intent was present, does violence to reason. Therefore, we cannot substitute any conclusion at which we might be tempted to arrive for that reached by the constitutional as well as statutory arbiter thereof. People v. Gilbert, 26 Cal.App.2d 1, 21, 78 P.2d 770; People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631; People v. King, 33 Cal.App.2d 538, 542, 92 P.2d 510.

Appellant next complains of the action of the trial judge in advising the jury that if they found the defendant guilty of burglary they must determine it to be burglary of the first degree. In this connection the record discloses that after giving the jury correct instructions defining the degrees of burglary the court said: "In this case evidence has been introduced that it was in the night time and that it was an inhabited dwelling, and therefore if you find the defendant guilty of burglary on count 1, it must be burglary of the first degree. Likewise, if you find him guilty on count 2 of the information, it must be burglary of the first degree". This was followed by the giving of an instruction on intent. Appellant contends that it is impossible to determine whether the court's statement was intended as an instruction to the jury that the burglary was, as a matter of law, one of the first degree or amounted only to a comment by the court as to his opinion respecting the degree. Notwithstanding the claim of the Attorney General that "It is quite apparent that the foregoing was intended as a comment" we are inclined to the view that it must be regarded as an instruction. Both the language used and the circumstances under which it was given endow the statement with the qualities of a direction or mandate of the court that under the evidence the offense charged "Must be burglary of the first degree".

[4-6] Furthermore, the instruction given cannot be deemed a justifiable comment by the judge "on the evidence and the credibility of a witness" as contemplated by the Constitutional Amendment, Section 19, Article VI, California State Constitution. The instruction did not purport to be such a comment. It amounted to a statement of the law, but in view of the evidence herein it was in reality a misstatement of the law. Nor do we think that the error in giving such an instruction was cured by the court in later admonishing the jury that "Now, it is your exclusive problem to determine the facts of the case, and to consider the evidence for that purpose. The Court cannot determine the facts for you but may aid you in two methods: By giving you the rules of law to be used by you in arriving at the truth; By commenting upon the evidence within proper limitations." Nor was it cured by reading to the jury Section 19, Article VI of the Constitution, and further instructing them "You will therefore, distinctly remember and ever bear in mind the fact that although during the trial I may have commented, and may in these instructions comment upon the witnesses or the evidence or both, nevertheless you at all times remain the sole and exclusive judges of the facts and the credibility of the witnesses. Any remarks I may have made or may make are intended solely to aid you in arriving at a verdict, but must not in any manner be construed as imposing my will upon you or as compelling you toward that verdict. In this connection I would caution you that it is your right and duty to exercise the same independence of judgment in weighing the judge's comments on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel". Rather than being a comment upon the evidence or the credibility of witnesses, the declaration of the court amounted to a statement of a purely legal proposition which the jury was bound to follow, as to the degree of the burglary charged against the defendant. It invaded the province of the jury. Without here repeating the evidence in greater detail than as heretofore narrated, it is sufficient to say that under the proven facts and circumstances there at least was possibility of a reasonable doubt as to which of the two degrees of burglary the defendant was guilty. Such being the case, he could only be convicted of the lowest of such degrees. Penal Code section 1097. However, if it can be said that appellant was legally and lawfully convicted of the burglary, then no miscarriage of justice resulted from the statement of the court, except that as a matter of law the jury improperly fixed the degree of the crime, and the court imposed the greater penalty therefor. That injustice may now be righted by this court without subjecting the State and the defendant to the delay and expense of a new trial. People v. Kelley, 208 Cal. 387, 393, 281 P. 609; People v. Golembiewski, 25 Cal.App.2d 115, 76 P.2d 717; Section 1181, subdivision 6, Penal Code.

[7] It is next contended by appellant that the court committed error in neglecting to advise the jury as to the general principle and fundamental rule of law that although the information contained two counts, such fact in itself did not add to the weight of the evidence against the defendant on either count and that each count should be considered as though separately tried. The record, however, does not sustain appellant in this contention. The court advised the jury of the necessary and essential elements of the respective crimes with which he was charged and then in unequivocal language informed the jury that the defendant was charged in two counts, with two distinct offenses; that he might be convicted upon either or both counts, and that each offense of which the defendant was convicted must be stated in the verdict. In view of the instructions given, coupled with the absence of any request for a more specific admonition, we cannot assume error or hold that the jury failed to realize that the two counts in the information were to be considered by them as though separately tried.

We come now to a consideration of appellant's claim that he was prejudiced by the conduct of the deputy district attorney during the latter's cross-examination of appellant. In that connection the record discloses that the prosecutor commenced his cross-examination of appellant by inquiring:

"Q. Mr. Lynch, you have been in court before, haven't you? A. Yes sir, I have.

"Q. And a good many times, haven't you? A. Yes.

"Q. Do you consider that you are familiar with court procedure? Sufficient so that you can represent yourself in this matter? A. When I admit to having been in court quite a number of times before I don't mean to admit that I have been in court where a jury was before, or a session inasmuch as presenting my side of the case, and if I feel competent myself, so far as being adequately equipped to do so, I know that there are many other people who are much better equipped to do so.

"Q. Then why didn't you avail yourself of the services of the Public Defender in this matter, and have him represent you?" When to the last question the defendant proffered an answer with which the district attorney was not satisfied, he persisted by asking:

"Q. Well why didn't you use the assistance of the Public Defender, to represent you in this case? A. I believe that there would be several reasons, and one is that at the time that I came into court I was—I had the thought in mind that if I had someone just to apprise me about the matter in court at the time of my arraignment, and anyway there was a person, I don't know who he was, advised me to come into court and plead as I have, and for the reason, he said I should so that because in view of my record, regardless of what the principal offense is, that the law will be such that I will probably get a life sentence in the penitentiary; and the thought I had in mind is that I did not feel about this particular case about the offense that I am charged with, that I would prefer to come in to present it to the jury myself rather than have a Public Defender present it to the Court and the jury for me.

"Q. And so you don't feel adequately represented in representing yourself here today, do you, that is that your knowledge of the law is sufficient for that purpose? A. My knowledge of the law is insufficient, I recognize that.

"Q. *Well, I take it that you don't have in mind here in representing yourself that you are appealing to the court for aid as you have done throughout this trial, that you wouldn't by that conduct gain the sympathy of the jury,* you would have nothing like that in your purpose, would you? (Emphasis added.) A. No, I am not concerned with sympathy.

"Q. And that thought never entered your mind, did it? A. Why, I think so far as entering my mind, yes, but not in connection with appealing to the jury or appealing to the court for instructions, no, but if I am permitted to say so I would say that the reason I have asked the court for instruction is not to cause the jury to think anything on account of sympathy for me because I am here inadequately defending myself but it is simply that I don't feel that I did anything wrong here.

"Q. How many times have you been in court? A. Counting the Juvenile Court?

"Q. Well if you want to go back that far, yes. A. Eight or 10 times, I believe."

[8] It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions were improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of the defendant. By such conduct a defendant is precluded from having that fair and impartial trial to which, whether innocent or guilty, he is entitled. Furthermore, it may serve to defeat the punishment of crime by jeopardizing a conviction when a defendant is clearly guilty. That the interrogatories were injected into the case for the manifest purpose of prejudicing the jury against the defendant is obvious. That the asking of such questions constituted misconduct, and of the fact that such misconduct was prejudicial, there can be little doubt. It would ignore human experience and belie the dictates of common sense to entertain a contrary view. With commendable fairness the attorney general does not attempt to justify the conduct of the prosecutor, but simply suggests that no objection was made thereto by the appellant who appeared as his own counsel. However, we think the foregoing course of conduct was so improper and so offensive to the requirement that the question of guilt or innocence shall be determined by an orderly legal procedure in which the substantive rights belonging to a defendant shall be respected, that the trial judge should have stopped the

asking of such questions when the first improper interrogatory was propounded without waiting for an objection. What was said by the Chief Justice of the U. S. Supreme Court in the case of Viereck v. United States, 318 U.S. 236, 63 S.Ct. 561, 566, 87 L.Ed. 734, reflects our views as to the duties and obligations of a prosecuting officer. We quote: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one".

[9] Appellant next complains of the conduct of the trial judge when, during the cross-examination of Dr. K. G. Bailey, appellant inquired as to whether the witness deemed himself qualified as a psychiatrist to express an opinion as to whether a person was sane or insane at a given time prior to the date of the medical examination of such person by the psychiatrist, when such examination was made "say a day after the thing in question is involved". In sustaining an objection interposed by the deputy district attorney, the court said: "The objection will be sustained. Doctor Bailey has given a full recitation of the facts on the basis of his opinion, and in the first place I consider him qualified to make this examination and express an opinion as an expert or specialist on the subject, and as I said before the law imposes upon me the necessity of appointing specialists as I have done here in this instance, to make an examination; and furthermore, I might state for your benefit, Mr. Lynch, *as well as for the jury* that I have had occasion to appoint Doctor Bailey on a large number of cases of this kind and there has never been any challenge to his competency." (Emphasis added.)

We regard these declarations of the court as transcending the bounds of legitimate comment upon the evidence or the credibility of a witness. It amounted to an attempt upon the part of the court to testify as to the competency of the witness as an expert in his chosen line of medical practice. And it is vain to attempt to do away with the prejudicial effect of such assertions upon the part of the court by giving the instruction provided for in section 1127b of the Penal Code.

[10, 11] It is true the jury had an opportunity to observe the demeanor and character of the witnesses and may have had reason to return the verdicts finding the defendant guilty of burglary and sane at the time of the commission of the offense, irrespective of the errors committed during the trial. As to this, of course, we can say nothing. But from the mere record, as we read it however, the errors may have turned the scale in favor of the prosecution. We do know, as heretofore noted, that the jury was led to convict the defendant of burglary of the first degree when as a matter of law he was entitled to a finding pursuant to section 1097 of the Penal Code that the offense was of the second degree. It is the bounden duty of courts to insist that a defendant be fairly convicted, because if he is not so convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. Criminal cases should not be conducted with an eye to the saving grace of section 4½, Article VI, of our State Constitution. Except in proceedings on a motion for a new trial, the constitutional section is of no concern to the trial courts, and so far as its application goes, it is of interest only to the courts of review. People v. Black, 73 Cal.App. 13, 43, 238 P. 374.

Other assignments of error need not be considered because it is not likely that they will occur upon a retrial.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each is, reversed.

YORK, P. J., and DORAN, J., concur.

59 Cal.App.2d 809

CUDA v. GIOTTO et al.

Civ. 14016.

District Court of Appeal, Second District, Division 1, California.
July 24, 1943.

As Modified on Denial of Rehearing
Aug. 23, 1943.

1. Evidence ⚷584(3)

Court is not bound to decide cause in conformity with testimony of any number of witnesses, where such testimony has not produced conviction.

2. Appeal and error ⚷1008(1)

In action, tried by court, in nature of creditor's suit to enforce collection of judgment obtained in previous tort action, whether sum transferred by judgment debtor from bank account in judgment debtor's own name to bank account in name of judgment debtor's son, by judgment debtor as guardian, was son's property, or was judgment debtor's property and was so transferred with intent to delay or defraud judgment creditor, was question of fact for trial court.

3. Fraudulent conveyances ⚷299(13)

In action in nature of creditor's suit to enforce collection of judgment obtained in previous tort action, evidence justified judgment for creditor on ground that sum transferred by judgment debtor from bank account in judgment debtor's name to bank account in name of judgment debtor's son, by judgment debtor as guardian, was judgment debtor's property and was so transferred with intent to delay or defraud creditor.

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Action in the nature of a creditor's suit by Sam Cuda against Catherine Giotto, also known as Catherine Duce, and others, to enforce the collection of a judgment obtained in a previous action. Judgment for plaintiff, and defendants appeal.

Affirmed.

C. M. Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellants.

Hiram T. Kellogg, of Los Angeles, for respondent.

DORAN, Justice.

In this action, which is in the nature of a creditor's suit to enforce the collection of a judgment obtained in a previous action, the plaintiff prevailed and defendants appeal.

The record reveals that plaintiff herein filed an action in tort for damages on September 7, 1940, against defendants herein, Catherine Giotto, also known as Catherine Duce, et al., and recovered judgment in the sum of $1,250, no part of which has been paid except the sum of $28.78 which was recovered from a co-defendant. Said judgment was entered June 7, 1941, and is final. In the course of supplementary proceedings incident to plaintiff's effort to collect the judgment, it developed that defendant had transferred $4,300 from an account in the bank in her own name to an account in the name of her son John Duce, by Catherine Duce, guardian.

Plaintiff alleges the foregoing in substance and further alleges that the transfer of said fund from one bank account to the other was done for the purpose of hindering, delaying and defrauding plaintiff as a judgment creditor. The money was transferred September 7, 1940. There is no dispute as to the evidence; the dispute results from the inference and conclusion reached by the trial court from a consideration thereof.

No witnesses testified at the trial. It was agreed between counsel as to what the testimony of certain individuals would be if called as witnesses.

It appears from the record that defendant Catherine Giotto's husband, Gaetano Duce, died in the year 1933; that before his death he and his wife Catherine (defendant) had opened a joint bank account which at the time of Mr. Duce's death contained the $4,300 that now is the subject of this litigation; that according to the terms of the joint bank account upon the death of either the monies in said account became the property of the survivor. Shortly after her husband's death, Mrs. Duce opened an account in the same bank in her own name to which account the monies in the joint account were transferred. From that date until the transfer to her son's account, there were no withdrawals except as shown by certain checks for the funeral expenses and doctors bills incurred during Mr. Duce's last illness. No money was ever withdrawn for the use and benefit of Mrs. Duce (defendant).

Additional deposits covering the same period, i.e.: 1933 to 1940, aggregate about $530.

It also appears that shortly before Mr. Duce died he and his wife Catherine agreed that the money in the joint bank account should be preserved for the benefit of their son John. It further appears that when the action in tort, hereinbefore mentioned, was filed, Mrs. Duce consulted Mr. Castruccio, her attorney, and after informing him of the history of the $4,300 was advised by him that in fact and in law said money was the property of her son John and should be on deposit in his name by her as guardian; that defendant thereupon transferred the money to the account of her son. The son's account had been in existence since before his father's death and at no time had contained more than $175. It too was a savings account.

The court found as a fact that defendant was the owner of the money in question and that the son John Duce had no right, title or interest therein; that the transfer of the money by defendant from one account to the other "was made with intent to delay or defraud the plaintiff and for that reason is void * * *".

It is contended by appellants in substance and effect that the evidence fails to support the findings and in that connection, that the trial court was bound to find, in the light of the evidence, in favor of appellant. It is urged that the evidence offered in support of defendant's contention that the money in question was a trust fund, is practically conclusive.

[1-3] It is elementary that a court is not bound to decide in conformity with the testimony of any number of witnesses, which does not produce conviction. Obviously, the court was not convinced by the testimony of plaintiff's witnesses, but to the contrary was persuaded by the evidence of circumstances surrounding the transaction. For example, the fact that the $4,300 bank account was not transferred from the exclusive control of appellant until five days after commencement of the tort action in which respondent recovered a judgment against appellant, could have been such a circumstance. And the fact that during all of this time there existed a bank account in the son's name in which the $4,300 could have been deposited originally, also could have been such a circumstance. The disputed question was one of fact and hence addressed exclusively to the judgment of the trial court and in the light of the record, any interference with the trial court's findings and conclusions clearly would be unwarranted.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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60 Cal.App.2d 239

PEOPLE v. NG KING.

Cr. 2268.

District Court of Appeal, First District, Division 2, California.

Aug. 17, 1943.

Poisons ⚷9

Evidence sustained conviction of unlawful possession of a preparation of opium. St.1941, p. 2820, § 11160.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Ng King was convicted of unlawful possession of a preparation of opium, and he appeals.

Affirmed.

Sol A. Abrams, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

After waiving a jury trial, defendant was tried by the court and was found guilty of the unlawful possession of a preparation of opium in violation of section 11160 of the Health and Safety Code, St.1941, p. 2820. He was sentenced to six months imprisonment in the county jail. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The sole contention made by defendant on this appeal is that the evidence was insufficient to sustain the conviction. We find no merit in this contention.

Defendant was arrested in the hallway of a rooming house located at 752 Pacific Avenue in San Francisco. He was wearing a vest but was not wearing either a coat or hat. His coat and hat were found hanging in room 46 of said rooming house. In that room the officers found a "laydown" or opium outfit and also a tin box, which tin box was located on a shelf directly above the place where defendant's coat and hat were hanging. A key which fitted this tin box was found in the vest pocket of the defendant. The tin box was opened and was found to contain two bindles of opium, a package of yen shee, and an opium bowl. When questioned as to the ownership of the tin box, defendant made no reply and upon the trial, he failed to testify.

It requires no citation of authority to support the conclusion that the evidence was sufficient to sustain the defendant's conviction. It is defendant's claim that the evidence was insufficient to show knowledge on his part of the contents of the tin box or to show that he was in "immediate and exclusive possession and dominion and control". Assuming without deciding that proof was required of such facts, we are satisfied that all of said facts may be reasonably inferred from the evidence adduced.

Defendant points to evidence showing that room 46 had been rented by the proprietor of the rooming house to Lew Kay, another Chinaman, and stresses the fact that it does not appear that defendant had a key to the room. He therefore states that there was a reasonable inference from the evidence that defendant "was there to smoke opium that was owned and possessed by Lew Kay" and he claims that the evidence was insufficient to sustain defendant's conviction because it failed to exclude every hypothesis other than that of the guilt of the defendant. It is a sufficient answer to this claim to point out that it is based upon the language employed in certain cases such as People v. Staples, 149 Cal. 405, 86 P. 886, the effect of which language has been often misunderstood. An exhaustive discussion of the language employed in said cases is found in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, which discussion shows that such language has no application on this appeal under the facts presented by the record before us. In the last mentioned case the court concluded on page 684 of 15 Cal.2d, 104 P.2d on page 781, as we may conclude here, that: "From the foregoing it follows that on appeal and in this case the defendant's contention that the circumstantial evidence which is incriminating is insufficient to establish his guilt because such evidence might also be deemed compatible with innocence, cannot be sustained."

The judgment of conviction and order denying defendant's motion for a new trial are affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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60 Cal.App.2d 236

PYLE v. EXETER REFINING CO. et al.

Civ. 13451.

District Court of Appeal, Second District,
Division 3, California.
Aug. 13, 1943.

1. Brokers 🔑86(1)

In action by a broker for commissions allegedly due on an exchange of oil between defendant and another pursuant to oral contract, evidence sustained finding that contract to pay commissions was limited to first agreement for exchange of oil and did not cover second agreement.

2. Accord and satisfaction 🔑10(1)
Compromise and settlement 🔑5(2)

Where broker had made several requests for a settlement of his commissions, but had received no accounting and had once demanded an amount larger than that tendered him, and commented on the peculiarity of an even number of dollars offered but was told that the check was offered as payment in full and accepted it, and it was doubtful whether commission agreement was in force, transaction constituted an "accord and satisfaction".

See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

3. Corporations ⚷306

In action by broker against corporation and its officer for commissions, nonsuit as to officer was proper where he was acting solely for defendant corporation.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Edwin Pyle against the Exeter Refining Company and Carl Von Bibra, etc., for commissions allegedly due plaintiff as a broker on an exchange of oil between defendant corporation and another. From judgment of nonsuit, as to individual defendant and judgment on the merits for corporate defendant, plaintiff appeals.

Judgment affirmed.

Allard, Whyte & Brownsberger, of Pomona, for appellant.

Don S. Irwin, of Los Angeles, for respondents.

SHAW, Justice pro tem.

Plaintiff appeals from a judgment adverse to him, which was a nonsuit as to the individual defendant, Von Bibra, but a judgment on the merits as to the corporate defendant, Exeter Refining Company, hereinafter referred to as the defendant. Plaintiff, who was engaged in business as an oil broker, sues for a commission claimed to be due him on an exchange of oil between defendant and Comet Oil Company, Ltd., at the rate of one cent per barrel of fuel oil delivered by defendant. Plaintiff brought to the attention of defendant the fact that Comet Oil Company was in the market for fuel oil which defendant had for sale and perhaps a deal could be made between them. As a result of this information a contract was made between defendant and Comet by which defendant exchanged its fuel oil for Comet's cracked residuum. This contract was in writing and was in the form of a proposal by defendant dated October 3, 1939, and an acceptance by Comet dated October 13, 1939. This contract was to run for six months or until cancelled, each party reserving the right to cancel it on ninety days notice. Later these parties made a second contract, effective February 9, 1940, which cancelled the first contract, but provided for further exchange of the same commodities between them, on somewhat different terms.

[1] One of the questions raised on this appeal is whether plaintiff is entitled to a commission on all oil delivered by defendant to Comet on either of these contracts, or is limited to that delivered under the first contract only. The trial court adopted the latter alternative as expressing the intent of the agreement for commissions, and we think its decision in that respect must be affirmed. The commission agreement was oral. Three persons were present at its making; plaintiff, Von Bibra, who was president and manager of defendant corporation, and W. T. Chappe, who was in the employ of defendant corporation. Each of them admitted that his recollection of the conversation in which the agreement was made was hazy, but each gave some testimony regarding it. Von Bibra testified that "I remember saying to Mr. Pyle that we would pay him one cent per barrel for fuel oil delivered by us under this exchange. * * * that the one cent per barrel to be paid on fuel oil delivered by us in exchange to the Comet Oil Company. * * * Under the arrangement or stated under the agreement dated October 3, 1939." Other testimony gave somewhat different versions of this conversation, but the choice between them was a matter for the trial court. Plaintiff, while denying any recollection of the limitation put on the agreement by Von Bibra, testified: "Q. You did not understand they were agreeing to pay you one cent a barrel on any fuel oil they would send to Comet from then on out? A. No, I didn't. Q. It was the particular deal you had under discussion at that time? A. That's correct."

[2] The trial court found that there had been an accord and satisfaction by which defendant had paid and plaintiff had accepted $180 as full satisfaction of his claim for commission. Plaintiff now contends that this finding is not supported by the evidence. The evidence shows that on February 12, 1940, defendant delivered to plaintiff its check for $180 and plaintiff accepted, endorsed and cashed it. This amount was less than was due plaintiff for deliveries under the first contract. Upon the face of this check when it was delivered to plaintiff, there was written: "Payment in full for commission re-sale of fuel oil to Comet Oil Co. Ltd." This check was delivered to plaintiff by Chappe, who told him at the time that a new agreement had

been made between defendant and Comet, that the check was payment in full under the deal that plaintiff had made with defendant, and that Chappe's only authority was to pay him that in full. Plaintiff testified that prior to the delivery of this check he had asked Chappe for an accounting of deliveries and his commissions. It does not appear that any such account was given him and he had no knowledge of the amount of commissions due when he took the check. No witness was able to say how the amount of the check was determined. Chappe testified further that plaintiff, when he received the check, said it was rather peculiar that it came out an even amount, that before the delivery of the check plaintiff had several times asked about his commissions, and that in one of these meetings plaintiff had asked for more money than the amount of the check. Plaintiff's point in this connection is that there is no evidence of a dispute between the parties in regard to the amount due. We think the evidence, while not strong, is sufficient to support the trial court's finding. The plaintiff had made several requests for a settlement of his commission, had received no accounting, had once demanded an amount larger than that tendered him, commented on the peculiarity of an even number of dollars offered, was told that the check was offered as payment in full, and accepted it. There was another agreement between the parties, under which it was claimed that plaintiff had failed to take delivery of distillate and oil as agreed. It was defendants' contention that in the discussion of this contract plaintiff voluntarily waived his right to commission on sales to Comet. There was evidence of such waiver and of a subsequent effort by plaintiff to reinstate the commission arrangement. It was open to doubt, at the time of the settlement, whether the commission agreement was in force. An inference of a dispute as to amount could reasonably be drawn from these facts.

[3] No complaint is made of the nonsuit in favor of Von Bibra, and it was obviously proper, since he was not acting in his own behalf, but solely for the defendant corporation, in his dealings with plaintiff.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

COLUMBIA LABORATORIES, Inc., v. CALIFORNIA BEAUTY SUPPLY CO. et al.

Civ. 13849.

District Court of Appeal, Second District, Division 3, California.

July 27, 1943.

Rehearing Denied Aug. 18, 1943.

Hearing Granted Sept. 23, 1943.

1. Landlord and tenant ⚿150(1)

A landlord had no duty under common law, in absence of an express agreement, to make repairs to demised premises.

2. Landlord and tenant ⚿166(3)

An action by tenant to recover for damages to tenant's stock of goods as result of landlord's failure to repair portion of building which remained under his control after it had been damaged by fire could not be sustained either upon theory that action was one for breach of contract, or for breach of duty imposed by law. Civ.Code, §§ 1941, 1942.

3. Landlord and tenant ⚿166(6)

The rule that if an owner leases a portion of his building and retains control of remainder and if he does not exercise common care in management of that portion of building which belongs to his special supervision and damages are sustained by tenant on that account, owner becomes liable for his negligence, had no application, where there is no pleading or finding of negligence on landlord's part.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Columbia Laboratories, Inc., against California Beauty Supply Company and another for damages to plaintiff's stock of goods while located in defendants' building. From a judgment for plaintiff, the defendants appeal.

Judgment reversed with directions.

George Penney, of Los Angeles, for appellants.

I. Charles Rubin, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Plaintiff, tenant of a portion of a loft building owned by defendants, had judgment for damages to its stock of goods caused by rainfall after a fire which destroyed the roof that was above a part of the building not occupied by plaintiff, but did not destroy any portion of the premises occupied by plaintiff or the roof above the same. Defendants appeal.

The judgment rests upon the following finding, which followed substantially the allegation of the complaint: "That it is true that on or about the 4th day of January, 1941, defendants, and each of them, did suffer damage to said building due to a fire on a portion of said building occupied other than by the plaintiff herein, and that the said defendants, and each of them, thereafter failed and neglected to repair said damage to said building, and as a direct and proximate result of such negligence and failure upon the part of the defendants, and each of them, to make the necessary repairs to the damaged portion of said building, that on or about the 24th day of January, 1941, waters due to rain did seep through the walls and ceiling of said premises occupied by the plaintiff herein, causing damage to the plaintiff's merchandise not in the amount of Two Thousand Nine Hundred Thirty-four and 29/100ths ($2,934.29) Dollars, but did sustain damages in the amount of One Thousand Seven Hundred Fifty ($1,750.00) Dollars." The theory of the action as pleaded and as disclosed by this finding is that there inhered in the relationship of landlord and tenant an implied covenant upon defendants' part to repair the damage caused by the fire, that they did not repair it, and that by reason of their alleged breach of duty they became liable for the damage to plaintiff's merchandise. This theory appears to be untenable.

[1, 2] Plaintiff was a tenant from month to month; there was no written lease and no contract imposing on the landlord the duty to restore or repair the leased premises or any part of the remainder of the building; there was no agreement for the restoration or repair of any part of the building that might be destroyed or damaged by fire. A landlord had no duty under the common law, in the absence of an express agreement, to make repairs to the demised premises. Farber v. Greenberg, 1929, 98 Cal. App. 675, 680, 277 P. 534; Wall Estate Co. v. Standard Box Co., 1912, 20 Cal.App. 311, 128 P. 1020; see cases collected in 15 Cal.Jur. p. 690; 36 C.J. 125; and 32 Am.Jur. § 657. Sections 1941 and 1942 of the Civil Code, under which a tenant may make use of the equivalent of a month's rent after demand upon the landlord and his refusal to repair dilapidations rendering untenantable buildings intended for the occupation of human beings, have no application to the case, nor did plaintiff attempt to state a case under those sections. Wall Estate Co. v. Standard Box Co., supra; Callahan v. Loughran, 1894, 102 Cal. 476, 36 P. 835; Green v. Redding, 1891, 92 Cal. 548, 28 P. 599. Sections 1941 and 1942, being eliminated as inapplicable, there is no statutory law in this state imposing upon a landlord an obligation to his tenant to make repairs to the premises occupied by the tenant. Nor is there a duty imposed by statute or by implied contract which would require a landlord to restore or repair portions of his building which remain under his control after they have been damaged by fire. The judgment cannot be sustained upon the theory that the action is one for breach of contract, express or implied, or for the breach of a duty imposed by law.

[3] Plaintiff tried its case upon the theory that there was liability for breach of an implied contract, and upon the appeal insists that it is such a case. Nevertheless, plaintiff relies upon cases which state the rule that if an owner leases a portion of his building and retains control of the remainder and if he does not exercise common care and prudence in the management and oversight of that portion of the building which belongs to his especial supervision and care, and damages are sustained by the tenant on that account, the landlord becomes liable for his negligence. H. C. Capwell Co. v. Blake, 1908, 9 Cal.App. 101, 111, 98 P. 51; Rathbun Co. v. Simmons, 1928, 90 Cal.App. 692, 266 P. 369. The rule has no application here, as there was no pleading or finding of negligence.

The complaint, as we have seen, alleged that defendants failed and neglected to repair the fire damage, but the evidence showed that defendants did repair the damage. The roof had been destroyed over an area of 80 by 94 feet; this was inspected on the day of the fire, temporary roof bracings were installed and the area was covered with waterproof canvas, the work being completed on the afternoon of the following day. Permanent repairs were commenced about three weeks later and the work was soon completed. The canvas was securely fastened and the evidence was that this temporary method of protecting against weather was practical and customary. Rain came and in some manner entered plaintiff's premises, but this fact alone did not establish a case for damages. It was not alleged that the fire was started through any fault of defendants or that there was any unreasonable delay in making the repairs or any negligence in anything that was done or omitted in restoring the premises to their former condition. Upon the complaint and the findings the judgment would be sustainable only upon the theory that defendants were for some reason in the position of insurers of plaintiff against damage to his merchandise resulting from fire and rainfall, but there is no such basis of liability. If plaintiff had a cause of action at all, it was for negligence. Defendants took this position throughout the trial and produced evidence tending to prove that the repairs were promptly and properly made, but we cannot find that plaintiff conceded at the trial that negligence was an issue. Upon the appeal plaintiff does not contend that it attempted to prove or did prove negligence. Defendants' general demurrer to the complaint should have been sustained. The complaint states no cause of action for damages and the findings do not support the judgment.

The judgment is reversed with direction to sustain the demurrer to the complaint.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

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60 Cal.App.2d 158

TSCHUMY v. BROOK'S MARKET et al.

Civ. 13834.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1943.

1. Negligence 🔑32(3)

A "business invitation" includes an invitation to use such part of premises as visitor reasonably believes are held open to him as a means of access to or egress from place where business is to be transacted.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitation".

2. Negligence 🔑32(2)

An "invitation" to use premises may be manifested by the arrangement of the premises or by owner's conduct.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitation".

3. Negligence 🔑32(3)

Fact that customer walked to market, and that she did not go to parking lot operated by market owner for convenience of his customers in an automobile, did not make customer's status that of a "licensee" when she was on parking lot.

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee".

4. Appeal and error 🔑1066
Negligence 🔑138(3)

In action against market owner and ice company for injuries sustained by customer at market when she tripped over sign installed by ice company on market owner's parking lot adjoining market, where it was established that customer's status when she entered premises was that of an invitee, instructions relating to a licensee and duty to refrain from wilful and wanton injury to a licensee constituted prejudicial error.

5. Negligence 🔑32(3)

The invitation to enter a market included an invitation for customer's departure from such premises over such portions thereof as a reasonable person, situated as customer was, would reasonably believe were held open as a proper means of departing from the premises.

6. Trial 🔑142

Where there is no conflict in evidence upon which the determination of a question of law rests, decision is for trial court and not for jury.

7. Appeal and error 🔑1064(1)
Trial 🔑243

An instruction that a person who is upon premises of another for purpose of transacting business is a licensee as to those portions of premises rendered reasonably necessary for his use in transaction of such business, though word "licensee" might have been used inadvertently instead of "invitee", was conflicting with other instructions correctly defining words "invitee" and "licensee" and was prejudicially erroneous.

8. Negligence ⚷32(1)

If one invites another to use his premises and invitee is injured due to negligent manner in which premises are maintained, invitor is responsible for resulting injury to invitee.

9. Appeal and error ⚷1064(1)
Landlord and tenant ⚷169(10)

In action against market owner and ice company for injuries sustained by customer at market when she tripped over sign installed by ice company on market owner's parking lot adjoining market, where it appeared that at time of accident, irrespective of written lease to ice company, market owner had retained right of use of passage over the space, an instruction that market owner was not liable if he had leased premises was prejudicially erroneous.

10. Landlord and tenant ⚷167(8)

Where ice company had sign located on parking lot operated by market owner only by invitation or acquiescence of market owner, ice company as an invitee or licensee owed customer at market as an "invitee" the duty of exercising ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Amelia G. Tschumy against Brook's Market, Meyer Stark, Central Ice & Cold Storage Company, Central Ice Company, and Associated Ice Distributors, for personal injuries sustained by plaintiff as result of a fall by reason of defendants' alleged negligence in maintaining a sign. From a judgment for defendants, the plaintiff appeals.

Judgment reversed as to the defendant Meyer Stark, doing business as Brook's Market, and as to defendant Southern Counties Ice Company.

Lee J. Myers and Robert Rush, both of Los Angeles, for appellant.

Betts & Garrison, of Los Angeles, for respondent Meyer Stark, d. b. a. Brook's Market.

Reginald I. Bauder, of Los Angeles, for respondent Southern Counties Ice Co.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment for defendants, based upon verdicts, in an action for damages for personal injuries sustained by her as a result of stumbling and falling by reason of the alleged negligence of defendants in maintaining a sign. Her contention is that the court erred prejudicially in giving and in refusing to give, certain instructions.

The defendant Stark was the owner and operator of a general retail food market in Los Angeles, known as Brook's Market, which included several departments or concessions. The market building was on the north side of a street and faced south. He also owned a parking lot adjacent to the market building on the west side, which he maintained for the convenience of the patrons of the market. Inasmuch as the solution to a principal question involved herein depends partly upon the arrangement of the market for the arrival and departure of patrons, a detailed description of the entrances should be given. The front line of those two parcels of land, owned by Stark, upon which the market and the parking lot were maintained, was the north edge of the public sidewalk. The front line of the market building did not extend to the sidewalk, but was 7 feet north thereof. The space between the sidewalk and the front of the building was paved with cement. The entire front of the building was open, as an entrance. The parking lot did extend to the sidewalk. In width it extended to the west 55 feet, and in length from the sidewalk to a point beyond the rear or north end of the market building, and was paved with dark asphalt. The sidewalk, about 12 feet wide, was paved with cement. Those paved areas, that is, the sidewalk, the space between the building and the sidewalk, and the parking lot, adjoined each other and were on the same level. It is to be noted that the south 7 feet of the asphalt pavement on the parking lot adjoined the 7-foot-wide strip of cement pavement which was in front of the building (which building did not extend to the sidewalk). In other words, if the front line of the building were extended westerly across the parking lot, there would be an asphalt paved space 7 feet wide between that line and the sidewalk, and that space would adjoin the cement paved space 7 feet wide which was between the front of the building and the sidewalk. Therefore, the paved area in front of the market building, including the sidewalk, and in front of the front line of the building extended westerly across the parking lot, including the sidewalk, was about 19 feet wide.

The defendant Stark and Brook's Market will be referred to hereinafter as "Stark," and defendant Southern Counties Ice Company will be referred to as "Ice Company."

On August 25, 1939, Stark and the Ice Company entered into a written lease whereby the Ice Company was to erect and operate an ice vending machine on a space 8 feet square in the southwest corner of the parking lot, 4½ feet from the west line of the lot and 1½ feet from the south line, and was to pay a certain amount of money and a percentage of the amount of sales each month as rent beginning October 1, 1939. Stark gave the Ice Company "free possession" and permission, orally and apart from the written lease, to construct the ice vending machine on the leased space at any time after the lease was made.

Two or three days before September 1, 1939, the date of the accident, the Ice Company placed a sign on the parking lot, in or near the area leased, about three feet from the south edge of the sidewalk. A photograph of the sign, received in evidence, shows that it was a portable sign, about 4 feet in height, about 3 feet in width, and about ½ inch in thickness; that the statement on the sign was in substance that an automatic ice vendor would be installed soon on that location; that the part of the sign upon which the words appeared was held in a frame made of strips of iron about 1½ inches in width and about 1/4 inch in thickness; that the sign was supported at its base, so that it would stand, by 4 strips of dark iron of the same width and thickness as the strips in the frame of the sign; that one of the supporting strips of iron was attached to each side of each bottom end of the upright sign so that 2 of the strips extended outward from each side of each bottom end of the sign at right angles to the frame and practically flat on the pavement for a distance of approximately 2 feet; and that, at the point about 2 feet from the frame, each of the four supporting strips was curved upward, then backward toward the sign, and then downward until it formed a ring about 5 inches in diameter at the end of the supporting strip of iron. The asphalt pavement and the iron strips and rings were practically of the same dark color.

Plaintiff, who lived about 2½ blocks southwest of the market, walked from her home to the market on September 1, 1939, about 7 p. m. (The bill of exceptions does not show the date or time, but it is assumed, by reason of statements in the briefs, that the statement just made is correct.) She had patronized the market about 7 years. The entire front of the market building was open, and she entered the building at the west side of the front entrance, i. e., at the southwest corner. She purchased articles in the grocery department and then in the vegetable department which extended out and in front of the building about 4 feet.

Plaintiff left the market from the southwest corner thereof at the same place where she had entered. She was carrying a package of articles she had purchased. From the place where she left the vegetable department, she walked diagonally on Stark's premises, in the direction of her home, toward a point on the public sidewalk about 10 feet east from the southwest corner of the parking lot, a distance of about 45 feet from the southwest corner of the market. She had gone out of the market that same way many times over a period of 7 years. She saw a sign ahead of her and noticed that it stated something about packaged ice, but she did not see any of the iron strips that extended from the sign or any of the iron rings at the end of the strips. When she stepped onto the sidewalk with her left foot and was taking a step with her right foot, her right foot caught in one of the iron rings at the end of an iron strip and she fell upon the sidewalk, receiving a permanent injury to her knee. During a period of several years other customers used the same part of the premises in entering and leaving the market as plaintiff used in leaving at the time of the accident. It was customary, during the many years plaintiff was a patron of the market, for other patrons who were upon the premises in front of the market or upon the parking lot to approach the front entrance of the market from various directions, and to approach an entrance door on the west side, 20 feet from the front, from various directions. It was also customary for other patrons during that time to leave those entrances in various directions. Plaintiff testified that it was getting dark when she entered the market, and it was dark when she was leaving the premises. As to lighting conditions, there were reflector lights directed upon advertising on the outside west wall of the market building, two lights at the top of a street lighting standard which was on the sidewalk near the curb opposite the place where she fell, and some lights at a gasoline station about 75 feet west.

The gasoline station attendant, who went to the scene when the accident occurred, testified in reference to visibility at the place where the accident occurred that it was "always a darker spot," and that it was a "bad spot," for the reason it was between the brightness of the lights of the market and the brightness of the lights of the gasoline station.

Stark testified that he did not know the sign had been placed on the parking lot, and did not authorize the Ice Company or anyone to place the sign there; that he owned the whole market and the parking lot, and leased portions of the market to various tenants; that he operated the meat department; and that he went to the market about 3 times each week, but 3 of his employees were on the premises all of the time.

In its instructions, given at the request of Stark, the court defined the term "licensee," and instructed the jury to the effect that if it found plaintiff was a licensee, and her presence on the premises was unknown to defendants, they were under no duty to her except to refrain from intentional harm or wilful injury; that if plaintiff was not using the parking lot for any purpose intended to result in any benefit to the owner or occupant of the premises, she was a licensee and not entitled to recover unless the injury was the result of a wilful act on the part of the owner or occupant.

The court also gave, at the request of the Ice Company, an instruction in part as follows: "A person who is upon the premises of another for the purpose of transacting business is a *licensee* as to those portions of the premises rendered reasonably necessary for his use in the transaction of such business. As to the remaining portions of the premises, however, such a person, even though upon the premises for the purpose of transacting business, is a licensee, and assumes the risk incident to the condition of the premises and the activities there carried on." (Italics added.)

Another part of that instruction, just referred to, was to the effect that if plaintiff, in leaving the premises, for reasons of her own walked upon the parking lot, and her presence thereon was not made reasonably necessary to accomplish her purpose, and that in using said lot she abandoned a known safe means of egress, then she was a licensee and assumed the risks incident to the condition of the lot.

The evidence was undisputed that the kind of business operated by Stark was a large general retail food market to which the public was invited. Also the evidence as to the arrangement of the premises and as to the actions of plaintiff while she was on the premises was undisputed.

The whole area, including the sidewalk, in front of the building and in front of the front line of the building extended westerly across the parking lot to the alley, was paved, level, and to all intents and appearances was a sidewalk about 19 feet wide. The part of the parking lot upon which plaintiff walked was directly west of the cement space, 7 feet wide, in front of the building. As plaintiff left the building she proceeded diagonally across the parking lot toward the sidewalk in the direction of her home. If she had not gone diagonally (southwest) across the corner of the lot, it would have been necessary for her to go (south) about 6 feet to the sidewalk, then turn at a right angle before proceeding in the direction of her home. She started on the lot at a point about 4 feet from the sidewalk, gradually drew nearer thereto, and arrived at the sidewalk after she had gone about 45 feet. The entire distance traveled by plaintiff on the parking lot was very close to the sidewalk. She had gone that way for 7 years. It was the custom, according to her testimony and that of the manager of the grocery department, for patrons to approach the front entrance and the west side door, from various directions on the parking lot, and to leave those entrances in various directions across the lot. Plaintiff testified that persons "walked all over the place," and that "they would come from all directions." As above stated, the facts were undisputed. The arrangement of the premises and the established practice in leaving the premises were such that a reasonable person, situated as plaintiff was, would believe reasonably that the means of departure adopted by plaintiff was open to a patron of the market.

[1-3] "A business invitation includes an invitation to use such part of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his business is to be transacted." Rest. Torts, sec. 343b, p. 942. An invitation may be manifested by the arrangement of the premises, or by the conduct of the owner. Stewart v. Lido Cafe, (1936) 13 Cal.App.2d 46, 50, 56 P.2d 553. The fact that plaintiff walked to the market, and did not go to the parking lot in an automobile, did not make her status that of a licensee when she was on the parking lot. In the case of Evans v. Sears, Roebuck & Co., (Mo.App.1937) 104 S.W.2d 1035, 1037, the plaintiff had walked to the defendant's store from her home, had crossed the parking lot at the rear of the store, made purchases, and was walking on the driveway of the parking lot on her way home when she slipped and fell by reason of ice on the automobile driveway on the parking lot. She had been a customer of the store about 5 years and had gone that way to the store about twice a week. There was testimony on behalf of plaintiff, by a person who lived near the parking lot, that "people from all over the neighborhood walked upon and used the driveway and that it was used for driving in and driving out of the parking lot." The only testimony on behalf of defendant related to the weather. The court said at page 1038 of 104 S.W.2d, "* * * the evidence is sufficient to show that plaintiff was an invitee upon the premises of defendant and not a mere licensee as contended by defendant." It was said further at page 1039 of 104 S.W.2d, "* * * the evidence is sufficient to show that the use of the driveway and the parking lot by pedestrians for the purpose of entering the rear entrance of the store had become a custom acquiesced in by defendant. Plaintiff, therefore, occupied the status of an invitee."

[4-6] The instructions above referred to relating to a licensee and the duty to refrain from wilful or wanton injury to a licensee were inapplicable to the case. The evidence did not justify any reference to a duty to refrain from wilful or wanton injury. It is agreed that plaintiff's status when she entered the premises was that of an invitee. The invitation to enter included an invitation for plaintiff's departure from such premises over such portions thereof as a reasonable person, situated as plaintiff was, would reasonably believe were held open as a proper means of departing from the premises. The entire front of the market, covering a distance of many feet, was open as an entrance. The pavement in front of the building and the pavement on the parking lot adjacent to the west side thereof, including the sidewalk, all of which was on the same level, constituted a proper means of approach to the front entrance by reason of the physical arrangement of the premises, acquiescence, dedication, and a long established custom. It is to be noted also that the whole parking lot had been used for many years as a means of approach and departure from the west side door of the market. If a patron who departs from the market from the west side door and crosses the parking lot is an invitee, it would seem there would be no basis for a contention that a patron who departs from the front entrance and crosses a corner of the parking lot is not an invitee. "* * * where there is no conflict in the evidence upon which the determination of a question of law rests the decision is for the court and it should not be submitted to the jury." Adrian v. Guyette, (1936) 14 Cal.App.2d 493, 504, 505, 58 P.2d 988, 993. The plaintiff was an invitee. The instructions above referred to, being inapplicable to the case, tended to confuse the issues.

[7] It is to be noted that one of the above instructions, given at the request of the *Ice Company*, was in part as follows: "A person who is upon the premises of another for the purpose of transacting business is a *licensee* as to those portions of the premises rendered reasonably necessary for his use in the transaction of such business." Of course, that was not a correct statement of the law. Apparently it was intended that the word "invitee" should be used in that sentence instead of the word "licensee." An examination of the original instruction in the files of the superior court shows that the word "licensee" is the word in the original instruction, and therefore the word "licensee" appearing in the bill of exceptions was not a typographical error. The giving of that instruction, requested by the Ice Company, although the word "*licensee*" might have been used inadvertently therein, was conflicting with other instructions correctly defining the words "invitee" and "licensee," and therefore increased the con-

fusion caused by the other instructions, given at the request of Stark, relative to a "licensee." The above instructions were erroneous prejudicially.

[8, 9] The court also gave, at the request of Stark, an instruction in part as follows: "* * * if you believe from the evidence in this case that the ground upon which the defendant Ice Companies [sic] sign was placed was at that time leased to the Ice Company by the defendant Meyer Stark, the defendant Meyer Stark would not be liable for any injury sustained by the plaintiff as a result of the Ice Company having placed its sign upon such land and under these circumstances your verdict must be for the defendants Meyer Stark, Meyer Stark doing business as Brooks Market, and Brooks Market."

The written lease, covering a space of 8 feet square near the southwest corner of the parking lot, was made on August 25, 1939, for a term commencing October 1, 1939. Stark testified that the Ice Company was to have *free* possession as soon as the lease was signed in order to erect the ice machine before October 1st. There was no designation upon the surface of the lot, or upon the sign, and there was no designation at all, to indicate that a part of the lot had been leased. There was nothing to indicate to plaintiff or other patrons of the market that there was a change, if any, by an oral or written lease or at all in the custom that had prevailed for several years whereby the patrons of the market were permitted by Stark, the owner of the market and lot, to approach and depart from the market across the parking lot; nor was there anything to indicate to such patrons that a small portion of the lot, 8 feet square or any other size, at some undesignated place on the lot was to be excluded from the usual and customary places over which the customers were allowed by many years of acquiescence to go and come in patronizing the market. Since the term of the written lease did not commence until October 1st, it appears that the Ice Company itself was permitted to be upon the 8-foot-square portion before October 1st only by the invitation or acquiescence of Stark. In any event, the small portion of the lot, undesignated as to location insofar as the patrons were concerned, was in the customary passageways on the market premises to and from the market building. At the time of the accident, irrespective of the written lease, Stark had retained the rights of use and passage over the space which was at some later date to be occupied by a small building, but also had permitted the Ice Company to go upon that space. In the case of Brown v. Pepperdine, (1921) 53 Cal.App. 334, at page 336, 200 P. 36, at page 37, it was said: "* * * the defendants having retained the right to use the driveway in common with [their] tenant, they are liable for any injury sustained by persons rightfully visiting such tenant due to their ordinary negligence." In the case of Van Wye v. Robbins, (1941) 48 Cal.App.2d 660, 120 P.2d 507, the owner of a market and the operator of a service station which was adjacent to the market entered into an oral agreement whereby the customers of the market were allowed to park their cars on the service station premises. A patron of the market fell by reason of slipping on grease that was on the service station parking area. In rejecting the contention of the market owner that he was not liable for the negligence of the proprietor of the parking lot, the court said, at page 662 of 48 Cal.App.2d, at page 508 of 120 P.2d: "The latter's [market owner] liability rests on the rule that if one invites another to use his premises and the invitee is injured due to the negligent manner in which the premises are maintained, the invitor is responsible for the resulting injury to the invitee." The above instructions to the effect that Stark was not liable if he had leased the premises were erroneous prejudicially.

[10] It was stipulated between plaintiff and the Ice Company that the Ice Company placed the sign within the area leased, but Stark refused to join in that stipulation. It does not appear that the sign was within that area at the time of the accident. On the contrary, the location of the sign as marked by plaintiff on the map of the premises, received in evidence, shows that the sign was entirely outside of that area, and the nearest part of the sign was about 1/2 foot from the southeast corner of that area. If the sign was not in that area, of course, instructions relative to the Ice Company's duty to a licensee would not be proper. Even if it were to be assumed that the sign was on the said area, instructions regarding a licensee should not have been given. It appears, as above stated, that at the time of the accident the Ice Company itself was permitted to be upon that area only by the invitation or acquiescence of Stark. Also, as above indicated, plaintiff was an invitee of Stark. The Ice Company as an invitee or licensee owed plaintiff as an invitee the duty of exercising ordinary care. In the case of Pease v. San Diego Unified Sch. Dist., (1942) 54 Cal.App.2d 20, 128 P.2d 621, a public school leased its auditorium to the Salvation Army which placed some wire across a walk in order to install a public address system. The plaintiff, a student in the school, fell and was injured when she tripped on the wire. The court said at page 23 of 54 Cal.App.2d, at page 622 of 128 P.2d: "Both the appellant [Salvation Army] and the respondent [student] were invitees of the owner of the premises and as such each was under the duty of using ordinary care with respect to matters which affected the safety of the other."

It is not necessary to discuss the other instructions.

The judgment is reversed as to defendant Stark, doing business as Brook's Market, and as to defendant Southern Counties Ice Company.

SHINN, Acting P. J., and BISHOP, Justice pro tem., concur.

ASH v. MORTENSEN et al.

Civ. 14093.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1943.

Hearing Granted Oct. 11, 1943.

1. Damages 🔑34

Where one sustains injuries as result of negligence of tort-feasor and exercises ordinary care in selection of physician by whom injuries are aggravated, aggravation is considered as proximately flowing from original tort.

2. Damages 🔑34

Where one is injured by negligence of tort-feasor, intervening malpractice of physician will not remove resultant aggravation from flow of resultant damage unless party injured fails to exercise reasonable care in selection of physician of ordinary competence.

3. Judgment 🔑590(3)

Plaintiff's election to sue motorist for injuries sustained in automobile accident was election to recover all damages resulting from motorist's negligence, including aggravation to plaintiff's injuries as result of physician's neglect, and recovery against motorist was bar to recovery against physician.

4. Judgment 🔑590(3)

Where jury, in automobile accident case, under instruction to consider plaintiff's condition as it would exist in future as shown by evidence, made award for plaintiff, award included aggravation of injuries caused by neglect or errors in judgment of attending physician.

5. Judgment 🔑892

Satisfaction of judgment obtained by plaintiff in automobile accident case covering plaintiff's injuries and future condition therefrom released not only defendant therein, but also released attending physicians and any other possible wrongdoers.

6. Release 🔑38

A general release operates in rem as well as in personam.

7. Damages 🔑208(7)
Judgment 🔑631

Aggravation of an injury by physician should be submitted to jury as an element of recovery against original tort-feasor, and only one recovery may be had from same cause.

◆

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Edith M. Ash against W. S. Mortensen and W. L. Mortensen for malpractice. Separate trials were had. Judgments for defendants, and plaintiff appeals.

Affirmed.

Anne O'Keefe and Ralph C. Curren, both of Los Angeles, for appellant.

Chase, Barnes & Chase, of Los Angeles, for defendant and respondent W. S. Mortensen.

William M. Rains, of Los Angeles, for defendant and respondent W. L. Mortensen.

MOORE, Presiding Justice.

The question for decision is whether, in an action for malpractice based upon the alleged negligence of the physicians in the treatment of injuries sustained by the plaintiff in an automobile accident, it is a complete defense that in a former suit brought by plaintiff against the negligent motorist for the injuries she sustained the latter was released when she satisfied her judgment of $15,000 for $5,753.22.

On August 18, 1940, plaintiff suffered comminuted fractures to the femur bones of both legs, with serious injuries flowing therefrom. On the following day the defendants were employed to and did render medical and surgical aid. One month thereafter plaintiff filed her action against the operator of the motor car (Ash v. Wubben, Superior Court) for damages resulting from her serious injuries received in the collision. On January 27, 1941, the case of Ash v. Wubben was tried. At the trial Dr. William L. Mortensen gave testimony concerning the medical treatment which the defendants had rendered to plaintiff. In his testimony Dr. Mortensen prognosticated that plaintiff would be disabled for some time; that there would be bowing, overlapping and shortening of her legs, and testified that corrective surgery would probably be necessary at a future time. He predicted that she would not be able to walk at all normally in less than a year from the time of the accident; that she may be left crippled; that there would be change in the position of the left femur which was not in the position that it should normally occupy; that there would be shortening of both legs, more in the left; that there would be a posterior bowing and possibility of further shortening when she put weight upon it; that if there should be no union "an open reduction would be necessary * * * a metal plate with screws into the bone * * * three months in bed." The facts so given by the witness at plaintiff's trial against Wubben referred to her condition subsequent to all of the alleged malpractices and the condition of plaintiff to be anticipated in the future.

In the instructions to the jury in the Wubben trial the jurors were admonished that in order to determine the amount of their award they should consider not only the condition of plaintiff as shown by the evidence at the time of the trial, but likewise her condition as it would exist in the future as shown by the evidence. The Wubben trial resulted in a judgment of $15,000 entered February 1, 1941. It was fully satisfied on February 5, 1941, by the payment to plaintiff by Wubben of $5,753.22.

Thereafter on the 21st day of August, 1941, plaintiff brought this action against the physicians who had treated her, alleging that the defendants in entering upon their employment on the 12th of August, 1940, failed to exercise that degree of skill and knowledge which is ordinarily exercised by physicains and surgeons in the locality where said injuries were treated; that they carelessly treated the fractured femur bones; that they negligently failed to secure said bones in position or to place them in a cast; and that on the 26th of August, 1940, an X-ray shadowgraph showed that the bones were no longer in the proper position or in the position to which they had been placed but that the position had so altered and changed that they overlapped and were no longer in alignment or joined in the manner required for the proper recovery; that they negligently allowed the bones to remain in such improper position and made no effort to reset them properly. Upon such allegations plaintiff demanded judgment for $50,000.

Following their general denials, each of the defendants pleaded affirmatively that in the Wubben case issue was joined as to all of the elements of damage and the proximate consequence thereof, the resulting judgment, and the satisfaction thereof executed by plaintiff in that case; that by reason of such satisfaction of the Wubben judgment both defendants pleaded that they were released and discharged of all responsibility for any damages sustained by plaintiff.

Following separate trials, the findings in each case embraced substantially the allegations of the affirmative defenses and the decision thereon was that by her satisfaction of the Wubben judgment she released Wubben and his heirs, sucessors, and assigns from all claims for injuries, losses and damages resulting from her injuries which were the basis of the judgment including the losses and damages not then known or anticipated by plaintiff but which might later be developed or discovered including all the effects and consequences thereof. Judgment was accordingly entered against plaintiff whereby she took nothing but was adjudged to pay the costs.

[1,2] Whether a physician accused of malpractice under such circumstances as those above related is liable has not been before the appellate courts of this state. However, it is the law that where a person sustains injuries as a result of the negligence of his tort feasor and thereupon exercises ordinary care in the selection of a physician by whom the injuries are aggravated, the aggravation is considered as an injury proximately flowing from the original tort and recovery may be had for such aggravation in the action against the original tort feasor. Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30; Boa v. San Francisco-Oakland Terminal Railways, 182 Cal. 93, 187 P. 2. The intervening malpractice of a surgeon will not remove the resultant aggravation from the flow of resultant damage unless the party injured through the negligence of another fails to exercise reasonable care and diligence in the selection of a surgeon of ordinary competence and skill, that is, the skill exercised generally by surgeons of ordinary care and skill in the community or in similar communities. Dewhirst v. Leopold, supra.

[3-6] Plaintiff was at liberty to sue Wubben for the damages she suffered in the automobile collision. But when she elected to sue him, her election was her decision to recover all damages resulting from his negligence and this included the aggravation to her injuries as a result of the physician's neglect. Having proceeded against Wubben, her judgment against that gentleman is a bar to her recovery against the doctors whose negligence might have aggravated the injuries received from Wubben's automobile. Evidence of plaintiff's condition subsequent to the treatment by defendants and her condition as it was anticipated in the future must be deemed to have been a part of the basis of the jury's verdict. There is no formula by which we may now determine that the jury awarded its verdict wholly for the injury she sustained at the time of the accident and nothing on account of the aggravation suffered as a result of the malpractice if any of defendants. If the verdict was to any extent based upon the anticipated future condition and upon the condition which followed the treatment by defendants it must follow that the verdict was rendered in satisfaction of the aggravation and of the future injuries to flow therefrom, as well as of the pain, suffering and other damages proximately flowing from the accident itself. Such damages included the aggravation caused by the neglect, or errors in judgment, of the attending physician. That plaintiff did release Wubben and thereby discharged her whole cause of action is altogether clear. By her recovery and satisfaction of the judgment not only was Wubben released but also it necessarily followed that these defendants as well as any other possible wrongdoers were acquitted of liability. Her cause of action having passed away with her judgment against Wubben, no one can be held liable. Smith v. Mann, 1931, 184 Minn. 485, 239 N.W. 223; Wells v. Gould, 1932, 131 Me. 192, 160 A. 30; 112 A.L.R. 553; Texas Pac. R. Co. v. Hill, 237 U.S. 208, 35 S.Ct. 575, 59 L.Ed. 918. A general release operates in rem as well as in personam.

[7] In the Wells case a parallel situation is reported. In the note of 112 A.L.R. the general rule as screened from the majority of the cases has been followed by both the Minnesota and Maine courts. In the leading case there cited as holding to the contrary, the basis for such holding was that the negligence of the physician caused a distinctly "new, separate and unforeseen injury unrelated to the original injury." Piedmont Hospital v. Truitt, 48 Ga.App. 232, 172 S.E. 237. Whatever be the implications arising from decisions that tend to support the claims of plaintiff, they do not serve to outweigh the effect of the established doctrine that the aggravation of an injury by a surgeon should be submitted to the jury as an element of recovery against the original tort feasor and that only one recovery may be had for the same cause. Reliance upon Smith v. Coleman, 46 Cal.App.2d 507, 116 P.2d 133, and other decisions in industrial cases is not justified. They arise under the Workmen's Compensation Act and are therefore not subject to common law rules. In proceedings before the Industrial Accident Commission the workman may not recover for all elements of damage recoverable in actions at law. Ansbach v. Department of Industrial Relations, 99 Cal.App. 677, 279 P. 224. Under the Workman's Compensation Act, the injured workman is limited to a recovery of compensation according to a schedule prescribed. He may not recover damages for all consequential injuries proximately resulting from the accident. His recovery before the Commission is confined to specific items named in the

schedule. Because of this he may follow the commission's award for an industrial injury with a legal action against a physician by whose negligence in treating such industrial injury deleterious consequences may have ensued. Whether a decision with reference to a release or to a discharge is pertinent to the issue under discussion can be determined only from a comparison of the facts adjudicated in the citation. While it is true that a release will not be allowed where there was no joint liability (Wallner v. Barry, 207 Cal. 465, 279 P. 148) such holding is a far cry from that in Wells v. Gould, supra, and in Dewhirst v. Leopold, supra, whose pronouncements spell finality for plaintiff's contentions.

The judgments are affirmed.

McCOMB, J., concurs.

59 Cal.App.2d 760

PEOPLE v. CLARK.

Cr. 2260.

District Court of Appeal, First District, Division 2, California.
July 23, 1943.

1. Criminal law 🔑1186(4)

Where evidence would have justified an acquittal, trial judge's signature on blank form for verdict of guilty, even though scratched out, was likely to influence jury's action and required reversal of conviction. Const. art. 6, § 4½.

2. Criminal law 🔑304(2)

It is a matter of common knowledge that juries are alert to take their cue from any intimation, real or fancied, of trial judge as to what verdict he believes they should return.

3. Criminal law 🔑1111(5)

Where transcript was certified as complete and correct, statement of trial judge made during argument of motion for new trial could not supplement or contradict certified record.

4. Criminal law 🔑338(1)

In prosecution for a narcotic offense, interjection into case by district attorney on cross-examination of defendant and in rebuttal of question as to race of another person present in hotel room of defendant at time of her arrest was error as irrelevant. St.1941, p. 2820, § 11160.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Emma Clark was convicted of a narcotic offense, and she appeals.

Reversed.

Walter H. Duane, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice pro tem.

The defendant was convicted of a violation of sec. 11160, Health and Safety Code, St.1941, p. 2820. Defendant appeals from the judgment and the order denying her motion for a new trial.

The evidence shows that on November 14, 1942, three narcotic agents went to a hotel room in San Francisco where defendant was found clad only in a nightgown. The agents searched her room and her clothes for narcotics and finding none they instructed her to dress herself, which she did in their presence. She was then taken in an automobile to a hospital where her body was searched by a physician for concealed narcotics. A nurse testified that while defendant was in the hospital she observed defendant putting her hand in her coat pocket and called one of the agents, and this agent testified that he took the coat into an adjoining room and out of the presence of the defendant found in the pocket of the coat a rubber finger stall containing thirteen grains of heroin wrapped in two paper covered packets. The agents testified that the pocket of this coat previously had been searched and nothing found therein. Defendant denied any knowledge of the heroin, and denied that she had at any time had it in her possession or placed it in the pocket of her coat.

This brief recital makes it clear that while the evidence was sufficient to support the judgment, it was of a character which might well create in the minds of the jurors a reasonable doubt of defendant's guilt and thereby result in her acquittal.

[1, 2] The record shows that the blank form of verdict finding the defendant guilty, which was given to the jury for their use and was actually signed by the foreman and returned as the verdict of the jury, had the name of the trial judge signed to it, with a penstroke drawn through the signature. This unusual circumstance is relied upon by appellant as prejudicial error. Appellant freely concedes that this signature was not affixed by the judge with any intention to influence the verdict, but was a pure inadvertence which the judge attempted to rectify by afterwards drawing the penstroke through it. The question presented on appeal however is not affected by the admitted fact that the trial judge innocently affixed his signature to the verdict. It needs no citation of authority to support the truism, so well known and often repeated, that juries are alert to take their cue from any intimation, real or fancied, of the trial judge as to what verdict he believes they should return.

The situation is apparently unique in the trial of criminal cases and not apt to recur, and it is not surprising that precise authority has eluded the search of counsel and the court. The case most nearly in point which we have discovered is Wyatt v. State, 65 Okl.Cr. 188, 83 P.2d 886, 887. The form of verdict submitted to the jury in that case and the ruling of the Criminal Court of Appeals of Oklahoma thereon fully appear from the following quotation:

"In this case the question presented is not a question or comment on the evidence but a question of the court's action in submitting to the jury a form of verdict containing a notation, 'Not over 10 years.' The form of the verdict complained of by the defendant on which the jury returned a verdict of guilty and fixing the punishment of the defendant at seven years in the state penitentiary clearly indicates that in fixing the punishment the jury must have been influenced by the notation on the verdict herein complained of, and that the defendant did not have a fair and impartial trial.

"No one can tell what influence the notation on the verdict had on the jury, and to what extent it influenced the jury in arriving at its verdict fixing a penalty of seven years. Jurors pay a great deal of attention to what the trial court says or does in the trial of a case, and any action or remarks by the court which indicates the feeling of the court is observed by the jurors and often the jury will go beyond the evidence and consider the action and remarks of the court.

"It was a prejudicial error for the court to furnish the jury with a form of verdict on which was written a notation, 'Not over 10 years,' as was done in this case.

"We hold that the notation on the form of the verdict submitted to the jury was prejudicial to the rights of the defendant and a violation of his constitutional rights and deprived him of a fair and impartial trial. The notation on the verdict was such that the jury in all probability reached a conclusion that the court wanted the defendant convicted and wanted the jury to have directly before it the maximum penalty provided by law."

We need only add that it seems likely that a form of verdict bearing the trial judge's signature might much more readily influence the jury's action.

The record shows that while appellant's motion for new trial was being presented the trial judge stated: "Well, I scratched it out and explained it to the jury."

[3] The judge's certificate, however, recites that the transcript "is a full, true, fair, complete and correct transcript of the proceedings had at the trial * * * and all rulings, decisions, acts or statements of the court", and although the instructions of the court are set out no reference to the judge's signature on the proposed form of verdict appears anywhere therein or elsewhere in the transcript. The bare statement of the trial judge during the argument of the motion for new trial cannot supplement or contradict the certified record of the proceedings before the jury. Estate of Kingsley, 93 Cal. 576, 28 P. 244.

[4] Another matter was interjected into the case by the district attorney on cross-examination of the defendant and in rebuttal as to the race of another person present in the hotel room of defendant at the time of her arrest. The race of this person had no connection with defendant's guilt of the crime charged, had no tendency to prove any issue in the case and on a retrial should be excluded. People v. Burness, 53 Cal. App.2d 214, 221, 127 P.2d 623; 8 Cal.Jur. 59; 22 C.J.S., Criminal Law, § 600, p. 922.

The attorney general appeals to Art. VI, sec. 4½, of the constitution, but we cannot hold on the evidence in this case that the errors were not prejudicial. It is better that justice be somewhat delayed if defendant is guilty than to have it utterly defeated if defendant is innocent.

The judgment and order appealed from are reversed.

NOURSE, P. J., and SPENCE, J., concur.

60 Cal.App.2d 9

COLONIAL INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14065.

District Court of Appeal, Second District, Division 3, California.

July 27, 1943.

Hearing Denied Sept. 23, 1943.

1. Workmen's compensation 🔑1295

Reimbursement of an employee for expense of medical treatment is payment of "compensation" and is effective to continue jurisdiction of Industrial Accident Commission so as to authorize an award for new and further disability, claim for which was filed within 245 weeks of original injury. St.1937, pp. 266, 281, 296, §§ 3207, 4600, 5410.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

2. Workmen's compensation 🔑1303

Where employer and insurance carrier accepted and paid for chiropractic treatment as a substitute for medical treatment, neither could deny that employee was paid "compensation" so as to deny power of Industrial Accident Commission to make award for further injuries within 245 weeks of original injury. St.1937, pp. 266, 281, 296, §§ 3207, 4600, 5410.

3. Workmen's compensation 🔑1303

By payment of compensation employer and insurance carrier impliedly consent to extend time for filing of an application for compensation by claimant and are thereafter "estopped" to set up as a bar to claim of injured employee lapse of time within which he could file application for compensation with Industrial Accident Commission if no payment had been made. St. 1937, pp. 266, 281, 296, §§ 3207, 4600, 5410.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Proceeding by Colonial Insurance Company, petitioner, against Industrial Accident Commission of the State of California and D. C. Milligan, respondents, on a writ of review to annul an award of the Commission to respondent Milligan.

Award affirmed.

Garratt B. Sargent, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, and R. C. McKellips, of Auburn, for respondents.

SHINN, Acting Presiding Justice.

In this proceeding to revoke an award of the Industrial Accident Commission to an injured employee, the question for decision is correctly stated by counsel for respondent as follows: "Does a monetary payment by the employer (who was reimbursed by his insurance carrier) to an injured employee, to be used to pay for the services of a chiropractor who had treated, and temporarily relieved, the pain in the employee's sprained back, give the Industrial Accident Commission continuing jurisdiction so that an application for compensation for new and further disability may be filed by the employee at any time within 245 weeks after the date of the original injury?"

On the day of his injury the employee engaged the services of a chiropractor and received a treatment for an injury to his back. On the second day thereafter he reported the injury to his employer, who reported to the insurance carrier; the employee remained at home during the ensuing week, was visited by his employer, and continued to receive chiropractic treatments. The employer tendered no medical treatment and the employee received none at that time, although within a week after the accident he was examined by a physician at the suggestion of the insurance carrier and was advised that he was all right. The commission did not find that the employer neglected or refused to furnish medical treatment. The charges of the chiropractor, amounting to $9, were paid to the employee by the employer, who was reimbursed therefor by his insurance carrier upon presentation of the chiropractor's bill and after receiving a communication from the chiropractor. No application was filed for compensation for the original injury and no sum in excess of $9 was paid to or for the employee. The present application for compensation was based upon new and further disability which developed, and was filed within 245 weeks after the date of the original injury.

Petitioner's contention is that while the employer was required to furnish medical, surgical and hospital treatment, he was not obliged to furnish treatment by a chiropractor and that the reimbursement of the employee for the cost of such treatment cannot be considered as compensation in any form so as to extend the time for the filing of a claim. The commission found that there was new and further compensable disability, that the employer had furnished "treatment" for the original injury, and that because thereof the claim depending upon the new and further disability was not barred. These findings are supported by the evidence and they justify the award. The commission did not find that chiropractic treatment constitutes medical treatment and there is nothing in the findings to indicate that the award was made upon the theory that the employer was obliged to furnish chiropractic treatment or to reimburse the employee for the cost thereof. Undoubtedly the theory was that reimbursement of the employee constituted compensation within the meaning of section 3207 of the Labor Code, St.1937, p. 266, and the decisions which hold that the payment of compensation for the original injury gives the commission jurisdiction for 245 weeks after the date of the injury to entertain proceedings for compensation for new and further disability. § 5410, Labor Code; Cowell L. & C. Co. v. Industrial Acc. Comm., 1930, 211 Cal. 154, 160, 294 P. 703, 72 A.L.R. 1118, and cases therein cited.

[1-3] "Compensation" as defined by section 3207 of the Labor Code includes "every benefit or payment conferred by Division IV upon an injured employee" and necessarily includes payment for medical treatment as provided in section 4600 of the code, St.1937, p. 281. Reimbursement of an employee for the expenses of medical treatment is payment of compensation and is just as effective to continue the jurisdiction of the commission as payment of wages would be. We may agree with petitioner, without deciding, that an employee is not entitled to receive chiropractic treatment at the expense of his employer and that reimbursement for such treatments would not be the payment of compensation in the strict sense. But it does not follow that payment of charges of a chiropractor by the employer and reimbursement of the latter by the insurance carrier with full knowledge of all of the facts would not be payment of compensation which would toll the statute of limitations. If the employer in the present case was not obliged and could have refused to furnish chiropractic treatment, he waived his right to limit his liability to the furnishing of medical treatment. The insurance carrier was not bound by the act of the employer and could have refused to reimburse him for an improper expenditure (Beverly v. Fairmont Hotel, 1927, 85 Cal.App. 567, 570, 259 P. 955), and if it had done so it would have been free to plead the bar of the statute. But having accepted and paid for chiropractic treatment as a substitute for medical treatment, neither the employer nor the insurance carrier can deny that the employee has been paid compensation for his injury. They made no claim then and make none now that the money was paid for any other purpose or with any different understanding. It is upon the doctrine of estoppel that payment operates to extend the time for the filing of an application for compensation (Union Iron Works v. Industrial Acc. Comm., 1922, 190 Cal. 33, 46, 210 P. 410); and it is immaterial whether the payment be large or small or whether there be one payment or several. It is payment of money as compensation that extends the time. Morrison v. Industrial Acc. Com., 1938, 29 Cal.App.2d 528, 85 P.2d 186, and cases cited page 534. The commission therefore correctly held that the claim, as limited to the new and additional disability, was not barred.

The award is affirmed.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

59 Cal.App.2d 820

COOKE et al. v. ODELL et al.

Civ. 12304.

District Court of Appeal, First District, Division 2, California.

July 26, 1943.

Rehearing Denied Aug. 25, 1943.

Hearing Denied Sept. 23, 1943.

1. Corporations ⚷320(11)

Where corporation director had made a large profit on sale of silver bullion held by him personally at about the time that he represented to corporation that purchases of silver bullion were good investments and the silver market remained fairly constant for about four months thereafter, a finding, in stockholders' representative suit against director, that at time the director made the representation it was false and was known by him to be false, was unsupported.

2. Limitation of actions ⚷104(2)

Failure of a foreign holding corporation to comply strictly with statute relating to information concerning subsidiary corporations, required to appear on balance sheet of holding corporation, was of no value in determining whether such failure amounted to fraudulent concealment which would toll statute of limitations on stockholders' representative suit against directors to recover for alleged misappropriation of corporation's funds, since statute does not specifically refer to foreign corporation. Civ.Code § 358.

3. Limitation of actions ⚷104(2)

In stockholders' representative suit to recover from directors of the holding company for loss resulting from speculation with money advanced by holding corporation to subsidiary corporation, no inference of fraudulent concealment which would toll statute of limitations could be drawn from form of balance sheet furnished by holding corporation, where accounts receivable showed a large and increasing indebtedness due from subsidiary corporation and statutes relating to the necessary corporate books and records did not apply to foreign holding corporations. Civ. Code, §§ 278, 342, 355, 356, 358, 359.

4. Limitation of actions ⚷104(2)

In stockholders' representative suit against directors of a holding corporation to recover for losses resulting from speculations with corporation's funds through a subsidiary corporation, where there was no evidence that a proper request to examine books of subsidiary corporation was refused, a finding of fraudulent concealment which would toll statute of limitations could not be predicated on an improper refusal to allow an examination of corporations' books. Code Civ.Proc. §§ 338, subd. 4, 339, subd. 1; Civ.Code, §§ 2229, 2234.

5. Limitation of actions ⚷197(2)

Evidence failed to establish that the purpose of organizing subsidiary corporation was to conceal from stockholders of holding corporation the business transactions carried on through subsidiary corporation, and a finding of fraudulent concealment which would toll statute of limitations on stockholders' representative suit against directors to recover for losses resulting from speculations with holding corporation's funds could not be predicated on such arrangement alone. Code Civ.Proc. §§ 338, subd. 4, 339, subd. 1, Civ.Code, §§ 2229, 2234.

6. Corporations ⚷314(1)

Directors' speculations with corporate funds could not be said to have been done for their own profit and that it was a breach of trust under statute, on ground directors' main holdings were of common stock and that only by speculation could the common stock have any value where accumulated dividends on preferred stock had to be paid prior to common stock dividends. Civ. Code, §§ 2229, 2234.

7. Corporations ⚷314(1)

Directors' speculation with corporate funds could not be said to have been done for their own profit and that it was a breach of trust under statute, on ground directors' main holdings were of common stock and that only by speculation could common stock have any value as accumulated dividends on preferred stock had to be paid first, where only one speculation was made and many profitable transactions would need to have taken place to give common stock any value. Civ.Code, §§ 2229, 2234.

8. Corporations ⚷317(3)

Where directors' alleged unauthorized use of corporate funds for speculation could only have resulted in benefit to stockholders, such speculation did not give rise to a "constructive fraud" under statute prohibiting trustee from using trust property for any purpose unconnected with the trust, since the phrase "purpose unconnected with the trust" refers to benefits to third parties. Civ.Code, §§ *2229, 2234, 2237, 2238.*

See **Words and Phrases, Permanent Edition,** for all other definitions of "Constructive Fraud" and "Purpose Unconnected with the Trust".

9. Limitation of actions ⚷28(1)

A stockholders' representative suit against directors to recover for loss resulting from alleged speculation with corporate funds was barred by the two year statute of limitations where no fraud was proved, either constructive or actual, which would toll the running of the statute. Code Civ. Proc. §§ 338, subd. 4, 339, subd. 1.

10. Corporations ⚷320(11)

In stockholders' representative suit against director to recover for alleged misappropriation of corporate funds, evidence failed to support finding that a trip to Europe made by director was an undertaking partially for the director's personal pleasure, and judgment against director for the expenses of the trip which were paid by the corporation could not stand.

On Petition for Rehearing.

11. Corporations ⚷641

The statute relating to information concerning subsidiary corporations, required to appear on balance sheets of holding corporations, does not apply to foreign corporations. Civ.Code, § 358.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Stockholders' representative suit by E. A. Cooke and others against Robert S. Odell and others to recover for alleged misappropriation of and speculation with funds of the State Guaranty Corporation while individual defendants were directors and officers of the corporation. From judgment in favor of the corporation against defendants Robert S. Odell, A. E. Falch and C. F. Adams, Jr., for $2,000 and against the defendants Robert S. Odell and R. L. Herrick for $130,793.78, such defendants appeal.

Reversed.

Sullivan, Roche & Johnson, of San Francisco, for appellants.

John A. Sinclair and Charles A. Christin, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is a stockholders' suit brought by plaintiffs in their representative capacity as stockholders of State Guaranty Corporation, which was made a defendant because it refused to bring the suit. The plaintiffs recovered judgment in the corporation's favor against defendants for alleged misappropriation of and speculations with the corporation's funds while they were directors and officers of State Guaranty Corporation and Pacific States Auxiliary Corporation, its wholly owned subsidiary. The defendants Odell, Falch and Adams have appealed from the judgment of $2,000 entered against them which concerned the alleged misappropriation of the funds of State Guaranty Corporation by Odell while on a trip to Europe upon the theory that the trip was only partially for the benefit of the corporation. Defendants Odell and Herrick appeal from a judgment of $130,793.78 entered against them which was the amount of loss on a purchase and sale as an investment of two lots of silver bullion by Pacific States Auxiliary Corporation. Pacific States Auxiliary Corporation, a California corporation, is the wholly owned subsidiary of State Guaranty Corporation, a Delaware corporation. It was organized to manage the foreclosed properties of Pacific States Savings and Loan, another wholly owned subsidiary of State Guaranty Corporation. As part of its business it made investments and carried the cash transactions of State Guaranty Corporation also. With respect to the corporate structure, the trial court found that both State Guaranty Corporation and Pacific States Auxiliary were dominated and controlled by Odell through his large holdings of common stock in State Guaranty Corporation and his position as an officer and director of State Guaranty Corporation and Pacific States Savings and Loan. This finding is supported by the evidence in the record and appellants' attack thereon is without merit. By virtue of his ownership of shares of common stock of the corporation together with his nomination by proxies of preferred shareholders, the defendant Odell controlled the election of the board of directors and dominated its actions. Odell, Falch, and Adams were directors and in addition Falch was President and Odell was Vice-president and Director of Finance of State Guaranty Corporation. During the period here involved Herrick was an employee of Pacific States Savings and Loan Company and was an officer and director of Pacific States Auxiliary Corporation.

The appellants further contend as to both judgments that the evidence is insufficient to support the findings on which they rest and that both causes of action, if any there were, are barred by the statute of limitations applicable to them. As both transactions were entirely separate the particular facts with respect to each are better stated separately.

The Silver Transactions.

Prior to August of 1935 defendant Odell had actively traded in the silver bullion market. At the commencement of that month he owned 1,310,000 Shanghai dollars —the value of which depended upon the intrinsic value of their silver content. On August 14, 1935, Odell sold 800,000 Shanghai dollars on the London market whereby he made a profit of $80,000. The dollars were then on deposit in the vaults of the Wells Fargo Bank and Union Trust Co. in San Francisco. On August 16, on Odell's representation that silver was a good investment, Pacific States Auxiliary Corporation purchased these same dollars at a cost of $390,400, which admittedly was their then market value. It is not contended that Odell realized any personal profit to the detriment of the corporation from these two transactions. The purchase by Pacific States Auxiliary was made from the Wells Fargo Bank on contracts. One hundred thousand dollars was advanced. This $100,000 was loaned to Pacific States Auxiliary by State Guaranty Corporation. Thereafter as the silver market declined additional advances were made. These Shanghai dollars (theretofore converted into bullion) were sold on February 18, 1936, at a loss of $116,696.65. In September of 1935, also at the suggestion of defendant Odell, Pacific States Auxiliary purchased 500,688 ounces of silver at a cost of $327,325.20. This purchase was also by contract, only $33,000 being advanced. This was sold on December 13th at a loss of $14,097.13.

The findings of fact on which the trial court based its judgment in favor of the corporation on this count are as follows:

"VIII. That during the years 1935 and 1936 the defendants Robert S. Odell and R. L. Herrick caused Pacific States Auxiliary Corporation to engage in speculation in the purchase and sale of silver bullion; that the said purchase of silver bullion was not connected with the business in which said corporation was then engaged, and was highly speculative. * * * That in causing said corporation to engage in said activities, said defendant directors violated the trust they owed to said corporation and to State Guaranty Corporation, and by reason thereof are indebted to said corporation in the sum of $130,793.78, together with interest thereon."

"XIII. The Court finds that the plaintiffs did not discover the facts constituting the frauds herein found until within three years of the time of the commencement of the action, nor could they have discovered said facts sooner by exercise of reasonable diligence. That the Board of Directors of State Guaranty Corporation, during the time covered by the transactions set forth in paragraphs VIII and IX, failed to render to the shareholders of State Guaranty Corporation the reports covering the affairs of Pacific States Auxiliary Corporation, as required by Section 358 of the Civil Code of the State of California, and never at any time during the period covered by said transactions submitted any financial statements or profit and loss statements of Pacific States Auxiliary Corporation to the shareholders of State Guaranty Corporation. That the plaintiffs were not permitted to examine the books of account of Pacific States Auxiliary Corporation until approximately September 2, 1939, notwithstanding that permission to make such examination had been requested by plaintiffs, or some of them, prior thereto."

"XVI. The action is not barred by Section 339, Subdivision 1, of the Code of Civil Procedure of the State of California."

It is conceded by respondents that unless section 338(4) of the Code of Civil Procedure is the statute of limitations applicable to this cause of action, it was brought too late, as the silver purchases were made in 1935, and this suit was not filed until May, 1940. They seek to support the judgment on three theories, actual fraud, constructive fraud and fraudulent concealment tolling the running of the statute. Appellants contend that the above facts show, at most, bad but honest judgment in making an investment in the ordinary course of the corporation's business. They further argue that the propriety of the investment is to be judged solely by the articles of incorporation which permitted an investment in any kind of personal property.

[1] To support a finding of actual fraud the respondents argue that Odell's representations that the purchases of silver dollars and bullion were good investments were false and were known by him to be false. The respondents rely upon the inference of fraud which might have been drawn from the fact that he did not apprise the other directors that he had just sold the silver dollars which they purchased for Pacific States Auxiliary Corporation. The trial court did not make any finding of actual fraud nor would such a finding have been supported by the evidence. We are faced with the facts that Odell made a profit on the sale of his Shanghai silver dollars of $80,000 and that the silver market remained fairly constant between August, 1935, and December, 1935, a few times rising above the price at which the silver dollars were purchased. On this showing a finding that at the time Odell made the representation it was false or that he believed it to be false would not have been supported by the evidence. Proof of fraud must be clear and convincing and there is no other evidence in the record upon which a finding of actual fraud could have been predicated.

[2, 3] Next respondents contend that by reason of the fraudulent concealment of a cause of action, the running of the statute of limitations thereon is tolled until the plaintiff discovers facts or should have discovered the facts. Assuming that this proposition of law is correct, there is no evidence in the record upon which a finding of fraudulent concealment by the defendants could be based. The fact that State Guaranty Corporation failed to comply strictly with the requirements of section 358 of the Civil Code relating to the information concerning subsidiary corporations required to appear on the balance sheets of holding corporations is of no value in determining fraudulent concealment because the obligations imposed by section 358 do not specifically refer to foreign corporations. Although foreign corporations are expressly mentioned in sections 355, 356, 359 of the Civil Code, all in the same chapter XII of the Civil Code relating to corporate books and records, their obligations and rights imposed by the chapter are limited to corporate books and records kept within the state. This emphasizes why foreign corporations were not intended to be included in section 358 in that the difficulties of enforcement would be insurmountable. Further it should be noted that section 359, relating to a stockholders' suit to compel the giving of a financial statement, was made applicable only to foreign corporations whose principal place of business was within this state. Section 278 of the Civil Code especially provides that the word "corporation" includes only domestic corporations. We can not agree with respondents that the legislature in section 278, where it explained what it meant by the use of the term holding corporation, meant to dispense with the use of the word "foreign" if it meant to include foreign holding corporations also. Further support for this view is also found in section 342 of the Civil Code where the legislature, in referring to the acquisition of shares of corporations by themselves or their subsidiaries, specifically refers to corporations domestic or foreign. Finally, the Delaware corporation laws contain no requirement that a holding corporation render statements concerning the financial position of its subsidiaries to the stockholders annually. Hence no inference of fraudulent concealment can be drawn from the form of State Guaranty Corporation's balance sheet, particularly where the accounts receivable showed a large and increasing indebtedness due from Pacific States Auxiliary Corporation from 1934 to 1939.

[4] Respondents next point to the fact that in the beginning of 1935, prior to the silver transactions here in question, defendants refused to allow one Andrews, who had been requested only to go over the books of State Guaranty Corporation for certain stockholders, to look over the books of Pacific States Auxiliary. It is conceded that the facts concerning the silver transactions were at all times on the corporate records of Pacific States Auxiliary. There is no evidence in the record that a proper request to examine the books of Pacific States Auxiliary was ever refused. Hence, no finding of fraudulent concealment could be predicated on the basis of an improper refusal to allow an examination of these books.

[5] Finally, in this connection, the respondents assert that the whole purpose of Pacific States Auxiliary Corporation was to conceal from the stockholders of State Guaranty Corporation the business transactions carried on through Pacific States Auxiliary. We can find no evidence to support this assertion nor did the trial court so find. It is well known that many hold-

ing companies are completely inactive and carry on their affairs through their subsidiaries. To hold that on such arrangements alone, a finding of fraudulent concealment could be predicated, would drastically change the burden of proof resting upon one charging fraud.

Respondents finally seek to support the judgment on the grounds that the defendants committed a constructive fraud on the corporation in investing the funds in the silver bullion. They assert that a constructive fraud arises upon the breach of the fiduciary duty of the director in either of two ways under section 2229 of the Civil Code. This section reads as follows: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Section 2234 of the Civil Code declares a breach of the preceding section to be a fraud against the beneficiary of the trust.

[6, 7] First the respondents contend that the defendants dealt with the corporate funds for their own profit when they invested in the silver bullion. They argue that defendants' main holdings were of common stock and that only by speculation could the common stock have any value as the preferred stock had accumulated dividends for five years which had to be paid prior to common stock dividends. This argument defeats itself. The directors' "own profit" in this case is the same as any other beneficiary of the trust and can not possibly be said to constitute a use of the corporate property for the benefit of the director as trustee. Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102, 120; Spering's Appeal, 71 Pa. 11, 10 Am.Rep. 684, 689. The tenuous argument that common stockholders would be benefited over preferred stockholders is also defeated by the fact that in order to pay off the accumulated dividends on the preferred shares by such investments as these, many profitable transactions would need to have taken place, buying at the lowest market price for silver in 1935 and selling at the highest level for 1935. Here only one such transaction was entered into which could not possibly have given any value to the common stock, assuming for the purpose of argument that the common stock at the date of the purchases in question had no value.

[8] Secondly, respondents contend that the use of corporate funds for the silver purchases was a use for a "purpose unconnected with the trust, in any manner," and therefore constituted a constructive fraud on the corporation. The respondents argue that although the alleged speculations were not ultra vires "in the strict sense that the articles of incorporation did not permit the buying of silver. * * * The speculations were so foreign to the business of the corporation as to be beyond the powers of the officers." Therefore they argue that the speculations were for purposes unconnected with the trust and constituted a fraud on the corporation. In support of this proposition they cite City of Fort Bragg v. Brandon, 41 Cal.App. 227, 182 P. 454, in which the trustees of the town gave away an interest in town property. Although a search has revealed no other case involving the final clause of the section, we understand that the words "purpose unconnected with the trust, in any manner" refer to benefits to third parties, instanced in the case cited, and not unauthorized uses of trust funds which could result only in benefit to the beneficiaries of the trust and to no other parties. In this connection sections 2237 and 2238 of the Civil Code should be noted, where the code distinguished the measure of damages applicable to breaches of trust under section 2229 and where "a trustee * * * uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary."

This view is supported by Albers v. Villa Moret, Inc., 46 Cal.App.2d 54, 115 P.2d 238, although the code section is not cited. At page 56 of 46 Cal.App.2d, at page 239 of 115 P.2d the court said: "The corporation was organized * * * primarily to engage in the business of producing, developing and selling sheet music. Its articles of incorporation, however, bestowed broad general powers, including that to acquire real property, erect buildings, deal in stocks and bonds, borrow and loan money, etc. Accordingly, the purchase of building and loan certificates, the erection of buildings and the investment in the fruit distributing company may be dismissed without further consideration unless in connection therewith there is proof of gross abuse of authority or discretion sufficient at least to approach negligence or fraud. The evidence herein may not be so characterized. * * * While some of the acts of the directors resulted in unwise investment, particularly as viewed in retrospect, they do not necessarily—depending upon the facts—constitute gross abuse of discretion." The weight of these remarks is somewhat restricted for the reason that in that case the court was upholding the findings of the trial court. However, we find no other evidence in the record to support the lower court's finding of fraud than that defendant engaged in the "highly speculative" silver transactions, hence the case is persuasive authority.

In Southern Counties Thrift Co. v. C. W. Rairdon, 47 Cal.App.2d 770, 118 P.2d 828, 829, although the fraud issue was apparently not raised, the court held that a demurrer to a complaint was properly sustained, the causes of action being barred by subdivision 1 of section 339 of the Code of Civil Procedure, where the complaint alleged "unauthorized and negligent acts * * * in that loans contrary to law were made" by the directors. At the most the transactions here in question were "unauthorized and negligent" hence by implication they do not come under section 338, sub. 4 of the Code of Civil Procedure, and the causes of action, if there were any, are barred by the sections cited. Fox v. Hale & Norcross S. M. Co., 108 Cal. 369, 424, 41 P. 308.

No cases have been cited and none have been found on the question before us—whether engaging in a "highly speculative" investment without more constitutes a fraud on the corporation so as to suspend the running of a statute of limitations until discovery has been made. Those cases relied on mainly by respondents are clearly distinguishable. In Fagerberg v. Phœnix Flour Mills Co., 50 Ariz. 227, 71 P.2d 1022, 1028, the court emphasized the concealment of the speculations on the wheat market from the other directors of the corporation and the false entries made in the books of the corporation in order to conceal the losses. Here there is no contention that the directors as a board did not authorize the investment nor were the losses covered on the books of the corporation. In Felsenheld v. Bloch Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545, 123 A.L.R. 334, although the statute of limitations point was involved, it should be noted that the court decided that cases cognizable in equity were governed by a different statute than those cognizable at law and held that any breach of trust by a director, whether by reason of fraud or negligence, would be governed by the equity statute. Broad language denominating the acts of directors fraud can be found in many cases not involving the question of the statute of limitations applicable to fraud actions as opposed to those for negligence and mismanagement. These cases must be carefully distinguished from the case at bar.

[9] We have assumed for the purposes of argument that these investments in silver were highly speculative as found by the trial court and that a cause of action for negligence on this basis might have lain against the directors here sued. We hold as a matter of law that no fraud was proved, either constructive or actual, upon the corporations which would make section 338, subdivision 4, applicable to the causes of action stated, if any. Whether a finding that such investments constituted actionable negligence on the part of the directors would be upheld, we need not decide.

The Automobile Trip.

There is no dispute as to the facts relating to this count. Appellants have summarized them in their opening brief and respondents concede this summary to be a fair statement. It is as follows:

"He (Odell) first proceeded to Yellowstone Park where he employed the manager of the Park Hotel and his crew for one of Pacific States' hotels; thence to Minneapolis to interview the Receiver for the Radison Hotel there, who later came to California to negotiate for purchase of some of Pacific States' properties. He next visited the Taylor hotels in Rochester and the manager of the Drake and Blackstone in Chicago—thence to Cincinnati to visit a hotel there and the Waco Airplane factory to look at airplanes. (Shortly after that a Waco plane was purchased and became the subject of plaintiffs' Count 'C' upon which judgment went for defendants.) He also stopped at Manchester, Iowa, where he called on the Holbrook Importing Company, importers of breeding stock, and priced their stallions.

"In New York Odell negotiated, with the Equitable Life Insurance Co., a $3,214,200.00 loan, which by reducing the interest rate from the 4½% being paid to 4%, and the appraisal fee from $16,000 to $5000, saved Pacific States $91,250.00. That saving covered the life of the loan.

"In London Odell induced Lloyds' Underwriters to reduce its 40% earthquake insurance rate to 24 cents and to include the Barbara Worth Hotel at El Centro in the blanket policy—a saving to Pacific States of $21,564.00.

"In Sweden and Norway he visited hotels; in Berlin he purchased glassware for the Pacific States hotels and visited various porcelain factories that supply the hotels with dishes.

"He also visited hotels in France. In France and Belgium he purchased breeding stock for the Nevada Ranch of Pacific States—the Nevada Ranch is a property approximately 250 miles long and a hundred miles wide, and comprises (including fee and leased lands, and lands occupied under grazing rights) almost 3,000,000 acres.

"In Belgium, for example, Odell bought two Percheron stallions, and two or three mares in France, and four Belgian stallions and about six mares in Belgium. To get 'a decent freight rate and pay for the caretaker and feed', he had to ship 20 horses, so he purchased 18 and added to the shipment 2 horses purchased by a man from Los Angeles, one Frank Powell. Odell had an arrangement with Melcher, Pacific States ranch manager, that when the horses arrived, Melcher would select what Pacific States needed and they would sell the balance. Five of the horses died en route, for which Pacific States was reimbursed through insurance. Melcher selected eight for the Pacific States Nevada ranch and Odell took the remaining five, paying therefor the actual cash outlay on them.

"Odell's wife accompanied him, and he paid all of her expenses. Pacific States paid Odell's expenses, including a flat allowance of $25.00 a day for meals, etc. Odell submitted this to the Building and Loan Commissioner and he approved $25.00 a day. Excluding the value of the use of the car and Odell's transportation expense, the expenses of the trip amounted to $1770.00. The trip consumed about 10,000 miles. Odell hired a chauffeur to drive the car in Europe, but furnished his own chauffeur at his own expense while in the United States. The cost of operating the car in the United States without the expense of a chauffeur was 5¢ per mile for 2800 miles; while the expense of operations for the balance of the 10,000 miles (the European travel) was 7¢ per mile including depreciation and the cost of the chauffeur, and everything.

"The trial Court found that part of the use of the automobile was devoted to the business of State Guaranty and its subsidiaries, and part to Odell's private business and pleasure, and that 'the sum of $2000.00 represented the pro-rata expenses so paid for the benefit of Robert S. Odell and the fair value of the use of said automobile during the time the same was used by Odell for his personal business and pleasure."

[10] From this statement we cannot find any basis for a reasonable inference that the trip was an undertaking partially for the personal pleasure of the defendant Odell. Moreover we are at a loss to find upon what basis the apportionment of the total expense was made. The respondents point to the profit realized by Odell on the purchase of five horses for his own use. If he profited at the expense of the corporation he would be liable therefore, but no such cause of action was pleaded, nor was the judgment based thereon.

We conclude that the cause of action pleaded relating to the silver transactions is barred by the statute of limitations, and that there is no substantial evidence in the record to support the findings of the trial court in relation to the cause of action concerning the trip to Europe; hence the judgment against Odell and Herrick, and Odell, Falch and Adams, respectively, cannot be sustained.

The judgment is therefore reversed.

SPENCE, J., concurs.

On Petition for Rehearing.

PER CURIAM.

[11] In their petition for a rehearing, respondents criticize our interpretation of section 358 of the Civil Code, and cite Gertridge v. State Capital Co., 129 Cal.App. 86, 18 P.2d 375, where it was held that the words "every corporation" used in section 355 applied to foreign corporations as well as to domestic. It should be noted that following that decision in 1933 the legislature amended section 355, St.1933, p. 1388, to make it applicable to "foreign corporations keeping any such records in this state," thereby expressly limiting the use of the term "every corporation." The words "such records" refer to corporate minutes, books of account, and share register, all of which are required to be kept

by domestic corporations under sections 352, 353, and 354. That these three sections do not require foreign corporations to keep such records is evident from the 1933 amendment to section 355 which was made applicable only to such foreign corporations as should voluntarily keep such records in this state.

It should also be noted that sections 356, 357, 358 and 359 were also amended at the same time as section 355, in 1933; and in the same bill, or chapter. Sections 356, 357 and 359 all expressly refer to foreign corporations. Section 358 does not make such reference, and it would be simple judicial legislation to add those words to the section. We must assume that the Legislature had some reason for permitting shareholders to inspect books of foreign corporations which are kept within the state; and some reason for limiting to domestic corporations the specifications required for an annual report found in section 358.

The petition is denied.

Hearing denied; CARTER, J., dissenting.

60 Cal.App.2d 224

BURTON E. GREEN INV. CO. v. McCOLGAN, Franchise Tax Commissioner.

Civ. 14073.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1943.

As Corrected Aug. 27, 1943.

Hearing Denied Oct. 11, 1943.

1. Taxation 🔑**219, 376(1)**

The term "net income" was used in the Bank and Corporation Franchise Tax Act to specify the sum constituting the basis for calculation of the franchise tax and is not a fund available for dividends or the "measure of the tax" which is all income, and to measure the tax, all allowable deductions are taken, and any dividends paid from net income derived thereby are, as having been paid out of "income included in the measure of the tax", exempt from franchise tax in the hands of the recipient corporation. Gen.Laws 1937, Act 8488, §§ 4(3), 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Income Included in the Measure of the Tax", "Net Income" and "Measure of Tax".

2. Taxation 🔑**47(4), 376(1)**

The purpose of section of the Bank and Corporation Franchise Tax Act providing for deduction of dividends declared from income included in the measure of the tax imposed upon the declaring corporation is to avoid double taxation and thereby prevent destruction of capital assets, and if the same dividend is included in the measure of the tax paid by two taxpayers successively under the act, the result is prohibited multiple taxation. Gen.Laws 1937, Act 8488, § 8(h).

3. Taxation 🔑**376(1)**

The section of the Bank and Corporation Franchise Tax Act providing that in computing net income no deduction shall be allowed for any amount otherwise allowable as a deduction which is allocable to income not included in the measure of the franchise tax, was designed to prevent corporations from deducting amounts properly allocable to income, but not subject to franchise taxation, and "income" was used as "gross income" not subject to the franchise tax, and not as "net income". Gen.Laws 1937, Act 8488, § 9(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Gross Income" and "Income".

4. Statutes 🔑**209**

Where word "income" was used as meaning "gross income" in section 9(d) of Bank and Corporation Franchise Tax Act providing that in computing net income no deduction shall be allowed for any amount otherwise allowable as a deduction which is allocable to income not included in the measure of the franchise tax, word had same significance in section 8(h) providing for deduction of dividends declared from income included in the measure of tax imposed upon the declaring corporation. Gen.Laws 1937, Act 8488, §§ 8(h), 9(d).

5. Taxation 🔑**376(1)**

Where gross income and specified deductions were the factors included in arriving at net income taxable under the Bank and Corporation Franchise Tax Act "gross income" was "income included in the measure of the tax" within section 8(h) providing for deduction of dividends declared from income included in the measure of the tax imposed upon the declaring corporation. Gen.Laws 1937, Act 8488, § 8(h).

6. Taxation ⚷376(1)

The purpose of computing deductible depletion under the Bank and Corporation Franchise Tax Act is to leave in taxpayer's hands that portion of his costs attributable to capital exhausted in earning the income on which the tax is to be paid. Gen.Laws 1937, Act 8488, §§ 4(3), 7, 8(g); Revenue Act 1936, §§ 23(m), 113(b) (1) (B), 114 (a), (b) (1, 3), 26 U.S.C.A. Int.Rev.Acts, pages 829, 865, 866, 867.

7. Taxation ⚷376(1)

Under the Bank and Corporation Franchise Tax Act providing for deduction of dividends declared from income included in the measure of the tax imposed upon the declaring corporation, a recipient of dividends is authorized to deduct dividends which have passed through the tax mill before their distribution by the declaring corporation, to avoid hardship to the recipient. Gen.Laws 1937, Act 8488, § 8(h).

8. Taxation ⚷376(1)

Where California corporation producing its oil only in the state reported all its revenues as gross income for franchise tax purposes and was allowed a deduction for percentage depletion in excess of its depletion computed on the basis of cost, the entire dividend paid by such corporation was declared from "income included in the measure of the tax" within section 8(h) of the Bank and Corporation Franchise Tax Act and was deductible by the recipient corporation in computing its franchise tax. Gen.Laws 1937, Act 8488, §§ 4(3), 7, 8(g); Revenue Act 1936, §§ 23(m), 113(b) (1) (B), 114(a), (b) (1, 3), 26 U.S.C.A. Int.Rev.Acts, pages 829, 865, 866, 867.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Burton E. Green Investment Company against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover an additional assessment of franchise tax paid under protest for the year 1938. From a judgment for defendant, plaintiff appeals.

Reversed with direction.

Claude I. Parker, of Los Angeles, Bayley Kohlmeier, of San Francisco, and Adele Walsh Moran, of Glendale, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The question for decision is whether a dividend paid by a California corporation, producing its oil only in this state, which reported all of its revenues as gross income for franchise tax purposes and which was allowed a deduction for percentage depletion for franchise tax purposes in excess of its depletion computed on the basis of cost, is deductible by the recipient corporation.

This action involved the obligation of the plaintiff under the Bank and Corporation Franchise Tax Act (Deering's General Laws 1937, Act 8488), hereinafter referred to as "the Act." Plaintiff, as a California Corporation, duly filed its franchise tax return for the year 1938. As required, the return was based upon plaintiff's income for 1937, the gross thereof being reported at $598,673.56. Of this amount plaintiff listed $465,000 as a dividend paid to it in 1937 by Belridge Oil Company, hereinafter referred to as Belridge. Plaintiff deducted this Belridge dividend from its return to the franchise tax commissioner in 1938, because it was the dividend of a domestic corporation, earned, declared, and paid in California. § 4, subd. (3). The remainder of its 1937 income was excluded as not proper items to be reported for assessment for franchise tax purposes. They are not involved in this discussion. Since none of its income was reported as the basis for computing its franchise tax, plaintiff paid a tax of $25, on its 1938 return.

In due season defendant served notices on plaintiff of his intention to assess additional taxes on its franchise for 1938. The aggregate of the two additional sums to be assessed was $6,373.28 and the interest charged on the two items was $934.38.[1]

Plaintiff protested the proposed assessments but paid them with interest under protest in October, 1940, after which this action followed to recover the $7,307.66 so assessed, charged, and collected by defendant. Inasmuch as plaintiff's exclusion from its 1938 return of the Belridge dividend brought on the additional assessments by defendant, in order fairly to appraise the factors of the controversy, we now expose to view the franchise tax return filed by Belridge in 1938 which also reported its income of 1937 as the basis for computing its franchise tax for 1938.

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[1] To be exact the assessments occurred in this manner: On July 25, 1939, the commissioner issued his first notice of an additional assessment for 1938 in the amount of $5,558.21 on the ground that plaintiff had overstated its deduction under Section 8, subd. (h) for dividends received. Plaintiff protested; paid the

Belridge's gross income for 1937 was reported as $7,190,232.47 (all of which was from oil except $71,677.40) with deductions of $4,207.961.85 leaving a net income for franchise tax purposes of $2,982,270.62. Included among its deductions for 1937 was the sum of $1,760,242.27 for depletion claimed under Section 8 subd. g of the Act which authorizes a deduction for depletion at the rate of 27½ per cent of the gross income from oil and gas wells. Such percentage of depletion was allowed Belridge by defendant in computing its franchise tax for 1938. The depletion sustained by Belridge for the year computed on the basis of cost was only $74,901.03 which was $1,685,341.24 less than 27½ per cent of the gross income of Belridge for 1937. The Belridge return for 1938 for franchise tax purposes shows that this corporation deducted for depletion in 1937 the sum of $1,760,242.27, or 27½ per cent of its gross income for that year. Also it discloses that the franchise tax assessed to Belridge for the same year computed on the basis of a deduction of 27½ per cent of its gross income for depletion was paid by Belridge. This deduction by Belridge was apparently not an error but was computed as correct, for none of the numerous disbursements for federal income tax, federal excess profits tax, and franchise tax charges was taken as a deduction for franchise tax purposes. It declared and paid dividends that year in the amount of $2,400,000 out of which came the $465,000 dividend paid plaintiff.

It was stipulated that in computing the additional amount of franchise tax to be paid by plaintiff for 1938, defendant concluded that only 62.968 per cent of the Belridge dividend paid during 1937 had been included in the measure of the tax imposed by the Act on Belridge. In deriving this percentage the commissioner used two factors. Factor A resulted from deducting the Belridge franchise tax of 1937, to wit: $116,499.55 from its net income of the same year, namely, $2,982,270.62, leaving $2,865,771.07. Factor B resulted from adding to such net income for 1937 the portion of deduction for depletion ($1,685,341.24) allowable to Belridge for franchise tax purposes for 1937 by which the depletion allowed Belridge exceeds the depletion sustained computed on the cost basis. From the sum resulting from such addition, take the franchise tax expense of 1937, to wit: $116,499.55 leaving as factor B $4,551,112.31. By dividing factor A by factor B the commissioner obtained the percentage of dividends paid by Belridge, in 1937, which have been included in the measure of the tax imposed by the Act on Belridge. Such percentage was 62.968 which multiplied by $465,000 determined the portion of the Belridge dividend of 1937 included in the measure of the tax was $292,801.20. This product was determined by the commissioner to be deductible under Section 8(h). No attempt is made in the stipulation of facts to demonstrate the correctness of the calculation or of the percentage or of the formula.

Since plaintiff contends that the entire dividend was deductible for franchise tax purposes as having been declared by Belridge from income "included in the measure of the tax" imposed by the Act on Belridge it appears that the determination of plaintiff's liability for the additional taxes assessed and collected by defendant must be determined by a construction of the language of the Act.

Section 4a provides for a franchise tax to be fixed at a percentage of the total net income for the next preceding calendar year "according to or measured by such net income."

Section 4(3) requires that every corporation doing business within this state and not expressly exempted from taxation by the constitution shall annually pay, for the

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assessment, with $734.61 interest and filed claim for a refund. The claim having been disallowed, this action was filed. On November 18, 1941, a further notice of additional franchise taxes to be paid by plaintiff for 1938, in the sum of $815.07, and interest in the sum of $199.73, the same procedure having been exhausted, a supplemental complaint was filed for such sum with interest amounting in all to $1,014.84.

privilege of exercising its corporate franchise, "a tax according to or measured by its net income" to be computed at the rate of four per centum "upon the basis of its net income" for the next preceding year.

By section 7 "net income" is defined to be the gross income less deductions allowed. By Section 8 the allowable deductions are defined. Among the items listed as deductible is "depletion" which is treated in subdivision (g) as follows:

"Depletion. In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements according to the peculiar conditions in each instance, such reasonable allowance in all cases to be made under the rules and regulations to be prescribed by the commissioner.

"Computation of depletion. In the case of leases the deduction shall be equitably apportioned between the lessor and the lessee.

"The basis upon which depletion is to be allowed in respect of any property and the amount of depletion allowable shall be as provided in sections 23(m), 113 and 114 of the said Revenue Act of 1936 [26 U.S.C.A. Int.Rev.Acts, pages 829, 859, 866], which are, for the purposes of this subdivision, hereby referred to and incorporated with the same force and effect as though fully set forth herein; provided, however, that the words 'with the approval of the secretary' in said sections shall be deemed omitted."

Section 114 of the Federal Revenue Act of 1936, incorporated into Section 8 subd. (g) is so far as applicable as follows:

"Section 114. Basis for Depreciation and Depletion.

"(a) Basis for depreciation. The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

"(b) Basis for depletion.

"(1) General rule. The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

"(3) Percentage depletion for oil and gas wells. In the case of oil and gas wells the allowance for depletion under section 23(m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23 (m) be less than it would be if computed without reference to this paragraph."

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Section 113(b) (1) (B) of Federal Revenue Act of 1936 is as follows:

"(B) In respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. Where for any taxable year prior to the taxable year 1932 the depletion allowance was based on discovery value or a percentage of income, then the adjustment for depletion for such year shall be based on the depletion which would have been allowable for such year if computed without reference to discovery value or a percentage of income".

Article 113(b)-1 of Federal Regulations 94 is as follows: "The deduction by which the cost or other basis is to be decreased shall include deductions allowed under section 114(b) (2), (3), and (4) of the Revenue Act of 1932, the Revenue Act of 1934, and the Revenue Act of 1936, for the taxable year 1932 and subsequent taxable years, * * *."

Subdivision (h) of section 8 provides for the deduction of dividends received during the income year from a corporation doing business in this state "declared from income which has been included in the measure of the tax imposed by this act upon the bank or corporation declaring the dividends."

From these sections we are to determine whether the Belridge dividend of $465,000 received by plaintiff was declared from income which had "been included in the measure of the tax" imposed by the Act upon Belridge (§ 8 subd. (h). Defendant's position is that because the 27½ per cent of the gross income from the oil wells operated by Belridge exceeded the depletion deduction based upon actual cost, the excess of the deduction allowed over actual cost depletion is not a part of income which had been included in the measure of the tax imposed, within the meaning of section 8(h). Plaintiff maintains that it should deduct the entire dividend because it was declared from income which had been "included in the measure of the tax." Defendant refers us to no provision in the Act providing that if depletion based on cost is a lesser amount than depletion computed at 27½ per cent of gross income, the lesser figure must be used in the measure of the tax. If the declaring corporation properly deducted depletion at 27½ per cent of the gross then any dividends paid out of the net income after such deduction are declared from income which had been "included in the measure of the tax" and are properly deductible by the recipient corporation. If it were true that net income is the "measure of the tax," then never could a recipient corporation deduct its dividend from a domestic corporation earning its income from a California oil pool. Under such construction the question of deduction for depletion becomes immaterial.

[1] The word "income" is used in the Act in only two senses, to wit: gross income, and net income. Both phrases are used in the sections above quoted and in sections 6 and 7 where both are defined. In numerous sections of the Act one may find the phrase "a tax according to or measured by its net income." Section 4(3) provides that "every corporation * * * shall annually pay to the State * * * a tax according to or measured by its net income." The term "net income" (subdivisions 1 and 3 of section 4, Act 8488) was used to specify the sum which should constitute the basis for the calculation of the franchise tax. It does not constitute the "measure of the tax." The income included in the measure of the tax is all income. In order to measure the tax all deductions allowable under the Act including 27½ per cent of the gross income are taken. Following this rule then any dividend paid from net income derived thereby would be a dividend paid out of income included in the measure of the tax. As such it is exempt from franchise tax in the hands of the recipient corporation.

[2] If the total Belridge income for 1937 was included in its gross income for franchise tax purposes and if out of its earnings of 1937 that corporation paid the dividend in question to plaintiff out of profits earned in that year, it must follow that the entire dividend so paid to plaintiff was declared from income which had been included in the measure of the tax. If it was, then it was deductible in full. The very purpose of Section 8 subd. h is to avoid double taxation and thereby prevent the destruction of capital assets. While it aims to tax all income received as dividends (except those exempted by law) which have not been taxed while in the treasury of the dividend payor, at the same time it purposes to avoid the inclusion of the same income in the measure of the tax to be paid by two or more different taxpayers. If the same dividend is included in the measure of the tax paid by two taxpayers successively under the Franchise Tax Act, the result is multiple taxation. It was to avoid such injustice that the Tax Commission reported to the governor on March 5, 1929, the proposed constitutional amendment "to enable the legislature to extend special treatment to dividends received from a corporation which has already paid the tax with the object of avoiding double taxation." California State Printing Office Publication No. 63725, p. 278.

Section 8 subd. (h) was first enacted in 1929. It then provided for the deductibility of dividends received during the taxable year from income arising out of business done in this state. This was construed to mean that it did not require dividends to arise out of business done in this state by the corporation which paid the dividends. Corporation of America v. Johnson, 7 Cal. 2d 295, 60 P.2d 417. Such construction allowed a deduction where the corporation paying the dividend was not a California corporation and did no business in this state but merely owned stock in corporations operating in California from which it received income. The section was first amended in 1933 so that only those dividends were deductible which were received during the taxable year from a corporation actually doing business in California declared from income arising out of business done in this state. The effect of this amendment was to make the deduction not available to any corporation not doing business within California. It was designed to tax all dividend payments made out of income earned in California which had not been subjected to California taxation in the hands of the declaring corporation. Commenting upon the 1933 amendment Professor Traynor wrote that the 1933 amendment "permits the deduction of dividends from corporations taxable under the Act * * *. It prevents the deduction of dividends from corporations * * * not taxable under the state constitution, in keeping with the purpose of the amended Act to allow only deductions necessary to avoid double taxation. * * *" 23 Calif. Law Review, 65.

The aim of the legislature was not to change the meaning of the section but merely to emphasize its intention to avoid double taxation. The 1937 amendment of section 8 subd. (h) was not designed to restrict the dividend deduction solely to net income. Such intention would have been stated in language to express such purpose. Therefore the 1937 amendment, which controls in this case, was not intended to alter its meaning as it was expressed in 1933.

Further proof of the legislative intention is to be found in Section 9 subd. (d) which was also enacted in 1937 when the phrase "included in the measure of the tax" first appeared in section 8 subd. (h). Section 9 subd. (d) reads as follows:

"Section 9. In computing net income no deduction shall be allowed for: * * *

"(d) Any amount otherwise allowable as a deduction which is allocable to one or more classes of income not included in the measure of the tax imposed by this act. * * *"

[3, 4] The language there used refers to income which is excluded from the computation of the franchise tax. That section was designed to prevent corporations from deducting amounts properly allocable to income but not subject to taxation under the Act. The language of Section 9 subd. (d) leaves no doubt that "income" is used in the sense of gross income not subject to the franchise tax. "Net income" could not have been in the mind of the legislature in the phrase, "allocable to * * * income not included in the measure of the tax imposed * * *." Deductions are not allocable to net income. A deduction expires the moment it is subtracted from the gross income. Throughout the act we are constantly reminded that some deductions are allocable to certain gross incomes. In view of the use of the word income in Section 9 subd. (d) in the sense of gross income we are convinced that it has the same significance in Section 8 subd. (h). The legislature could not have intended to use a significant word in two different senses in the same statute. Ransome-Crummey Company v. Woodhams, 29 Cal. App. 356, 156 P. 62; Coleman v. Oakland, 110 Cal.App. 715, 295 P. 59.

[5] Since the gross income and specified deductions are the factors included in arriving at the net income, the conclusion is unavoidable that it is gross income that is included in the measure of the tax.

[6] It is a significant observation that the sovereignty does not by any method of taxation seek to tax the capital of any income-producing business. It is because of this principle of preserving capital intact that deductions are allowed for depletion and depreciation. The one is designed to avoid taxation upon the exhaustion of a natural resource; the other to avoid exhaustion of property used in business.

[7] Whatever method of computing depletion be followed, under any system, the purpose is to leave in the hands of the taxpayer unappropriated that portion of the cost attributable to the amount of capital exhausted in earning the income on which any variety of tax is to be paid for the particular taxable year. In view of the extreme difficulty of deriving a precise formula whereby mineral resources will be exhausted it was obviously determined that depletion based upon a percentage of the gross income from the mineral or oil deposit most closely approximates the actual physical exhaustion. Such was evidently in the mind of Congress in enacting section 114 of the Revenue Act of 1936 whereby it was provided that the exhaustion of capital should be allocated to those years in which it was actually sustained by the coordination of income received from the property within the taxable year. From the Federal Revenue Act and our own Franchise Tax Act it appears that percentage depletion is not a dole to mine and oil operators. It is found to be a valuable factor in computing the current income of the taxpayer and is deducted from the gross income and must be taken into account in order to determine the taxpayer's basis for gain or loss on a sale or exchange of the property and to compute future cost depletion. If it represents a positive exhaustion of the capital it should be deducted by the owner of the property as a method of avoiding the exhaustion of his capital. If it is properly deducted in computing the oil operator's income for dividend purposes it should not thereafter be charged to the recipient corporation in computing his income for franchise

tax purposes. To avoid such a hardship the recipient is authorized to deduct the dividend which has passed through the tax mill before its distribution by the declaring corporation. Plaintiff was entitled to deduct the dividend because it had been paid by a domestic corporation out of income which had been included in the measure of the franchise tax assessed against such domestic corporation.

Defendant maintains that the Belridge dividend is not deductible in full by plaintiff because it represents Belridge income which had been computed on a basis which was in excess of depletion computed on the basis of cost. Not only does the Act make no provision for computing depletion on the basis of cost but by the very federal statute incorporated into the Act it is specifically provided that 27½ per centum of the gross income shall be allowed for depletion.

Finally, the defense is based upon the fallacious concepts (1) that a portion of the Belridge dividend was paid from an untaxed source and (2) that it was declared from franchise tax net income and from the excess of the statutory percentage depletion over cost depletion. That such are erroneous deductions must be clear to the impartial student after a study of the Act and a consideration of its design. The "net income" referred to in the Act serves no function except that of comprising a factor in the formula whereby to compute the amount of the franchise tax. If used in the sense of a fund for dividends, it is at once seen that it has no relation to the corporation's actual earnings. Inasmuch as the excess of the percentage depletion over cost depletion had no effect upon the declaration of dividends, the Belridge dividend of $465,000 was not declared out of such excess. Whether the amount of net income for the purpose of computing the franchise tax is increased or decreased by any adjustment which does not at the same time proportionately enlarge or diminish profits, it will not affect either the declaration of a dividend or the amount thereof. The "excess" of statutory depletion allowance does not augment the fund available for dividends. Such allowance is for the purpose of preventing a depletion of capital. If it should unwisely be distributed along with the net earnings in the form of dividends, the capital investment of the corporation would ultimately have all been paid out to the shareholders. But if it is kept intact as a reserve for depletion it performs its function as does any other reserve set aside for the purpose of perpetuating the capital assets. Since gross income is the original source of all dividends and since all of the Belridge income was reported as gross income, all of its dividends were from a fund which had been flailed by the tax master which fund was itself the measure of the tax.

[8] For these reasons we conclude that the dividend paid plaintiff by Belridge was a deductible item in computing plaintiff's franchise tax in 1938; that a percentage depletion deduction was proper rather than a depletion deduction based upon cost.

It is therefore ordered, adjudged and decreed that the judgment be and it is hereby reversed and the court below is directed to enter judgment in favor of plaintiff as prayed.

McCOMB, J., concurs.

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60 Cal.App.2d 189

Ex parte WHITLATCH.

Cr. No. 1828.

District Court of Appeal, Third District, California.

Aug. 9, 1943.

1. Criminal law 🔑**304(2)**

Court takes judicial notice that it was dark and moon was not shining at a designated time and place on a specified date.

2. Automobiles 🔑**344**

Under 1941 amendment to section of Vehicle Code dealing with negligent homicide, something more than ordinary negligence is required to constitute the offense. Vehicle Code, § 500, St.1941, p. 1414.

3. Automobiles 🔑**344**

Language used in amendment to section of Vehicle Code dealing with negligent homicide should be interpreted in accordance with definitions given by courts to similar terms, if such definitions may reasonably be said to fit the particular words used. Vehicle Code, § 500, St.1941, p. 1414.

4. Automobiles ⚷181(1)

"Willful misconduct" within meaning of section of Vehicle Code dealing with civil liability of motorists for injuries to guest implies, at least, intentional doing of something either with knowledge that serious injury is probable result or intentional doing of an act with wanton and reckless disregard of its possible result. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

5. Negligence ⚷11

Actor's conduct is in "reckless disregard of safety of another" if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that such conduct not only creates unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to him.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Disregard of Safety of Others".

6. Criminal law ⚷238

Mere inferences that accused was driving automobile at night at excessive speed and must have seen automobile stalled partly on pavement in time to avoid collision in face of presumptions that accused took ordinary care of his own affairs, obeyed the law, and was innocent of crime, did not warrant conclusion that accused was operating his automobile with "reckless disregard" or "willful indifference to safety of others" so as to afford "probable cause" for holding him to answer to charge of negligent homicide. Vehicle Code § 500, St.1941, p. 1414; Code Civ. Proc. § 1963.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause" and "Willful Indifference to Safety of Others".

7. Habeas corpus ⚷21

One committed on a criminal charge without reasonable or probable cause for holding him to answer thereto is entitled to discharge on habeas corpus.

Original proceeding in the matter of the application of Gerald Whitlatch for a writ of habeas corpus to obtain release from custody under a commitment holding him to answer on a charge of negligent homicide.

Petitioner discharged.

Wallace Shepherd, of Sacramento, for petitioner.

Robert W. Kenny, Atty. Gen., T. G. Negrich, Deputy Atty. Gen., and Charles E. Johnson, Dist. Atty., of Yreka, for respondent.

ADAMS, Presiding Justice.

Petitioner was charged in the Justice's Court of Yreka Township, County of Siskiyou, with the crime of negligent homicide, in that he did "wilfully, unlawfully and feloniously drive a motor vehicle with reckless disregard and wilful indifference to the safety of others then and there injuring one Orville H. Sutter, who dies as a proximate result of said injuries." On hearing before the Justice of the Peace sitting as a committing magistrate, but three witnesses were called. Walter N. Wise testified that about 7:45 in the evening of December 9, 1942, he was proceeding north on Highway 97 near a place called Deer Mountain when he was "flagged down" by Sutter, whose car was standing on the west side of the highway, about half on and half off the pavement, headed south; that the highway was dry, though there was snow on the sides, and that it was light enough to see objects in the road. He at first said that the moon was shining, but on cross-examination could not recall whether this was true or not. He stopped his truck, a gasoline transport, on the opposite side of the highway, about 100 yards after he had passed Sutter's car, and stated that after he got out of his truck he could see the tail light burning on Sutter's car. He said that he went to Sutter's car, and while he and Sutter were standing in the road beside same, and he was examining the mechanism under the hood, he was struck and rendered temporarily unconscious; that he heard no car coming and that he could not recall that any car had passed on the highway during the time that he was there before the accident, a period of about ten minutes. When he recovered consciousness Whitlatch was assisting him to his feet, Sutter was lying in the highway, and

Sutter's car was sitting crosswise, with the end off the highway.

The second witness called was a physician who testified to the injuries sustained by Wise and Sutter, and stated that the latter died of his injuries on December 10th.

The third witness was G. B. Daley, a captain of the California Highway Patrol, who was called to the scene of the accident. He testified that he found the Sutter car standing with the front half off the pavement, and the back half on; that defendant's car was near the right-of-way fence on the east or opposite side of the highway, with the front end badly damaged. It was approximately 100 feet east of the center line of the pavement, there were skid marks on the highway from the rear of Sutter's car, and from the point where they first appeared to the point where defendant's car came to rest was a distance of 168 feet; that the Sutter car had been struck in and to the left of the center of the rear, the body of same being driven forward and the frame bent. The defendant's car had the grilling on the radiator broken and bent, its headlights broken, its fenders torn loose and the front axle bent. This witness also testified that as he was proceeding to the scene of the accident he passed a car in which Whitlatch was riding and that the latter stated to him that he had had an accident and had hit a man and thought he was killed. It was admitted that no flares or warning signals were put out by either Sutter or Wise.

The Justice of the Peace, after hearing the foregoing testimony, made his order holding the said defendant to answer, his bail being fixed in the sum of $2,500.

Having been committed to the custody of the sheriff, Whitlatch petitioned this court for a writ of habeas corpus, contending that his imprisonment and detention by the sheriff were unlawful, that his commitment had been made without reasonable or probable cause, and that the evidence failed to show the commission of a criminal offense. The writ having issued, the sheriff answered denying the allegations of the petition, and attaching to his answer a transcript of the proceedings in the Justice's Court.

Section 500 of the Vehicle Code, as amended in 1941, St.1941, p. 1414, and in force at the time of the accident in this case, provides: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to, the safety of others, the person so operating such vehicle shall be guilty of negligent homicide, a felony, and upon conviction thereof shall be punished by imprisonment in the county jail for not more than one year or in the State prison for not more than three years."

The question in this case is, then, whether the evidence adduced before the committing magistrate is sufficient to show reasonable grounds for concluding that Sutter's death was the proximate result of the driving of a vehicle by defendant "with reckless disregard of, or wilful indifference to the safety of others."

[1] Respondent, in support of the action of the committing magistrate, says in his brief that a fair and reasonable inference to be drawn from the circumstantial evidence and the physical facts presented, is that the automobile driven by the defendant was traveling at an excessive high rate of speed when it collided with the rear end of the decedent's automobile that was stalled upon and partly obstructing the right lane of the roadway ahead of defendant's automobile; that the evidence shows that this obstruction was in plain view of a person traveling this highway at this point at least three hundred yards each way from the point of collision and that the tail light on the decedent's automobile, from the evidence adduced, was plainly visible at least three hundred feet, if not more, in the direction from which the defendant was proceeding with his automobile; and that seeing this obstruction in the roadway, as it must be inferred and presumed that he saw it, he must have known that this obstruction existed in ample time to slacken his speed and bring his automobile under control to avoid striking the obstruction, and that it must have been apparent to him that if he struck the obstruction, he would endanger the life of anyone in or near the automobile that was partly obstructing the highway. From the foregoing it is obvious that respondent contends that it was proper to hold defendant to answer on inferences alone, to wit, an inference that defendant was traveling at an excessive rate of speed, an inference that Sutter's car was visible at least three hundred yards from the point of collision,

an inference that the tail light on Sutter's car was plainly visible at least three hundred feet away, an inference that defendant saw the obstruction in ample time to avoid it, and an inference that he wilfully disregarded or was wilfully indifferent to the safety of persons who might be in or near said car. However, it was not shown that Sutter's car was in plain view of a person traveling the highway at this point at least three hundred yards each way from the point of collision. Respondent apparently relies upon the following questions and answers during the examination of Wise:

"Q. You were traveling north? A. I was going north and he was going south.

"Q. What part of the mountain was this? A. Well, just as near as I can explain, it was just about what you could say was the summit.

"Q. On the top there? A. Yes.

"Q. On the top there, is there quite a long distance there? A. Yes, there is. I would say a person could see 300 yards either way."

This is not evidence as to the visibility the night of the accident, and there is no other evidence from which it could be deduced that there was a visibility in either direction of three hundred yards. Wise did testify that when he got out of his truck about 100 yards from Sutter's car, he could see the tail light of same; but he was walking toward it with Sutter after he had passed the Sutter car and been flagged down. The time was 7:45 p. m. and the date was December 9th. That it was after dark and that there was no moon are facts of which we take judicial notice. That there was little traffic appears from Wise's testimony; and that Sutter's car was partly on the highway in defendant's lane of travel, and Sutter and Wise were both beside it in the traffic lane is conceded. There was no testimony as to the rate of speed at which defendant was traveling, and that he was "traveling at an excessive rate of speed" is merely deduced from the location of his car after the collision and the condition of both cars.

[2-5] As to what constitutes driving a vehicle with reckless disregard of or wilful indifference to the safety of others, within the language of section 500 of the Vehicle Code, the Supreme Court said, in People v. Young, 20 Cal.2d 832, 129 P.2d 353, 356, that the amendment of the said section in 1941 shows that the legislature intended that something more than ordinary negligence is required to constitute the offense; that the language used in the amendment should be interpreted in accordance with the definitions given by the courts to similar terms; and that therefore the construction put upon like words used in cases dealing with the liability of a host for injury to his guest, under section 403 of the Vehicle Code, St.1935, p. 154, is applicable. It cited and quoted from Howard v. Howard, 132 Cal.App. 124, 129, 22 P.2d 279, to the effect that: "But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

It also said (20 Cal.2d at page 837, 129 P.2d at page 356): "'The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.' Restatement, Torts, § 500. There may have been instances in which the phrase 'reckless disregard for the safety of others' has been considered as conduct less reprehensible than that described in the above quotation, but it must be remembered that we are here interpreting a criminal statute carrying a severe penalty, and thus it is reasonable to suppose that the Legislature was concerned with conduct which was at least quasi criminal in character."

It then went on to say that speed alone or inattention to the roadway alone does not constitute wilful misconduct (citing Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165); that colliding with a car at an intersection while traveling sixty miles an hour is not wilful misconduct (citing McCann v. Hoffman, 9 Cal.2d 279, 70 P. 2d 909); and it was concluded that, where defendant was driving an automobile about twenty-five or thirty miles an hour behind a street car, and did not stop at the rear of same as it slowed down to stop, as required by section 571 of the Vehicle Code, St.1935, p. 189, but proceeded to pass the stopped car and struck decedent who had alighted from the front door of the street car, the evidence was insufficient to sustain a conviction under section 500 of the Vehicle Code; that the negligence of defendant did not constitute reckless disregard of or wilful indifference to the safety of others.

In People v. Montes, 56 Cal.App.2d 30, 131 P.2d 581, where defendant drove through a stop sign at about thirty-five miles per hour and collided with another car, killing the driver thereof, and where a witness saw the cars when they were 250 or 300 feet away from him, showing that the view of the intersection was unobstructed for that distance, the court said that the evidence showed that defendant was negligent but that the circumstances under which such negligence occurred were not such that they amounted to recklessly ignoring the safety of others by intentionally doing acts with wanton and reckless disregard of their possible result; and that the circumstances were not such that they amounted to an intentional lack of regard concerning the safety of others by intentionally doing something with knowledge that serious injury was a probable result.

In Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165, cited in the Young case, defendant drove his car some 21 inches over the center line of the highway while crossing a curved portion of a bridge, and collided with an oncoming car, though he had been warned by his guest passenger that he was on the wrong side of the highway. The court, holding that wilful misconduct was not shown, said at page 426 of 31 Cal.App.2d, at page 167 of 88 P.2d: "In order to support the conclusion of wilful misconduct the quoted finding must affirmatively show that defendant intentionally did something in the operation of his motor vehicle which he should not have done, or intentionally failed to do something he should have done, under circumstances disclosing either an express knowledge on his part or a knowledge to be implied from the facts and imputed to him under the surrounding circumstances, that injury to his guest would be a probable (not a possible) result. Though there need be no actual conscious intent to injure the guest, the act done or the omission made must be intentional."

[6] The evidence here adduced does not affirmatively show that petitioner intentionally did something in the operation of his car which he should not have done, or intentionally failed to do something he should have done. Inferences alone are indulged in support of the finding of the committing magistrate that "the offense of negligent homicide has been committed and that there is sufficient cause to believe" the defendant guilty thereof. As opposed to such inferences are the presumptions that defendant took ordinary care of his own affairs, that he obeyed the law and that he is innocent of crime. Sec. 1963, C.C.P.

[7] We conclude that, petitioner having been committed on a criminal charge without reasonable or probable cause, he should be discharged; and it is so ordered.

PEEK and THOMPSON, JJ., concur.

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60 Cal.App.2d 196

PEOPLE v. MORALES.

Cr. No. 556.

District Court of Appeal, Fourth District,
California.
Aug. 9, 1943.

1. Homicide 🔑250

Evidence supported conviction of manslaughter based on death of defendant's four year old granddaughter from a form of pneumonia which was directly caused by defendant's treatment of the little girl and a blow defendant had inflicted upon her.

2. Criminal law 🔑1174(6)

Where it did not appear that allowing jury to take three exhibits into jury room without having made any request for them in any way prejudiced the defendant, the error, if any, in permitting such occurrence did not justify a reversal.

3. Criminal law ⚷1186(4)

A mere technical violation of defendant's right to be present at all stages of trial is not necessarily ground for reversing a judgment of conviction. Pen.Code, §§ 1043, 1181; Const. art. 6, § 4½.

4. Criminal law ⚷1186(4)

In determining whether a violation of defendant's right to be present at all stages of his trial necessitates a reversal of a judgment of conviction, the determining question is whether any prejudice to defendant's substantial rights appears. Pen.Code, §§ 1043, 1181; Const. art. 6, § 4½.

5. Criminal law ⚷1166½(1)

The inadvertent re-reading of instructions to jury in absence of defendant did not entitle defendant to a new trial on ground that her right to be present at all stages of trial were violated, where evidence was unusually convincing. Pen.Code §§ 1043, 1181.

6. Criminal law ⚷660

Where defendant's counsel learned of re-reading of the instructions to jury in absence of defendant before a verdict was reached but did not inform trial court of the irregularity until thereafter, defendant "waived" the right to have been present at the re-reading of the instructions, in absence of a showing of prejudice. Pen. Code, §§ 1043, 1181.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

◆

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Christina Morales was convicted of manslaughter, and she appeals.

Affirmed.

Edmond A. Chevalier and Lester N. Gonser, both of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of manslaughter in connection with the death of her four-year old granddaughter. A jury found her guilty and she appeals from the judgment and from an order denying her motion for a new trial.

[1] It is first contended that the evidence is insufficient to sustain the verdict. The story disclosed by the testimony in this case is a pathetic one and it would serve no useful purpose to set forth any of the details here. A very general reference to some of the facts brought out in the evidence will be sufficient. The little girl had been living with the appellant for some months, having been abandoned by her father and mother. Apparently, the appellant resented the presence of the child and certain extra work and attention required by the child, and it rather clearly appears that she developed a dislike for the little girl. The testimony of a number of witnesses shows a continued course of neglect, exposure and abuse over a period of more than three months preceding the death of the child. This included not only depriving the child of proper food and exposing her to the elements in very cold weather, but also repeated and frequent whippings or beatings administered in a ruthless and brutal manner. The autopsy surgeon testified that the body of the little girl appeared to be undernourished, that both of the eyes had been blacked, that there were a number of abrasions and contusions on the arms and legs, and that there was an injury to the forehead which he thought had been caused by a single blow. He further testified that the cause of death was lobar pneumonia, that previous exposure and treatment had probably contributed to this but that the head injury "is the thing that precipitated it." There is evidence which justifies the inference that this child had been beaten by the appellant during the night preceding her death. While there is some conflict the evidence, as a whole, clearly indicates that the death of this child resulted from a form of pneumonia which was directly caused by the appellant's treatment of the little girl and a blow she had inflicted upon her. A reading of the record compels the conclusion that the evidence is sufficient and ample to support the judgment.

[2] Some contention is made that prejudicial error appears in that the jury was allowed to take three exhibits into the jury room without having made any request for them. In its instructions the court told the jury that it was entitled to take the exhibits if it so desired. While no such request was made the clerk of the court handed to the jury three exhibits, be-

ing two photographs of the dead body of the little girl and a leather strap with which, according to the evidence, the appellant had sometimes whipped the girl. Before the jury brought in its verdict counsel for the appellant called the matter to the attention of the court and the court offered to have the only remaining exhibit, which was a blackboard used during the trial, sent in so that all of the exhibits would be before the jury. Counsel for the appellant replied that it was unnecessary to do this. It is now contended that although the jury was entitled to take these exhibits it was error to permit this to be done without a specific request therefor from the jury. Assuming, but not holding, that any error appears, no prejudice is shown and any possible error in this regard would not justify a reversal.

The main point raised is that the appellant is entitled to a new trial under sections 1043 and 1181 of the Penal Code because the instructions were re-read to the jury in her absence. Insofar as material here section 1043 provides that "The defendant must be personally present at the trial", and section 1181 provides that when a trial has been had in defendant's absence "the court may * * * grant a new trial." It appears from the record that the instructions were first read to the jury in the presence of the appellant and her counsel. When the jury went out the appellant was removed to the jail. During its deliberation the jury made a request that the court re-read to it some of the instructions. The jury was returned to the court room and all of the instructions were again read to it, word for word, as they had been read in the first instance. No one noticed or thought of the fact that the appellant was not present. After the jury had returned to the jury room, and before they had reached a verdict, counsel for the appellant discovered that she had been absent from the court room during the second reading of the instructions, but this fact was not called to the attention of the court until after the jury had returned its verdict and had been discharged. The matter was presented on the motion for a new trial.

In People v. Soto, 65 Cal. 621, 4 P. 664, 665, a similar thing occurred. However, in that case, the irregularity was discovered before the jury had reached a verdict and the instructions were again read to the jury in the presence of the defendant and the jury was further instructed to disregard what had taken place in the defendant's absence. In holding that any error had been cured the court there said: "It is manifest no injury could have been done defendant by reason of that which occurred while he was absent." In People v. Guareno, 22 Cal.App.2d 82, 70 P.2d 504, the defendant was seized with a coughing spell while the instructions were being read to the jury. He was permitted to go into the judge's chambers, which adjoined the court room, and thence into a lavatory. He returned to the court room within a few minutes and it was contended on appeal that his temporary absence required the granting of a new trial. The court referred to the fact that it did not affirmatively appear that the defendant was not within hearing at all times and then pointed out that it was unnecessary for the defendant to except to any of the instructions being given in order to protect his rights, and that the defendant might waive his statutory right to be present during the time in question. It was then held that no prejudice appeared and the judgment and order denying a new trial were affirmed. In People v. White, 20 Cal.App. 156, 128 P. 417, the jury was taken to view the premises while the defendant remained in the court room. This point was raised on appeal. It was there stated that in viewing the premises the jury was receiving evidence, that the defendant had a right to be present which, if demanded, could not be denied him without committing a serious irregularity, that this right is one which could be waived, and that if it could fairly be said that he had waived this right he would not be heard to complain that he had wrongfully been deprived of it. Since no objection had been made either by the defendant or by his counsel who knew of the situation, and since no prejudice appeared, it was held that the right had been waived and the judgment was affirmed. In People v. La Munion, 64 Mich. 709, 31 N.W. 593, 596, a part of the instructions were re-read to the jury in the absence of the defendant and of his counsel. The court there said: "We are unable to see in what manner the (defendant) could have been prejudiced by these proceedings." In Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 204, 28 L.Ed. 262, the requirement that a defendant "be personally present at the trial" is defined as requiring his presence "at every stage of the trial when his substantial rights may be affected by the proceedings against him."

[3, 4] While, unquestionably, such a defendant has a right to be present at all stages of his trial, the principle running through the cases just cited is that a mere technical violation of that right is not necessarily ground for reversing a judgment of conviction. In each case the determining question has been whether or not any prejudice to the substantial rights of the defendant appears. In two of the cases it was held that this right might be waived by the defendant under the circumstances and in one, People v. White, supra, it was held that the defendant's attorney could, and did, waive the right by failing to make any demand or objection when he knew that the defendant was not present.

These principles are especially applicable in view of the provision of section 4½ of article VI of our Constitution that a judgment shall not be set aside "for any error as to any matter of procedure", unless it appears that the error has resulted in a miscarriage of justice.

[5, 6] Applying these rules here, we are unable to hold that there was any possible prejudice to this appellant and we are not of the opinion that any miscarriage of justice has resulted. Not only was the evidence of guilt unusually convincing in this case, but it is inconceivable that the presence of the appellant during the second reading of these instructions could have in any way or manner improved her position, or have had any practical effect upon her substantial rights or upon the verdict of the jury. It appears, without conflict, that this appellant did not understand a word of the English language and, so far as she is concerned, her presence could have contributed nothing other than a mere technical compliance with this rule of law. The instructions were re-read exactly as they had been read before and nothing occurred which had not already occurred in the presence of the appellant. The error was entirely inadvertent and no one, including appellant's counsel, thought of the fact that she was absent. Her counsel discovered this fact before a verdict was reached but preferred not to inform the court of the irregularity. In the absence of a showing of prejudice, at least, neither a defendant nor his counsel should be permitted to thus speculate on the action of a jury. The error could easily have been corrected had it been called to the court's attention after it was discovered and, by not disclosing it, counsel should be held to have waived it. In any event, no prejudice appears and the constitutional provision, to which we have referred, is applicable.

The judgment and the order denying a new trial are affirmed.

MARKS and GRIFFIN, JJ., concur.

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60 Cal.App.2d 201

FONG BROS. v. GEIGER, Director of Health, et al.

Civ. No. 12374.

District Court of Appeal, First District, Division 1, California.

Aug. 11, 1943.

1. Mandamus ⟹164(1)

In mandamus, a party is not entitled as a matter of right to answer after demurrer to petition is overruled, but court has discretion to allow an answer. Code Civ.Proc. § 472.

2. Mandamus ⟹164(1)

Where respondents answered after their demurrer to petition for writ of mandamus was overruled, denial of petitioner's motion to strike answer was equivalent to the granting permission to respondents to file answer. Code Civ.Proc. § 472.

3. Mandamus ⟹187(2)

Order granting permission to answer over after demurrer to mandamus petition has been overruled is always subject to review. Code Civ.Proc. § 472.

4. Mandamus ⟹168(3)

In mandamus to compel issuance of city license for distribution of fluid milk, if application for license could legally have been denied upon grounds other than those stated when application was denied, evidence of such grounds should be introduced in addition to proof of particular one upon which license was formerly refused.

5. Mandamus ⚿168(3)

Where city ordinance relating to licensing of fluid milk distributors required as prerequisite to issuance of a license an investigation of statements made in application and of sanitary facilities, in mandamus to compel issuance of license, to negative allegation that refusal to license petitioner was arbitrary and capricious, it was proper for licensing authorities to show such investigation and result thereof.

6. Mandamus ⚿168(4)

Where Chinese petitioner in mandamus to compel issuance of city fluid milk distributor's license produced no evidence of any prejudice against petitioner because of race or that permits were granted to Caucasians who conducted a milk business in an unsanitary manner or under a false label, assertion that license was refused in violation of petitioner's constitutional rights based upon prejudice could not be sustained.

7. Municipal corporations ⚿592(1)

Under statute providing that licenses issued under terms of Agricultural Code for milk industry are in addition to licenses or ordinances of counties and municipalities, San Francisco department of health was not limited to granting of permits for fluid milk distribution to producers handling fluid milk and holding distributors' permits issued by agricultural department. St.1941, pp. 3008, 3019, §§ 735.3(f), 737.5.

◆

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Mandamus by Fong Bros., a copartnership, against Dr. J. C. Geiger, as Director of Health, Department of Health, City and County of San Francisco, and others to compel respondents to issue a permit for the distribution of fluid milk and fluid cream. From a judgment dismissing its petition, plaintiff appeals.

Affirmed.

Robert L. Levy, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondent.

WARD, Justice.

An appeal by petitioner, a copartnership, from an order and judgment of the superior court dismissing its petition for a writ of mandate to compel respondents to issue a permit for the distribution of fluid milk and fluid cream under the provisions of section 486, Part II, Ch. V, Art. 9 of the Municipal Code of the City and County of San Francisco. This section provides that a permit must be obtained from the director of public health before there may be offered for sale, exposed for sale, sold or delivered for distribution, sale, use or consumption within the City and County of San Francisco, any milk, etc. In order to procure a permit the applicant must file a written application containing specified information. If the statements made therein are true, and it appears that the applicant does not intend to dispose of unwholesome milk as food for human beings, and that the handling is to be under sanitary conditions and in conformity with certain regulations, the permit must be issued.

The petition herein alleged that an application was filed in the manner prescribed by law for a permit to engage in the distribution of fluid milk and fluid cream, and that the application was refused; "That said refusal is and was arbitrary, capricious and based upon prejudice and bias in that petitioners herein are of Oriental extraction"; that petitioner has not been accorded equal rights under the law with others engaged in the same line of business, which "is an abridgement of constitutional rights"; that it has been engaged in delivering milk exclusively in the Chinatown district, and that respondents have caused the arrest of one of the members of the copartnership and have harassed petitioner.

An order for an alternative writ was made on the date the petition was filed and the alternative writ thereafter issued. A demurrer filed to the petition was overruled, and subsequently after several continuances the matter was heard on the order to show cause. Some time after the hearing an answer was filed which admitted and denied certain allegations of the petition, and alleged that "William Fong, one of the members of said partnership, was arrested on two different occasions, and further alleges that said petitioner, and particularly William Fong was convicted of the offense charged." The answer "further alleges that under the law and ordinances in existence in the City and County of San Francisco, and the State of California, respondent is without authority or right to grant a peddler's license as requested by petitioner, and further alleges that petitioner comes into this court of equity with unclean hands in this, that said petitioner has delivered milk in a falsely labeled truck, and has filled cans of milk from quart bottles, all of which is against the Agricultural Code of the State of California." Petitioner moved to strike the answer from the file, which motion was denied. The court found in accordance with respondents' contentions and entered judgment.

[1-3] The question of the propriety of filing the answer may be disposed of immediately. Petitioner contends that in a mandamus proceeding a party is not entitled as a matter of right to answer after demurrer to the petition is overruled. Homestake Mining Company v. Superior Court (Private Investors v. Homestake Min. Co.), 11 Cal.App.2d 488, 54 P.2d 535. The question is clarified by the following extracts from that opinion (pages 492, 493 of 11 Cal.App.2d, page 537 of 54 P.2d): "The position assumed by the petitioners here is that 'as a matter of right' they were entitled to answer over after their demurrer was overruled, and therefore, 'as a matter of right' they are entitled to a supersedeas. Petitioners are wrong in both instances. There is no absolute right to answer over in any civil case. Section 472 of the Code of Civil Procedure provides: 'A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed.'" "Section 472 of the Code, and section 67 of the Practice Act which preceded it, have been uniformly held to confer upon the trial court discretion to grant or deny leave to answer after a demurrer is overruled." It is clear that the emphasis should be placed on the words "as a matter of right" but in the present case the denial of the motion to strike the answer is the equivalent to permission that the answer be filed. The order granting permission is always subject to review, to be decided according to the particular circumstances of the case. In the Homestake decision, supra, 11 Cal.App.2d page 494, 54 P.2d page 537, the court said: "* * * the courts will always presume that another court acting within its jurisdiction has acted with judicial discretion. If the claim is made that such discretion has been abused, some showing must be made to rebut that presumption." In the present case it does not appear that the trial court abused its discretion.

The reason assigned for the refusal of the permit was that petitioner was conducting his business of distributing and delivering milk in a business district zone, whereas under the zoning laws of the City and County of San Francisco such business may be conducted only in a light industrial zone. Petitioner did not introduce evidence to the contrary, and this appeal might well be determined at this point except that other issues were raised by the petition—prejudice, etc.—upon which respondents proved that the milk was being distributed by petitioner in a truck falsely labeled; that containers had been refilled contrary to the provisions of the Agricultural Code of the State of California; that the milk was not processed or pasteurized at the place of business; and that on at least one occasion petitioner had been found guilty of violating section 486, supra. Evidence was introduced also that there are no proper facilities at petitioner's place of business for the washing and sterilization of cans and bottles. In short, it appears that in the conduct of the business petitioner had indulged in various unsanitary practices.

[4] The practice of acquainting an applicant with only one of the grounds upon which his application is denied is not to be commended, for the reason that he is left in ignorance of how to meet expected requirements. If the application, however, could legally have been denied upon grounds other than those stated in the "refusal," evidence of such grounds should be introduced in addition to proof of the particular one upon which the refusal was formally based. The present case illustrates the point. The applicant was refused a permit on the ground that its business was conducted in a specified zone. Petitioner might have obviated this disqualification but still might have continued to conduct his business in an unsanitary manner in violation of the provisions of a statute or ordinance or board ruling. An unqualified applicant should not be given the right to conduct a business in an unauthorized manner merely because the administrative body has designated an illegal ground for its refusal to issue a permit. In the present case the petitioner's claim that it was not accorded equal rights under the law with others engaged in the same business furnishes an additional reason for the introduction of

the character of evidence above referred to. The evidence tended to show other grounds sufficient to justify the refusal, including that of unsanitary conditions.

[5] Section 486 requires an investigation of the statements in an application and of the sanitary facilities connected with the business. The issuance of the permit depends upon both factors. By way of negativing an allegation in the petition that respondents acted arbitrarily or capriciously, it was proper to show that the latter had made investigation, and to present the result thereof.

[6] Petitioner claims that the action of respondents is an abridgement of its constitutional right. There is a fundamental distinction between the facts in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, where a license to conduct a laundry was refused a Chinese and under similar circumstances given Caucasians, and those herein. In both cases there appears a lack of consent or approval by a duly constituted legal body. In the Yick Wo case there was no evidence that petitioner had not complied with all legal regulations as had Caucasians to whom permits were granted, except in the matter of operating without a license. In the present case, there is no evidence that a permit was ever granted a Caucasian conducting a milk business in an unsanitary manner or under a false label. Petitioner did not introduce any evidence that there was any prejudice against it because its members were of Oriental extraction.

[7] The final contention of petitioner is that under the definition of "distributor" in California Agricultural Code, Div. 4, Ch. 10, Art. 1, sec. 735.3, subd. (f), St. 1941 p. 3008, the authority of respondents is limited to the granting of permits to any one who is a producer handling fluid milk, etc., and who holds a distributor's permit issued by the Agricultural Department of the State of California. The licenses issued under the terms of the Agricultural Code for the milk industry "are in addition to any and all licenses * * * or any law or ordinance of any county or municipality of this State." Section 737. 5, St.1941, p. 3019.

The findings of fact are supported by the evidence and they in turn support the judgment, which is hereby affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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60 Cal.App.2d 177

TAKASHI KATAOKA et al. v. MAY DEPARTMENT STORES CO. et al.

Civ. 13822.

District Court of Appeal, Second District,
Division 3, California.
Aug. 9, 1943.

Hearing Denied Oct. 7, 1943.

1. Trial 🔑178

The trial court, in passing on motion for directed verdict, has no power to weigh evidence, but must view it in light most favorable to party against whom direction is asked and accept every legitimate inference and presumption therefrom in his favor, and motion can be granted only when result of such consideration of evidence is determination that there is no evidence of sufficient substantiality to support a verdict for such party.

2. Carriers 🔑238
Negligence 🔑32(4)

A minor child, not using escalator in department store as means of transportation before or at time of his injury by catching hand in escalator while his mother, who took child with her when she went to store on business errand, was talking to department manager, was not a "passenger" within rule requiring carrier to exercise highest degree of care toward passengers, but "business invitee", to whom store owner owed duty to use ordinary care to keep premises reasonably safe.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitee" and "Passenger".

3. Negligence 🔑4

"Ordinary care" is relative, and standard by which it is measured varies with circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Care".

4. Negligence 🔑10

Care exercised by party for another's safety must be in proportion to danger to be avoided and consequences that may reasonably be anticipated as result of negligent conduct.

5. Negligence 🔑7, 85(2)

A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such children are chargeable with knowledge of such fact and bound to exercise greater amount of caution than in dealing with adults.

6. Negligence ⇨32(4)

The rule that persons dealing with children of immature years are chargeable with knowledge that such children are expected to exercise only such care as pertains to childhood and bound to exercise greater caution than in dealing with adults must be given full effect as between operator of business and children whom he invites to come on his premises for business reasons.

7. Negligence ⇨23(1), 32(4)

In action against store owner for injuries to minor child catching hand in escalator after being taken to store by his mother on business errand, rule applicable in determining defendant's duty is not "attractive nuisance doctrine", but that requiring ordinary care to make premises safe for invitees, as qualified by rule that special caution is necessary where invitees are children, but such rule exacts of one inviting children on his premises no less caution than landowner, who knows that trespassing children are in habit of playing around his attractive nuisance, must exercise.

See Words and Phrases, Permanent Edition, for all other definitions of "Attractive Nuisance Doctrine".

8. Negligence ⇨32(4)

One inviting children on his premises must take precautions dictated by ordinary care to protect them from injury by any instrumentality on premises which is likely to attract them and subject them to dangers which reasonably prudent person would anticipate.

9. Negligence ⇨136(16, 19, 24)

In action against store owner for injuries to minor child catching his hand in escalator, whether escalator was object naturally attractive to children, whether defendant in exercise of ordinary care should have known of such fact and anticipated accidents such as that which happened, and whether ordinary care required stationing of guard at escalator or other precautions, *held* for jury.

10. Negligence ⇨54

A floor manager of store department, wherein minor child sustained injuries by catching his hand in escalator, regarding which such manager had no responsibility except to stop and start it in case of accident, was not liable for such injuries on grounds of negligence in failing to exercise ordinary care to make premises safe for invitees and to protect invited children from injuries by instrumentality likely to attract them and subject them to dangers which reasonably prudent person would anticipate.

11. Negligence ⇨8

A store owner's department manager *held* not liable for injuries to customer's minor child, catching his hand in escalator, on grounds that manager was negligent in trying to extract hand after stopping escalator and in reversing it instead of calling mechanic to remove comb plate, which would have required 15 or 20 minutes, even if such reversal aggravated child's injuries.

12. Negligence ⇨121(3)

In action against store owner and department manager for injuries to minor child catching hand in escalator, "res ipsa loquitur" doctrine *held* inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

13. Negligence ⇨121(2)

A fundamental element of "res ipsa loquitur" doctrine is that thing causing injury be under defendant's management and control.

14. Negligence ⇨121(2)

The reason for "res ipsa loquitur" doctrine is that ordinarily injured person is not in position to know more than that he was injured by some unusual movement of instrumentality, whereas one who operates such instrumentality should know and be able to explain precise cause of accident.

15. Negligence ⇨121(2)

Where evidence affirmatively shows that operator or manager of instrumentality, by means of which injuries were inflicted, has no superior knowledge of, or is unable by exercise of reasonable care to secure information regarding, cause of accident, or establishes that plaintiff possesses all such knowledge or information reasonably accessible to operator, "res ipsa loquitur" doctrine is inapplicable.

16. Negligence ⇨89(2)

A wife's negligence in caring for children of herself and her husband is imputable to husband and a defense to action by him in community's behalf to recover damages for children's injuries to which such negligence contributed.

17. Negligence ⚿136(30)

In action against store owner and department manager for injuries to minor child catching his hand in escalator, whether plaintiff's mother was guilty of contributory negligence in failing to keep proper watch over plaintiff and prevent him from getting hand caught *held* for jury.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Takashi Kataoka, a minor, by his guardian ad litem, Toki Kataoka, and Tsutomu Kataoka, minor plaintiff's father, against the May Department Stores Company and Jerry Goddard for personal injuries to minor plaintiff and the cost of medical, hospital, and nursing treatment. Judgment for defendants, and plaintiffs appeal.

Judgment for defendant Goddard affirmed, and judgment for defendant company reversed and cause remanded for new trial as to such defendant.

For prior opinion, see, Cal.App., 139 P.2d 25.

Albert E. Coger, of Los Angeles, for appellants.

Schell & Delamer, of Los Angeles, for respondents.

SHAW, Justice pro tem.

This action is brought to recover damages for personal injuries suffered by plaintiff, Takashi Kataoka, who was, when he was injured, a boy four years of age. The first three counts of the complaint set forth, in varying forms, his cause of action to recover damages for his own injuries. In a fourth count, plaintiff Tsutomu Kataoka, who is the father of the other plaintiff, seeks recovery for liabilities he has incurred for medical, hospital and nursing treatment for his son. In the following opinion the word "plaintiff" will be used to designate the plaintiff Takashi Kataoka, unless otherwise indicated. Both plaintiffs appeal from a judgment against them entered after a directed verdict in favor of defendants.

The defendant corporation conducts a large department store in the city of Los Angeles. At the time plaintiff was injured this store had, upon its third floor, a department selling infants' and children's wear, for babies and for children between the ages of two and six. Plaintiff's mother went to this department to exchange a suit bought for another of her children, taking plaintiff with her. While she waited for and talked to the manager of this department (defendant Goddard) the plaintiff was walking around at a distance of about fifteen feet from her. In the store were a series of escalators for carrying the public from floor to floor, and the place where plaintiff was walking around on the third floor was quite near to the lower end of the escalator coming down from the fourth floor to the third floor. When plaintiff's mother started to talk to defendant Goddard she called plaintiff to come to her. He was then two or three feet from the escalator and she saw him come two or three feet toward her. After that she stood diagonally facing plaintiff and talked to Goddard two or three minutes without observing plaintiff. At the end of that time she heard plaintiff cry and she and Goddard rushed to him and found his right hand caught in the escalator.

This escalator had at its lower end, fastened to the floor where the moving steps disappeared under the floor, a device designated as a "comb plate," the purpose of which was, if some passenger did not lift his feet up and step off the escalator, to slide them gradually up on the plate. This comb plate had forty or fifty teeth 3½ inches long and 9/16 inch apart. Between the comb plate and the steps as they passed under it there was a space about ¼ inch deep. There was no guard or attendant stationed at this or any of the escalators at the time of the accident, although on busy days it was the custom to have such an attendant.

Plaintiff's hand was caught in the space between the comb plate and the steps passing under it. Goddard stopped the escalator, took hold of plaintiff's wrist and tried to pull his hand out, but was unable to do so. Then he got a key which was kept near by and reversed the escalator. When it started going in the opposite direction plaintiff's hand at once came out. Two fingers were mangled, crushed and cut off, so that now only short stumps are left.

No witness saw plaintiff just before his hand was caught and hence there is no direct testimony disclosing how it happened. The theory of plaintiff's counsel is that plaintiff was attracted to the escalator by its bright appearance and moving steps, went to it and in childish curiosity reached out his hand to investigate the steps and thus got caught. Confirmatory of this theory, there is testimony by plaintiff's mother that "he was very active and he was very much interested in everything, like a boy. He was always breaking it up and trying to look into the inside, and things like that. * * * he was very anxious to know everything that was around him." There is also testimony that the sidewalls of the escalator were of steel or chrome and the steps of steel. It had been installed only ten months to a year before the accident, so the jury might infer that each of these metals was still bright. A moving device like an escalator would attract the attention of most children of plaintiff's age, but especially of one with such an active curiosity as that shown by his mother's description of plaintiff. Defendants suggest other possible causes for the plaintiff's mishap, and contend that the theory advanced in behalf of plaintiff is based on pure speculation and conjecture, but we think the jury would have been warranted by reasonably certain inferences from the evidence in accepting plaintiff's theory.

[1] The question here for decision is whether, on the foregoing facts, and a few others which we shall mention as they become pertinent to our discussion, the court should have directed a verdict for defendants. The power of the court in passing upon such a motion is strictly limited. It has no power to weigh the evidence, but must view it in the light most favorable to the party against whom the direction is asked and accept every inference and presumption in his favor that may legitimately be drawn therefrom, and the motion can be granted only when, on such a consideration of the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of that party if one were given. (Gish v. Los Angeles Ry. Corp., (1939) 13 Cal.2d 570, 573, 90 P.2d 792; Newson v. Hawley, (1928) 205 Cal. 188, 190, 270 P. 364; Wiswell v. Shinners, (1941) 47 Cal.App.2d 156, 159, 163, 117 P.2d 677; Barty v. Collins, (1930) 109 Cal.App. 94, 96, 292 P. 979.)

[2] In answering the question above put as to the propriety of the directed verdict, we deal with the defendants separately, reaching a different answer for each of them. We take up first the case of the defendant corporation. Plaintiff contends that it was required to exercise the highest degree of care toward him, likening the escalator to an elevator and citing cases where operators of elevators and escalators were held to the exercise of such care toward their passengers. But while the rule of care which plaintiff invokes may bind carriers of passengers, in proper cases, both before and after the actual carriage, it does not extend to cases where the relation of carrier and passenger does not exist. Plaintiff here was not using the escalator as a means of transportation when he was injured, he had not previously done so and there is nothing to indicate that he or his mother intended to use it thereafter. The business which his mother was then transacting, and the activities of plaintiff himself, bore no relation to the matter of transportation. Plaintiff cannot be regarded as a passenger. He was, at the time in question, simply a business invitee of defendant corporation, and to him it owed the duty which exists in all such cases, that is, to use ordinary care to keep the premises reasonably safe for those so invited to go upon them. (Koppelman v. Ambassador Hotel Co., (1939) 35 Cal.App. 2d 537, 540, 96 P.2d 196; Tuttle v. Crawford, (1936) 8 Cal.2d 126, 130, 63 P.2d 1128.)

[3, 4] "The term 'ordinary care' is a relative one, and the standard by which it is to be measured varies * * * with the circumstances attending each particular case." (19 Cal.Jur. 579; Lolli v. Market St. Ry. Co., (1941) 43 Cal.App.2d 166, 168, 110 P.2d 436.) "Care must be in proportion to the danger to be avoided and the consequences that may reasonably be anticipated as the result of conduct, and the circumstances may be such that far greater care is exacted from one party to an action than from the other." (19 Cal. Jur. 579, 580; see also Hatzakorzian v. Rucker-Fuller Desk Co., (1925) 197 Cal. 82, 98, 239 P. 709, 41 A.L.R. 1027.)

One of the factors affecting the care to be exercised may be the presence of children on the scene. In this case the accident happened in the infants' and children's wear department of a large store. While there is no evidence of the number of children visiting that department, it is clear that children under the age of six years were invited to go there and that the defendant storekeeper should have expected their presence. Children of such an age ordinarily could not appreciate the danger of putting their fingers in or around moving machinery, but would be attracted by it, especially if it were bright, and would be likely to investigate with their fingers anything to which they were attracted.

[5, 6] "A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult." (Hernandez v. Murphy, (1941) 46 Cal.App.2d 201, 208, 115 P.2d 565.) Substantially the same rule was declared in Shannon v. Central-Gaither U. School Dist., (1933) 133 Cal.App. 124, 129, 23 P.2d 769; Brizzolari v. Market St. Ry. Co., (1935) 7 Cal.App.2d 246, 248, 46 P.2d 783; and Harrison v. Gamatero, (1942) 52 Cal.App.2d 178, 183, 184, 125 P.2d 904. In the Shannon case the court quoted with approval from 45 C.J. 702 the following: "* * * the fact that children cannot and do not ordinarily exercise the same degree of prudence and care for their own safety as adults imposes upon those by whose acts or omissions a child may be injured an obligation of exercising more vigilance and caution than might be sufficient with respect to an adult, and conduct which might reach the standard of ordinary care with respect to an adult might, in the case of a child, amount to negligence or even gross negligence." In Brizzolari v. Market St. Ry. Co., supra, the court stated the rule by quoting this passage from 19 Cal.Jur. 623: "As has been seen, a child of immature years is expected to exercise only such care and self-restraint as pertains to childhood. A reasonable person is expected to know this and to govern his actions accordingly, so that when a child liable to be injured cannot be expected to exercise the usual quantum of care, a greater amount of caution is necessary on the part of the one whose act might cause injury." This rule was applied to a variety of circumstances in the cases just cited. It is a general rule applicable in any case where negligence toward children is involved and must be given full effect as between the operator of a business and children whom he invites to come upon his premises for business reasons. (45 C.J. 838.)

This matter has been considered in several cases from other jurisdictions, in which not only were escalators in stores involved, but the facts were that small children had gotten their fingers caught in them, and it has been held that the proprietors of the stores might be held liable for negligence in not anticipating and guarding against such accidents, and that the question whether their failure in that respect did constitute negligence was one of fact for the jury. (Hillerbrand v. May Mercantile Co., (1909) 141 Mo.App. 122, 121 S.W. 326, 328; Graves v. May Dept. Stores Co., (Mo.App.1941) 153 S.W.2d 778, 783; Jablonski v. May Dept. Stores Co., (Mo.App. 1941) 153 S.W.2d 786; Reynolds v. May Dept. Stores Co., (8 Cir., April 8, 1942) 127 F.2d 396; Burdine's, Inc., v. McConnell, (1941) 146 Fla. 512, 1 So.2d 462.) In Hillerbrand v. May Mercantile Co., supra, the court said: "Proprietors of premises who invite children on them must use care to keep them reasonably safe, not omitting precautions against injury from childish impulses. * * * This doctrine is but one phase of the wider doctrine that an owner must keep his premises reasonably safe for the use of people whom he invites to come on them—an application of the general doctrine with special reference to the nature of children, and in accordance with the principle that what constitutes due care in a given instance depends on the degree of danger to be apprehended. [Citing cases.] Because children are more heedless and have less discretion and capacity to avoid danger than adults, more care must be exercised by others for their safety." Part of this language was quoted with approval in Graves v. May Dept. Stores Co., supra, where the court further said: "We think the evidence in the case at bar was sufficient to warrant the jury in saying that the moving escalator was such an instrumentality as was likely to attract a small child's curiosity and likely to cause it to put its hand upon the moving step at the point where the opening was located and justified a finding that it presented a condition of such a dangerous nature to children of tender age that a reasonably prudent person, exercising ordinary care, would have anticipated such danger to a child and guarded against it." The evidence there was not substantially different from that here, except that the injured child there was only 2½ years old. It was also held, we think correctly, in Hillerbrand v. May Mercantile Co., supra, and Graves v. May Dept. Stores

Co., supra, that the fact that there was no evidence of previous similar accidents did not prevent the finding of negligence, the statement being made in the Hillerbrand case and repeated in the Graves case that "* * * the jury might say from their knowledge of the instincts of childhood that the construction and movement of the machinery was likely to excite a small child's curiosity, and allure it into thrusting its hand into the box * * *."

[7, 8] The defendants insist, especially in their argument on rehearing, that a decision against them on this point is an application of the rule of the so-called "attractive nuisance" cases, that some of the conditions necessary to the application of that rule were not shown, that plaintiff's counsel conceded in the trial court that this is not an "attractive nuisance" case, that the case was tried on the theory that it is not such a case, and that this theory cannot be abandoned on appeal and a recovery sought on some theory not presented to the trial court. It is true plaintiff's counsel did make the concession as claimed, but he has not at any time argued on appeal that this is an "attractive nuisance" case. We do not base our decision on the rule of those cases, for this is plainly not such a case. That rule has grown up as an exception to the rule that a landowner has no duty toward trespassers except to abstain from wilful or wanton injury. Here the plaintiff was not a trespasser, and there is no need to invoke a rule whose purpose is merely to relax some of the rigors of the ancient rule of non-liability to trespassers. The rule here applicable is that requiring ordinary care to make the premises safe for invitees, as qualified by the further rule that where the invitees are children special caution is necessary. But this rule exacts of the one who invites children upon his premises no less caution than must be exercised by the landowner who knows trespassing children are in the habit of playing around his "attractive nuisance." The former must be held to the necessity of taking whatever precautions ordinary care would dictate to protect the invited children from any instrumentality he maintains upon his premises which is likely to attract them and subject them to dangers which a reasonably prudent person would anticipate. The facts from which the defendant storekeeper here might be held liable on this view of the law were presented to the jury and we find nothing in the record to suggest that the case was tried on the theory that there was no such liability.

[9] We do not intend, by what we have just said, to declare that negligence of defendant corporation here was established as a matter of law, or that a verdict for it would have been without support in the evidence. But upon the evidence questions of fact arose for the jury, which should have been allowed to determine whether the escalator was of the class of objects naturally attractive to children, whether defendant corporation should in the exercise of ordinary care have known that it was of that class and anticipated accidents such as that which happened to plaintiff, and if so, whether ordinary care required the stationing of guards at the escalator or other precautions to prevent such accidents. Upon these issues findings in favor of plaintiff would have been supported and would have required judgment in his favor against the defendant corporation.

[10] The foregoing conclusions do not apply to defendant Goddard. He did not install or maintain the escalator and was not in charge of its operation. He was merely the floor manager in charge of the department of the store where plaintiff was injured. He had been instructed how to stop and start the escalator, in case accidents should happen, but is not shown to have had any other responsibility regarding it. He cannot be held liable to plaintiff on any of the grounds above suggested. Plaintiff contends, however, that other grounds of liability exist as to him, growing out of his conduct after the accident happened.

[11] This contention is based on the testimony of plaintiff's mother that plaintiff was kneeling down facing toward the escalator with his hand caught in it, that Goddard, when he came up, stopped the escalator, took hold of plaintiff's wrist and tried for "about two minutes * * * a little while" to extract the hand, that failing in this effort, Goddard reversed the escalator and "then Takashi's finger came out with the blood shooting out," that before the escalator was reversed there was no blood visible on plaintiff's hand, and the blood appeared "just when the escalator was reversed." From this plaintiff seeks to draw the conclusions that the reversal of the escalator was the cause of the loss of parts of his fingers and that Goddard was negligent in reversing

the escalator instead of calling mechanics, who were somewhere about the building, to remove the comb plate, an operation which would take 15 or 20 minutes after the mechanics arrived. In addition to the facts thus relied on by plaintiff, the mother's testimony also shows that the back of plaintiff's hand was injured "quite a bit * * * torn and blistered like." These facts do not justify the inferences suggested by plaintiff. From the fact that the back of the hand received the injuries above stated—injuries which were impossible unless the back of the hand were drawn in between comb plate and step—it is clear that the fingers were not visible when plaintiff's mother looked at the hand before the escalator was reversed. Hence her failure to see blood affords no basis for an inference that the fingers were not then bleeding. It is easy to understand how the forward movement of the steps pulling on the fingers when the hand was caught in the escalator might inflict the injuries suffered by the fingers; but it is not so clear how the backward movement of the steps, freeing the fingers from detention, could have produced that result. We have no information regarding the internal construction of the escalator to aid us in reaching the conclusion that it did so. Any such conclusion must be based on pure conjecture, which is not a basis on which a verdict may be founded.

Moreover, Goddard knew that it would take 15 or 20 minutes to remove the comb plate and thus free plaintiff's hand, after the mechanics arrived, in addition to the time necessary to get them there. He had discovered that the hand could not be released by such efforts as he could make with the escalator stopped. Plaintiff was already crying with the pain of his injuries. Goddard's conclusion that a reversal of the escalator would at once free the hand was a reasonable one, under the circumstances, and was proved correct by the event. It is not shown that anything apparent to him should have caused him to know, or even to suspect, that reversal of the escalator would result in the cutting off of plaintiff's fingers or otherwise increase the injuries he had obviously suffered already. If Goddard decided, as apparently he did, that it was better to free plaintiff's hand at once than to keep him in a strained and necessarily painful position for a period of time which might considerably exceed 15 or 20 minutes, we see no reasonable ground on which a jury could have found that his action in that respect, done under the stress of a sudden emergency, was negligent, even if we assume that, in fact, the reversal of the escalator did aggravate plaintiff's injuries.

[12-15] Plaintiff also contends that the doctrine of res ipsa loquitur is applicable here and that under it an inference of negligence on the part of both defendants may be supported without anything more than appears in the record. That doctrine is clearly not applicable in support of plaintiff's case against defendant Goddard. One of its fundamental elements is that the thing causing the injury be under the management and control of the defendant. (19 Cal. Jur. 704, 708.) No such condition existed as to Goddard. The doctrine is likewise not applicable to defendant corporation, but for other reasons. "The reason for the rule is that ordinarily the one injured is not in a position to know more than that, by some unusual movement of the instrumentality, he was injured, whereas the one who operates the instrumentality should know and be able to explain the precise cause of the accident." (19 Cal.Jur. 705–707; Alexander v. Wong Yick, (1938) 25 Cal.App.2d 265, 269, 77 P.2d 476.) "If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application." (Johnson v. Ostrom, (1932) 128 Cal.App. 38, 43, 16 P. 2d 794; Alexander v. Wong Yick, supra, and cases therein cited; Jorgensen v. East Bay Transit Co., (1941) 46 Cal.App.2d 189, 193, 115 P.2d 556.) "* * * when the cause is established by either party to the action the doctrine is not then applicable." (Manuel v. Pacific Gas & Elec. Co., (1933) 134 Cal.App. 512, 517, 25 P. 2d 509.) Here the evidence clearly establishes the immediate cause of the plaintiff's accident. It resulted from the facts that the escalator was in operation and that it was so constructed that there was an opening in which plaintiff's fingers could get caught. It did not result from anything about the operation of the escalator, such as the sudden jars or jolts

which the operators of moving vehicles have been required, under this doctrine, to explain. Whether defendant corporation was to be held liable for the injuries thus caused depended on the consideration of matters which were as open to investigation by one party as by the other. Since we hold that an inference of the corporation's negligence was possible without the application of this rule, this point is perhaps not of importance to the present decision; but we determine it for the purpose of a new trial, to guide the trial court in its instructions to the jury, or its own consideration of the case if there is no jury.

[16, 17] Defendants contend that plaintiff's mother was guilty of contributory negligence in failing to keep proper watch over plaintiff and to prevent him from getting caught in the escalator. As defendants concede, such negligence would not bar plaintiff Takashi's action for his own injuries (Zarzana v. Neve Drug Co., (1919) 180 Cal. 32, 37, 179 P. 203, 15 A.L.R. 401), and it was not pleaded as a defense thereto; but defendants argue that any recovery by plaintiff Tsutomu would be community property of himself and his wife, the mother of the other plaintiff, and hence her contributory negligence would constitute a defense to Tsutomu's action. It is true that negligence of the wife, if any, in caring for the children of herself and her husband is imputable to the husband and is a defense to any action brought by him in behalf of the community to recover for injuries to the children, to which such negligence contributed. (Dull v. Atchison, T. & S. F. Ry. Co., (1938) 27 Cal.App.2d 473, 479, 81 P.2d 158.) But from the evidence it appears that the wife took some precautions by way of watching over and caring for the son, and we cannot say, as a matter of law, that they were not sufficient. The question was one for the jury. (See Healy v. Market St. Ry. Co., (1940) 41 Cal.App.2d 733, 738, 107 P.2d 488; Carrisosa v. Southern Service Co., (1932) 128 Cal.App. 160, 163–165, 16 P.2d 1032.)

The judgment in favor of defendant Goddard is affirmed. The judgment in favor of defendant May Department Stores Co. is reversed and the cause is remanded for a new trial as to that defendant.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

PIERCE v. SINNER et al.

Civ. 2896.

District Court of Appeal, Fourth District, California.

Aug. 20, 1943.

Rehearing Denied Sept. 8, 1943.

Hearing Denied Oct. 18, 1943.

1. Master and servant ⚷330(3)

Where contractor rented gunnite men and equipment for resurfacing building, paid the men, carried insurance on them and directed them how and when to work, although there was a question whether the contractor or owner of gunnite equipment had the right to discharge, a finding that crew members were contractor's "employees" was sustained, and justified recovery against contractor for injuries sustained by an employee of subcontractor through negligence of one of the gunnite men in constructing a temporary platform for subcontractor's men.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Negligence ⚷134(11)

In action against contractor for injuries sustained by subcontractor's employee in falling from a scaffold constructed by contractor, where jury could have found that contractor's employees were negligent either in selection of material or in manner of construction and that plaintiff did not have equal knowledge with contractor's employees as to material used and manner of construction, a finding that negligence of contractor's employees was a "proximate cause" of the injury was justified.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Negligence ⚷136(27)

In action against contractor for injuries sustained by a plasterer, employed by subcontractor, in falling from a scaffold constructed by contractor's employees, where plasterer was engaged in his work while the scaffold was being constructed and did not have equal opportunity with contractor's employees to observe manner of construction, question of contributory negligence was properly submitted to the jury.

4. Negligence ⚷124(1)

In action against contractor for injuries sustained by a plasterer, employed by subcontractor, in falling from a scaffold constructed by contractor's employees, admission in evidence of regulations of the Industrial Accident Commission regarding the construction of scaffolds was not error.

5. Appeal and error ⚷1060(1)

Record did not show prejudicial misconduct by plaintiff's counsel in his argument to the jury.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Claude Pierce against John B. Sinner and others, as partners doing business as Sinner Brothers, to recover for injuries sustained by plaintiff while engaged as an employee of a subcontractor on a construction job on which the defendants were general contractors. From a judgment for plaintiff, defendants appeal.

Affirmed.

Monroe & McInnis, of San Diego, for appellants.

J. K. Stickney, Jr., of San Diego, Frank H. Nottbusch, of Chula Vista, and Stickney & Stickney, of San Diego, for respondent.

GRIFFIN, Justice.

Defendants and appellants John B. Sinner and Oscar A. Sinner, are partners, doing business as Sinner Brothers, and were engaged in the contracting business. They were the general contractors employed to remodel a cathedral located in San Diego. As a part of the work to be done, the outside of the building was changed and resurfaced. There were numerous buttresses projecting from the outside walls of the building, between which appeared recesses. It was while he was working upon the surface of one of these recesses that plaintiff and respondent was injured.

Plaintiff was a plasterer employed by the plastering subcontractors, Larson Brothers. Lester A. Larson was one of the members of that firm. Sinner Brothers, under its general contract, was required to build, construct, maintain and make the necessary changes in the scaffolding which was used by the plasterers and others in doing the work required to be done. The resurfacing of the building was done by the "gunnite process", with a machine designed for the purpose, which forced heavy plastering material through a hose to a nozzle and the gunnite crew operated the nozzle so as to spray the material under pressure upon the outside of the building. This gunnite material dried quickly, but before it was set it was necessary to smooth out the rough places which were a usual and customary incident of the gunnite process. This smoothing was the work of the plasterers. They followed the gunnite crew and, working from the scaffold, reached the wall surface and put the final touches on the gunnite finish. In doing this work it was customary for the plasterer to use a tool known to the trade as a rod.

Defendant John B. Sinner testified concerning the details of the scaffold, as constructed by him. He identified the model which he had made to illustrate its construction. Witnesses on behalf of the plaintiff disputed his testimony in this regard, and although they admitted that this model correctly portrayed the scaffold as it was originally built, they contended that the scaffold had been changed and portions thereof removed shortly before the accident, as portrayed by a model made and identified by Lester A. Larson. All of plaintiff's witnesses agreed that Larson's model was correct. As originally constructed, and as illustrated by Mr. Sinner, the scaffold had an additional platform which extended into the recess between the two buttresses. The scaffold, as described by plaintiff's witnesses and illustrated by the model, did not have such extension, but the planks forming the platform extended outside of the buttresses. Originally, the scaffold was a regulation, pole-type scaffold. The "uprights" were 4"x4". The ledger boards were 1"x8". The planks for the flooring of the scaffold were 2"x10" and 16' long. At the time of the accident there were two planks constituting the lower floor or tier of the scaffold which were laid about six feet from the ground and about four feet from the recess walls. The scaffolding as originally constructed was too close to the building for the use of the gunnite men and the plasterers. The evidence would indicate that it was at Larson's suggestion that the defendants made the change in the plans of the original scaffold, and three tiers were rebuilt by them. Defendants maintain otherwise.

Just prior to the time of the accident here involved Mr. Larson and plaintiff had been smoothing the cement and marking it off in squares on the first floor or tier of the scaffold. Plaintiff found that it was necessary to have additional platform laid into the recess before he could reach in and finish the work in that corner. He notified Larson of his inability to reach into the recess from the scaffold as thus constructed. Larson then called down to the defendants' workmen: "Somebody get something in that angle so we can work it out". It had been defendants' previous instruction to Larson that if any planks were to be moved or rearranged for him, he should notify defendants and they would have their workmen do it. Thereafter, one of defendants' workmen (Homsma) who was on the ground, started to select from the lumber around the building, some boards with which to erect an additional platform for Larson and the plaintiff. One Smith, who had been working with the gunnite crew and who was then on the ground, heard the request of Larson. He testified that Homsma "started to get up on the scaffold"; that he was awfully slow; that the gunnite was drying; that he, Smith, climbed up there and told Homsma to hand "me the planks up", and that he handed him a 2x4 and a 2x10, each about 8 feet long; that he laid them on the scaffold as "near the corner as he could get them"; that he laid the 2x4 flat, rather than on its edge; that it ran "from the inner platform board * * * in about a 45 degree angle over to the ledger board"; that the 2x10 was laid "practically perpendicular to the building, the end of it about even with the outside of the scaffold, and the other end a little farther from the recess than the ledger board, and this 2x10 is practically across the center of the 2x4"; that after he laid the boards he then went on with his gunnite work; that he did not pay any particular attention to the 2x4 when it was handed up to him; that he "never really looked at it. They was in a hurry, so I just laid it up there." While he was thus placing the boards, Larson went around to the front of the building.

Plaintiff testified that while this operation was going on he continued with his plastering work; that he did not see the boards laid or who laid them; that Larson returned, asked for the rod, and indicated to plaintiff, who weighed about 200 pounds, to stand on the outward end of the 2x10; that he did so and Larson stepped across to the other end, finished the recess plastering, and just as he was about to turn, the 2x4, over which the 2x10 had been placed, broke; that Larson fell to the ground unhurt; that plaintiff fell over backwards and was severely and permanently injured. The accident happened on Sunday. Sinner Brothers were pressed for time and had requested the plasterers and the gunnite men to work on that day in order to meet a deadline. The gunnite men were paid by Sinner Brothers but the gunnite equipment was rented from one Woods. No carpenters were present on the outside of the building when the necessity for additional timbers became apparent. Oscar Sinner was a carpenter and was inside of the building directing the work there. John B. Sinner was on the outside of the building engaged in general supervision of the work. No broken 2x4 was found after the accident. John B. Sinner testified that he looked for one but did not see any around; that there were several 2x4's around the building; that he did not authorize Smith, the gunnite man, to rebuild or reconstruct the platform in the manner indicated; that he did not see nor inspect the lumber placed thereon for that purpose, and that he did not see plaintiff fall, although he was about 15 feet from him at the time; that he rented the gunnite men and equipment by the day and paid them and carried insurance on them; that he directed their work but did not have the right nor power to discharge them; that Woods gave no instructions to him regarding their work while they were employed on that job. Other witnesses testified that they saw the 2x4 break, but did not examine it for imperfections or defects. Apparently, as a result of the imperfection in the 2x4 or in the manner in which it was laid, plaintiff received severe injuries. Plaintiff recovered judgment against defendants in the sum of $10,000. Defendants appealed.

They now contend first, that the evidence is not sufficient to show that Smith was, at the time, an employee of defendants and acting within the scope of his employment. Second, that the evidence is not sufficient to show negligence on the part of defendants mainly because there is no evidence to show (a) that the 2x4 was in fact defective; or (b) that if it was defective, that such defect was known, or by the exercise of reasonable care should have been known to defendants; or (c) that the facts and conditions which brought about his injuries were not equally known to plaintiff. Third, that the plaintiff was guilty of contributory negligence as a matter of law.

Considering the evidence on the first point presented, the record shows, in addition to the facts already stated, that defendants rented Woods' equipment by the day. The employees, including Smith, who usually operated the gunnite machine for Woods, operated that equipment on this particular contract.

Sinner testified in this respect that "they were the same as his employees", except that he "couldn't perhaps have fired them if Mr. Woods hadn't wanted it and had said 'They are my men. They are my employees, and they are going to stay here'"; that he had the power to tell them "when to work * * * how to do it, and how to do their work"; that he exercised that power "during the entire period of this work"; that when these men worked on Sunday they were working at his direction. Larson testified that on previous occasions he had observed Smith "fixing up the scaffold"; that "as the work progressed around the building, anyone available, that is, from the gunnite crew and the labor crew, would change the scaffold and move planks, etc. from time to time. I would say hundreds of times."

Sinner testified that it was the job of the gunnite men and the plasterers to remove the planks "for the purpose of clearing away for the gunnite that doesn't attach itself to the wall".

A gunnite workman testified that he was the one who told Sinner that in order for him to "shoot this particular place" Sinner would have to remove "that scaffolding that was there and set it back away from the wall"; that he had never seen plaintiff place any scaffolding but that Sinner's men would do it for him; that the scaffolding throughout the whole job "was good outside of this one point where the accident happened"; that on another occasion a scaffold gave away and slipped off of the building; that another gunnite man "was up there moving plank or something".

In respect to the scaffolding, plaintiff testified that he did not have anything to do with the placing of any boards in the recesses; that that work was done by laborers working for Sinner; that part of the time one of the gunnite laborers would do it; that he had seen Smith do it on numerous occasions before the accident over a period of three months and while Sinner was around; that on occasions when there were no carpenters around he had asked Sinner to place planks or the scaffolding for him; that in response thereto Homsma, Smith and other gunnite men would do that work for him on "numerous occasions" and that that was their "usual and customary practice".

In this respect it is mainly argued that because Sinner did not have the right to "fire" Smith and because Smith was not then doing work which he was employed to do, Smith should not therefore be considered as authorized to bind Sinner for any negligent act of his in the selection of the proper materials and in the construction of the makeshift platform, citing such cases as Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551; and Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241.

[1] The first cited case holds directly that the existence of the right of control over the employee is the critical test of liability for his acts, and that it is the right to exercise control rather than the mere fact of its exercise which is decisive. While the right of Sinner to discharge the gunnite employees in the instant case under the facts appearing may be subject to question, nevertheless, any presumption arising from that fact alone is sufficiently overcome by the remaining evidence and fully supports the jury's conclusion, which was reached after hearing proper instructions on the subject, that Smith, as well as Homsma, were employees of defendants at the time in question and that each was acting within the scope of his employment. Peters v. United Studios, Inc., 98 Cal.App. 373, 277 P. 156; Callahan v. Harm, 98 Cal. App. 568, 277 P. 529; Silberman v. Industrial Acc. Comm., 21 Cal.2d 609, 134 P. 2d 228.

[2] Considering the negligence of defendants, it must be conceded that plaintiff was severely injured and that such injury was the result of a negligently constructed, makeshift platform, or as the result of the negligent selection and use of defective material in its construction. The question then presented is this: By whose negligence was such injury brought about? The evidence justifies the inference that the jury might have concluded that the defendants' agents negligently placed the 2x4 with the flat side down rather than on edge and that if it had been laid on edge under the circumstances related, it would not have

broken. There is evidence that had it been laid on edge rather than flat, "it would be at least three times as strong". There is other evidence that might indicate that one end of the 2x4 might have been negligently laid too close to the edge of the ledger board and the weight of the workmen caused it to slip rather than break. The evidence also shows that on the two tiers above, where the plasterers had "those bad reaches", a similar method was used by defendants' employees in constructing a similar makeshift platform on the tiers above. One witness testified in this respect that "It would be a very short job to stick it up there and tack it (the 2x4). It had been done before". The evidence would indicate that on this particular occasion the 2x4 was not nailed as compared to the practice of nailing it down on the tiers above. It might also well be argued that the 2x4 was in fact defective and that it did break. The jury might well have concluded that defendants' agents were negligent in failing to make a reasonable examination of the material to be used considering the weight it had to carry and the purpose for which it was to be used. Defendants' employees were in better position than plaintiff to know the character of the material used and were the ones who made the selection and placed the material there. This would factually differentiate the instant case from the case of Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26, 29, relied on by defendants. There it was said: "If there were any evidence whatever in the case showing that the contractor or his foreman or other employee placed the board over the open space or in any other way had an opportunity other than that possessed by the respondent to observe said board and to note any defect therein, then the case might be different. * * *" The evidence supports the finding that the negligence of defendants was at least a proximate cause of the accident and injury. Whether negligence is a proximate cause of the injury is almost entirely a question of fact. Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 145, 124 P.2d 51. Plaintiff testified that he had no part in the selection of the timbers or in laying them; that he was busily engaged in his work of plastering while they were being laid. Assuming the truth of this statement, it cannot therefore be said that he had equal knowledge with defendants' workmen, of the facts and conditions which brought about his injuries.

[3] It may likewise be said, as to the third point, that it cannot be held, as a matter of law, under the evidence, that plaintiff was guilty of contributory negligence. The question of the contributory negligence of plaintiff was fully argued to the jury and was a fact for it to determine under proper instructions. We cannot now interfere with that determination on this appeal. Douglass v. Crabtree, 57 Cal.App.2d 568, 134 P.2d 912; Fischer v. Davis Standard Bread Co., 134 Cal.App. 1, 24 P.2d 538.

[4] During the trial there was offered and received in evidence the regulations of the Industrial Accident Commission regarding the construction of scaffolds. Defendants assigned the admission of these regulations as error. Sinner testified that he had read and was familiar with the contents of these orders and that he constructed his scaffolds in accordance with the standards therein specified. Even if we held that the court's ruling was erroneous, which we do not, it cannot be said that such ruling was prejudicial. Brumhall v. Sutherland, 110 Cal.App. 10, 14, 293 P. 672; McKeon v. Lissner, 193 Cal. 297, 223 P. 965; Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231; DeGraf v. Anglo California National Bank, 14 Cal.2d 87, 92 P.2d 899.

[5] Defendants charge that respondent's counsel was guilty of prejudicial misconduct in his argument to the jury. This accusation was fully presented to the trial court on a motion for new trial. That court properly held that the claim was without foundation. Mudrick v. Market St. R. Co., 11 Cal.2d 724, 738, 81 P.2d 950, 118 A.L.R. 533; Roddy v. American Smelting, etc., Co., 34 Cal.App.2d 457, 460, 93 P.2d 841.

Judgment affirmed.

BARNARD, J., concurs.

60 Cal.App.2d 245

PEOPLE v. JOLLET et al.

Cr. 3694.

District Court of Appeal, Second District, Division 3, California.

Aug. 20, 1943.

Hearing Denied Sept. 15, 1943.

1. **Criminal law** ⟶562

A showing of mere opportunity for defendant to commit a crime, unless it excludes all reasonable opportunity for its commission by another is not, standing alone, sufficient to justify a conviction.

2. **Burglary** ⟶31
Larceny ⟶43

In prosecution of two defendants on two counts of grand theft and three counts of burglary of jewelry stores, wherein it appeared that same pattern of operation was used in each instance, acquittal on one burglary count did not prevent consideration of evidence regarding such count in connection with other counts so far as it was pertinent so as to authorize an inference that there was a concert of action between defendants involving a definite scheme for entry into stores.

3. **Criminal law** ⟶673(4)

In prosecution of two defendants, statements of one admitted against him only cannot be considered against other.

4. **Burglary** ⟶41(1)
Larceny ⟶65

Evidence sustained conviction of grand theft and burglary.

5. **Burglary** ⟶41(3)

In prosecution for burglary of jewelry stores in daytime, evidence was sufficient to establish the required intent to commit theft when defendants entered respective stores.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John L. Jollet and Robert Pinkerman were convicted of grand theft and burglary. From the judgments and orders denying each of them a new trial they appeal.

Affirmed.

John S. Cooper, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

The indictment against defendants contains 2 charges of grand theft and 3 of burglary. After a jury waiver and trial by the court, they were acquitted of the burglary charged in Count V and found guilty of all the other charges, and they appeal from the judgments and from the orders denying each of them a new trial. The only contention made on appeal is that the evidence is insufficient to support the findings of guilt. Facts set forth in the following statement are shown by evidence adduced by the prosecution, unless otherwise stated.

Counts I and II relate to a theft of two diamond rings from the Howes jewelry store, situated on the north side of Wilshire Boulevard in Los Angeles. The burglary charged in Count II is the entry into that store with intent to commit theft. These rings were in a showcase near the front of the store and were close to the back corner of the case. Defendant Jollet came into the store about noon, asking to see some watch bands, and after talking with a clerk, Miss White, for 5 or 10 minutes, was turned over to the assistant manager, Mr. King. Jollet asked King about attachments for ladies' watches, seemed much interested in what he saw, said his wife was across the street and he would talk to her and return. He then left the store, but never came back. About the time Jollet was turned over to King defendant Pinkerman came into the store, said to Miss White that he was waiting for his sister and sat down in a chair in front of the showcase containing the rings, close to the end at which the rings had been placed. He gradually moved the chair more to the end of the case, so that, from its final location, it was possible to reach the back of the case. Jollet went out about ten minutes after Pinkerman entered. The latter remained in the store for three-quarters of an hour to an hour after Jollet left, but no one came in to meet him and he departed at about 1:15 p.m. About 2 o'clock King noticed that the sliding door of the case containing the rings had been opened five or six inches at the end where the rings had been, and that the rings were gone.

The last time any of the employees had seen the rings in the showcase was about 11 a.m. None of them took the rings from the case, and no other visitors than Jollet and Pinkerman were in the store from a few minutes after the time Jollet entered until the loss of the rings was discovered. In this respect, the period of an hour before noon is not covered by the evidence. While King was waiting on Jollet he stood at a showcase farther back in the store than that at which Pinkerman was sitting. King faced Pinkerman and could see him but did not actually observe him all of the time because, as he said, he had to look at the man he was waiting on. Besides, Pinkerman was leaning on the end of the case and this obstructed King's view of the case. Miss White walked around some but mostly sat where she could see Pinkerman's head and shoulders but not his hands. She did not watch him all the time, for she did not see him go out. Another employee, Miss Flynn, came back from lunch before Pinkerman left and saw him, but seems to have paid little attention to him, for she, also, did not notice his departure.

The transaction above stated occurred on July 30, 1942. On August 12, 1942, the two defendants put on a similar act at the jewelry store of Carl E. Schultz on Wilshire Boulevard in Beverly Hills, and this is the subject of Counts III and IV which charge grand theft and burglary. Defendant Pinkerman came into the store about 12:50 p.m., said he was waiting for his sister, wandered around the store, looking in the show windows and then sat down in a chair right in front of the diamond window showcase, in which a diamond ring worth $1,235 had been placed that morning. After he had sat there about 15 minutes, defendant Jollet entered the store, told Schultz he was looking for some watch attachments, and after being shown some, asked for ladies' watch bands. He looked at those, said his wife was shopping near and he would bring her back, left the store and did not return. During the time Jollet was in the store, Schultz was about 20 feet from Pinkerman and could not see what Pinkerman was doing because Jollet kept between Schultz and Pinkerman. The two defendants were in the store altogether about 30 minutes and when Jollet left Pinkerman had already gone but Schultz did not see him leave.

When Schultz prepared to close his store, at 5:30 p.m. that day, he discovered that the ring above mentioned was gone from the window showcase near which Pinkerman had sat. The last time he had seen it there that day was about 11 a.m. This showcase was enclosed on the store side by a partition, of wood at the bottom and of glass at the top, which extended 6 feet above the floor. Above this partition was an open space of 4 feet. There was a hinged door in the partition, but it was kept locked and was not opened this day from the time the case was filled at the opening of the store until Schultz was preparing to close the store. The ring was at the back of the window, near this partition, and to reach it from the store with the door locked a person would have to stand on a chair and reach down over the partition. No one was seen to do this. While the two defendants were in the store with Schultz no one else was there, but during other parts of the day other persons were in it.

The evidence shows the two transactions above mentioned in much more detail than does the foregoing statement, but we have omitted no detail which seems to us of consequence. The defendants took the stand and denied both transactions, and denied that they had been in the stores at all, or in the Anstead store, hereinafter mentioned. No witness saw any ring removed from the showcase in which it had been placed by the storekeeper, or saw any overt act possibly constituting part of the process of removal, no fingerprints were shown to have been found on any of the showcases, and the articles stolen have never been found, as far as appears. The facts thus far stated, however, will support several inferences which the trial court may have drawn in support of its judgments. First: that defendant Pinkerman had an opportunity to commit each of the thefts charged. The opportunity was such as to require considerable agility, quickness and audacity on his part to take advantage of it, especially in the Schultz case, but yet it was an opportunity. Second: that the presence and activities of Jollet in each store helped to create this opportunity. Third: that neither of the defendants had any legitimate reason for entering either store. The reason assigned by each for entering appears to have been fictitious.

[1] The first of these inferences is insufficient of itself to support the convictions. A showing of mere opportunity for the defendant to commit a crime, unless it excludes all reasonable opportunity for its commission by another is not, standing alone, sufficient to justify a verdict or finding of guilty. People v. Viets (1926)

79 Cal.App. 576, 589, 250 P. 588; People v. Silva (1920) 48 Cal.App. 728, 737, 192 P. 330; People v. Tarbox (1896) 115 Cal. 57, 63, 46 P. 896; see also People v. Wong Ah You (1885) 67 Cal. 31, 7 P. 8; People v. Ong Git (1910) 14 Cal.App. 278, 111 P. 630.

[2] We need not decide whether the second and third inferences above mentioned add sufficient support to the findings to uphold them, for other facts were shown. The defendants admitted as witnesses, and Jollet admitted to the arresting officers also, that they were acquainted with each other. Testimony for the prosecution showed that on August 29, 1942, defendant Pinkerman entered the Amstead jewelry store on Wilshire Boulevard in Beverly Hills, was approached by a salesman and said he was waiting for his sister, and then went and stood by a showcase containing watches and looked into it. In a few minutes defendant Jollet came into this store and said he was waiting while his wife was telephoning. Pinkerman left while Jollet was there, although no sister had appeared, and Jollet stayed only a few minutes and left. While they were in the store, the owner of the store and four employees were in it. One of these employees, Todd, had talked to the police before this visit. He went out to the street and watched the defendants after they left, and testified that they entered an automobile together, with Jollet at the wheel and a woman in the back seat. This occurrence was the subject of Count V on which the defendants were acquitted. The acquittal does not, however, prevent the consideration of the evidence regarding this count in connection with other counts, so far as it is pertinent.

Adding these facts to those previously shown, the trier of facts could reasonably infer that there was a concert of action between the defendants, involving a definite plan or scheme by which they would enter jewelry stores with an excuse for Pinkerman's presence which would in itself avert attention from him, while Jollet averted it further by actively concentrating it on himself, thus enabling Pinkerman to steal any accessible article without detection. In the Anstead case no doubt they saw at once that their plan would not work because the store personnel was too numerous for all to be easily diverted, and so they departed with little delay and contrary at least to Pinkerman's excuse for being there.

[3] To the officers who had him in custody Pinkerman made incriminating statements. He stated, in reply to questions which referred to both the Howes and the Schultz cases, that he had given the ring taken from the Schultz store to a man who had taken it to Chicago and that "If I tell you all about these thefts, I haven't got a chance, I am sunk, but if I say nothing, why I have got one chance in one hundred of beating the rap, beating the case." These statements of Pinkerman were admitted against him only, so they cannot be considered against Jollet. Jollet, at the time of his arrest, which was ten days after that of Pinkerman, refused to say what he had been doing or where he had been living, and tacitly admitted that he had moved in a hurry the night Pinkerman was arrested, leaving some things behind.

[4] We think the evidence, taking it as a whole and accepting all the reasonable inferences from it most favorable to the findings of guilt, is sufficient to uphold them as to both defendants and on both counts. It is true, there is no such implied admission of guilt by Jollet as that made by Pinkerman in saying that if he told all about these thefts he was "sunk"; but Jollet was present with Pinkerman at all of the places where theft was committed. He denied such presence, as a witness, thus failing to give any explanation for it, and he gave the storekeepers explanations which were false. He moved in great haste after Pinkerman's arrest and refused to give any account of his movements or doings thereafter. He and Pinkerman were, as already stated, cooperating in a plan for obtaining jewelry from these stores.

[5] As a branch of their argument on insufficiency of the evidence defendants argue that there is no showing of their intent to commit theft when they entered the respective stores—an intent which must be shown to prove the burglaries charged. To our minds, such intent stands out so plainly from the evidence, accepting that which the trial court believed, that no further discussion of it appears necessary.

The judgments and orders appealed from are affirmed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

60 Cal.App.2d 87

In re WITHINGTON'S ESTATE.

SWEITZER et al. v. WITHINGTON et al.

Civ. 2893.

District Court of Appeal, Fourth District, California.

Aug. 3, 1943.

Rehearing Denied Aug. 24, 1943.

Hearing Denied Sept. 30, 1943.

1. Executors and administrators 🔑506(3)

Evidence sustained finding that executor was not short $65,120.47 in accounting for cash received by him.

2. Executors and administrators 🔑507(2)

Where property had been sold by executor and had been reported in its converted form, the court was justified in finding that it had been fully accounted for.

3. Executors and administrators 🔑513(12)

Where property had been sold by executor and reported in its converted form, order approving executor's account did not preclude him from showing source from which he derived the funds and did not require that he be charged twice for the same amount.

4. Executors and administrators 🔑465

Where no part of Mexican bank account ever came into hands of California executor but it came into his hands as Mexican executor and under Mexican law he was required to account therefor to Mexican court, the California executor could not be charged with the Mexican bank account.

5. Executors and administrators 🔑465

A California executor must be charged with everything which came into his hands as such executor, and he may be charged with property which he should have taken into possession as such executor, or which in due course should be distributed to California estate.

6. Executors and administrators 🔑506(3)

Evidence sustained finding that Mexican bank account did not come into hands of California executor so as to require executor to account therefor.

7. Executors and administrators 🔑506(3)

Evidence sustained trial court's refusal to surcharge executor on theory that value of loan had been lost through acts of executor.

8. Executors and administrators 🔑506(3)

Evidence sustained trial court's refusal to surcharge executor with amount of two notes which he allegedly permitted to outlaw, where notes were secured by trust deed which had never outlawed.

9. Executors and administrators 🔑465

Where money was loaned in Mexico from funds on deposit in Mexican bank, the item was one for which executor was accountable to Mexican courts as part of estate being administered in that country and executor was not accountable therefor in California proceeding.

10. Executors and administrators 🔑506(3)

Evidence sustained trial court's refusal to charge executor with $800 withdrawn from estate funds on ground that money belonged to executor personally.

11. Executors and administrators 🔑510(11)

Where executor permitted devisee to collect part of rentals from property but executor had correctly accounted for estate's share of rentals collected by him, refusal to charge executor with entire amount of rentals would not be disturbed where interest of estate was not affected.

12. Executors and administrators 🔑111(1)

Executor was properly allowed credit for $5,000 paid to attorney who filed claim for legal services performed for decedent, where claim was timely filed, was approved by executor and by court.

13. Executors and administrators 🔑510(11)

Allowance of $5,000 on account of executor's fees and two payments of $5,000 and $850 for attorneys' fees was not shown to be an abuse of discretion and would not be disturbed. Code Civ.Proc. § 1616.

14. Executors and administrators 🔑308

Where all beneficiaries interested in testator's estate consented to compromise with testator's widow, the beneficiaries were "estopped" from insisting that executor be charged with amount paid to widow in accordance with the agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

15. Executors and administrators 🔑308

Where all beneficiaries interested in testator's estate consented to compromise agreement with testator's widow under which executor made payment to widow, subsequent agreement in which beneficiaries stated that they had knowledge of and acquiesced in all acts of executor, constituted a "ratification" of payment to widow.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

16. Executors and administrators ⚷301

Refusal to charge executor with advances made to certain beneficiaries without decrees authorizing partial distribution was not improper, where executor had been removed and the matter could easily be adjusted on final distribution.

17. Executors and administrators ⚷506(3)

Evidence sustained trial court's refusal to surcharge executor with amount which had been delivered to executor in testator's lifetime on ground that amount belonged to executor personally.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Carl Withington, deceased, wherein objections were filed to the account of Lysle Woodward Withington, executor and wherein American Surety Company of New York, intervened. From a decree settling the final account of the executor, Callie Belle Sweitzer, individually and as administratrix with will annexed of the estate of Carl Withington, deceased, and others appeal. Upon the removal of Callie Belle Sweitzer as administratrix of the estate of Carl Withington, the new administrator of the estate was substituted on the appeal.

Affirmed.

Frank Pomeranz, Charles C. Crouch, and Richard F. Kahle, all of San Diego, for appellants.

Frank A. Gazlay, of San Diego, Mathes & Sheppard and Wm. C. Mathes, all of Los Angeles, Charles Fox, Jr., of San Diego, and Gordon F. Hampton, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

Carl Withington died on October 23, 1925, while a resident of San Diego County. By his will he left nothing to his widow other than her community interest in his property and, after a few relatively small bequests, he left the residue of his estate in equal shares to his three sisters Harriet W. LeMay, Norma Withington, Callie Belle Sweitzer, and his brother Lysle Woodward Withington. His estate was finally appraised at $715,713.39. About 80% thereof was in personal property, consisting of cashier's checks, Liberty bonds and certain gambling interests and other property situated in Mexico. His estate also included undivided interests in real estate in Kern County which were valued at some $50,000. Prior to and shortly after his appointment as executor Lysle Withington sold the gambling interests in Mexico and succeeded in bringing into this state most of the property in Mexico which had been owned by the decedent.

The will was admitted to probate on November 13, 1925, and Lysle Withington was appointed executor. Although the will exempted him from giving bond, upon the request of the widow the court ordered a bond in the sum of $250,000 and such a bond was furnished by the American Surety Company, the intervener here. On March 6, 1926, the will was also admitted to probate in Baja California, Mexico. Lysle Withington was appointed executor there and proceedings for the administration of the estate in Mexico have since been and still are pending.

Upon her petition the widow was granted a family allowance of $1,000 a month. Thereafter, she filed a contest to the probate of the will, which was finally determined adversely to her in 1929. In re Estate of Withington, 99 Cal.App. 617, 279 P. 196, 280 P. 152. Negotiations between the widow and the brother and sisters for a settlement of the widow's community interest in the estate then followed, which resulted in an agreement by which the widow agreed to accept $225,000 in full settlement of all of her claims and that amount was ordered distributed to her and was paid to her in 1931. In July, 1933, the executor filed a petition asking that the bond theretofore issued be discharged. The three sisters of the executor signed and filed a request that this be done. On August 5, 1933, an order was entered discharging the bond. Theretofore, all claims of creditors and all specific legacies had been paid and partial distributions had been made to the residuary legatees. Thereafter, as disclosed by the record, the executor and his sisters proceeded to divide up the decedent's jewelry and, apparently, to deal with the money and property of the estate largely by mutual agreement. The sisters, as they had done before, took and used the income from the estate's portion of the Kern County real property and at times received other funds from the estate. The executor, on the other hand, seems to have drawn at will from the funds of the estate for his personal needs.

On August 25, 1939, on the request of Norma Withington, an order was entered requiring the executor to file an account. On December 16, 1939, an agreement was filed in the estate proceedings which was signed by the executor and all three of his sisters. This agreement provided that Lysle Withington thereby resigned as executor; that the citation of August 25, 1939, requiring him to render an account "is hereby dismissed with prejudice, and the clerk is hereby directed to enter a dismissal thereof"; that the three sisters and each of them waived any and all right to have the executor file or make an account of any kind; that each of them had had knowledge of and had acquiesced in all of his official acts as executor from the date of his appointment; that each of them released him "from any and all claims from any administration of said estate"; that he in turn waived any right to require any of his sisters to account to the estate or to him for anything they had done or failed to do in connection with the property or income of the estate; that each released the others from any claim for anything theretofore done in connection with this estate, whether as executor or otherwise; that each acknowledged that from time to time, by consent of all, partial distributions of the estate have been made; that a petition "for ratable distribution of certain real property" which had been filed should be granted by the court; and that Norma Withington, with the approval of the court, should be appointed as administratrix to complete the administration of the estate. On December 16, 1939, an order was entered appointing Norma Withington as administratrix with the will annexed. A petition for a ratable distribution was thereafter granted.

In the summer of 1940, it was discovered that the state inheritance taxes had been only partly paid. The sisters were then urged to give notice of rescission of the agreement of December 11, 1939, and to proceed to compel the executor to file an account. They refused to do this but, after strong pressure, finally reluctantly yielded. On July 3, 1940, they filed a notice of rescission of the agreement and on July 10, 1940, a citation was issued ordering the executor to file an account and suspending his powers as executor. Thereafter, he was fully removed as executor, Norma Withington acted as administratrix for a time, after which Callie Belle Sweitzer was appointed administratrix and later removed, and then another administratrix was appointed.

When the agreement of December 11, 1939, was filed and the order appointing Norma Withington as administratrix was entered, the executor turned over to her all papers and files in the estate which were in his possession and those which he was able to obtain from the office of his attorney, who was then dead. After the citation to account was issued the executor filed his account in two sections, and a lengthy hearing was had. Thereafter, upon direction of the court, he filed an amended report and account in order to conform to the proof. The three sisters filed objections to the account, many of which were sustained by the court. In its findings and decree the court charged the executor with approximately $90,000 over and above the property of the estate which he had turned over to his successor. Harriet LeMay and Norma Withington having died in the meantime, Callie Belle Sweitzer appealed from the decree settling the final account of the executor for herself and also as administratrix of the estate of Carl Withington, as the administratrix of the estate of Harriet LeMay, and as executrix of the estate of Norma Withington. Upon her removal as administratrix of the estate of Carl Withington, the new administrator of that estate was substituted on this appeal. The record consists of 15 volumes, besides innumerable exhibits.

Lysle Withington also took an appeal from the decree settling his final account but that appeal has been dismissed. For convenience, we will refer to him both as the executor and as the respondent. It may first be observed that in its decree the court specifically made its findings only as to an accounting between the executor and the administratrix with the will annexed, and reserved consideration of the rights of all other parties arising from the contract of December 11, 1939, which waived an accounting, for adjudication on a later petition for distribution. Why the court did not directly pass upon the effect of the contract of December 11, 1939, and the attempted rescission thereof, does not appear. We are pointed to no evidence which would have supported a finding of rescission of that contract and portions of the evidence indicate not only that restoration was not made but that the sisters were unable to restore what they received under that agreement.

[1] The first point raised by the appellants is that the respondent executor was short $65,120.47 in accounting for the cash received by him and that the court erred in not allowing this item as a charge against him. On September 20, 1926, the executor filed his inventory and appraisement, the first item of which was "money belonging to the said deceased which has come to the hands of the executor, $344,453.05." In his account he charged himself with $279,332.58 as received in cash, and the difference is the amount here in question.

The undisputed evidence is that shortly before his death Carl Withington divided all of his actual cash between his brother and his three sisters; that he left certain cashier's checks, bank drafts and bank accounts, all of which were deposited by the executor in the estate account; and that prior to the time the inventory was filed the executor sold certain gambling interests and other property left by the deceased and deposited the proceeds in the estate account. There is a clear inference from the evidence that this item of the inventory included not only the cashier's checks and bank drafts, which might be considered as money, but also money received from the sale of property after the death of the decedent and before the inventory was filed. Under this view all of this item was accounted for. This view is supported by considerable testimony, including that of two public accountants. One of them testified that the addition of the totals of the cashier's checks, bank drafts and similar items and the amounts deposited in the estate account up to the time the inventory was filed would give the amount thus listed in the inventory within $1.66. He gave a logical explanation for this difference in that the attorney, in preparing the inventory, could easily have omitted two items of .83¢ each which were a part of larger figures. The evidence sustains the court's findings in this regard and no evidence to the contrary was offered by the appellants.

[2] It is now argued, however, that the amount set forth in this item of the inventory was accepted as true and acted upon in a number of subsequent proceedings in the estate without being questioned by the executor, and that it is now too late, under the doctrine of laches, for him to correct any error if such there was. The cases cited in support of this contention have no application here. This is not a case of an executor charging himself with certain property belonging to an estate and many years later attempting to claim that the property belonged to himself rather than to the estate. Here, the property was merely reported in its converted form and the court was justified in finding that it was fully accounted for.

[3] In their reply brief the appellants state that the executor filed a first account on October 4, 1928, in which he charged himself with this same item and that this account was approved by a minute order dated January 4, 1929. It is then argued, for the first time, that this order approving the first account has become final and precludes him from disputing "the correctness of the amount of cash with which he charged himself in his original inventory." Cases are cited to the effect that items once settled in a previous account are conclusive and may not be reexamined upon the settlement of a final account. Assuming, but not holding, that this minute order was sufficient to settle the first account, we see nothing in this rule which would prevent this respondent from showing the source from which he derived the amount with which he charged himself and which was thus approved. There is nothing in this rule which would require the respondent to be charged twice for the same amount received, and the evidence supports the court's refusal so to do.

Taking them out of order the appellants, in six other points, contend that various other amounts received by the executor were not inventoried by him or accounted for, and that the court erred in not charging him therewith. These items were $2,500 received from the sale of an automobile, $1,498.12 received from the sale of a gambling interest, $35,000 received from the sale of an interest in the Foreign Club, $20,047.24 received from the sale of a gambling interest known as the "Atkin Book", $510 received from the "Holland note", and $165.94 received as interest on a certificate of deposit. The evidence is that these amounts were all deposited in the estate account and that they were included in the first item of the inventory, to which we have just referred. In their reply brief the appellants concede this and concede that our holding, with respect to these six items, should follow our holding with respect to the first point above discussed relating to the alleged shortage of about $65,000 in the amount of cash inventoried. In view of this concession nothing further need be said with respect to these six points. It is also contended that the court erred in failing to allow interest on three other amounts charged to the executor. As pointed out by the respondent, interest on these amounts was allowed by the court.

It is next urged that the court erred in failing to charge the executor with the loss of $25,207.88 from a deposit in a bank in Mexicali, Mexico. About $39,000 was on deposit in that bank in the deceased's account at the time of his death and was listed in the inventory filed on September 20, 1926. However, it was never brought to California and the evidence supports the finding that it never came into the possession of Lysle Withington, as executor of the California estate. There is evidence that he was advised by Mexican attorneys that this deposit could not be legally transferred to California and that the bank refused to permit this to be done. With the knowledge and consent of the sisters, probate proceedings were also started in Mexico and he was appointed executor there. On April 7, 1931, he, as executor of the Mexican estate, removed $25,207.88 from this account and redeposited it in a bank in Tiajuana, Mexico. He then authorized his Mexican attorneys to withdraw moneys from this account and the evidence indicates that they withdrew it all for their personal use.

The court found that this executor had been appointed executor of the estate of Carl Withington in the Republic of Mexico; that he is still so acting and, as such, is accountable to the courts of that country for all the Mexican assets of said estate; that under the law of Mexico in force at the death of the decedent a deposit in a Mexican bank is a portion of the Mexican estate for which the Mexican executor is accountable there; that this bank account was listed in the inventory there as a part of the Mexican estate; that under the applicable law of Mexico the probate proceedings in that country are in no sense ancillary to but are entirely independent of the probate proceedings in California; that under that law the Mexican executor is held accountable to the Mexican courts for any deposit in a Mexican bank; that under that law, upon the closing of the estate in Mexico, the Mexican executor will be required to account to the Mexican courts and to distribute all remaining property direct to the beneficiaries of the Mexican estate; and that under the Mexican law this executor is accountable to the courts of Mexico for the amount of this bank deposit and is not accountable therefor in this proceeding.

[4-6] The appellants rely upon In re Ortiz's Estate, 86 Cal. 306, 24 P. 1034, 21 Am.St.Rep. 44; In re Estate of Grivel, 199 Cal. 351, 249 P. 184; In re Estate of Grivel, 128 Cal.App. 186, 17 P.2d 172, and In re Estate of Barreiro, 125 Cal.App. 752, 14 P.2d 786. While some of the language used in those cases is favorable to the appellants' contentions here that language is largely based upon the relation between domiciliary administration and ancillary administration as the same exists as between various states in this country. Moreover, each case must depend upon its own particular facts. In the instant case, the evidence supports the court's findings as to the nature and effect of the pertinent laws of Mexico and it fully appears that no part of this bank account ever came into the hands of the California executor, that it did come into the hands of Withington as a Mexican executor, and that he must account therefor to the courts of that country. While it may be conceded that a California executor must be charged with everything which came into his hands as such executor, and further that he may be charged with property which he should have taken into possession as such executor or which, in due course, should be distributed to the California estate, it is quite another matter to hold that he must ignore the courts of another jurisdiction or to charge him with property which has not, and which cannot, come into his possession as California executor. As was said in Re Estate of May, 112 Cal.App. 673, 297 P. 955, 957, "Under the circumstances it would have been futile to make an order that would not be binding in Mexican jurisdiction." The matter was a question of fact for the trial court and the evidence, while conflicting, supports the finding made.

It is next contended that the court erred in not charging the executor with $72,605.33 as the loss on a so-called "stockholders' loan" to the Aztec Brewing Company. In the original inventory, filed in 1926, this loan was valued at the amount above stated. In 1941, these appellants petitioned for reappraisement of properties belonging to the estate, alleging that, through error, various properties had been excessively valued. Their petition was granted and a reappraisement was made and filed by a state inheritance tax appraiser in which he appraised this item as being of no value at the time the testator died.

From the evidence it appears that the Aztec Brewing Company, a Mexican corporation, was formed about 1923, Carl Withington having one-half of the stock for which he paid $25,000. Other stockholders contributed a like amount. They found they needed more money and Withington loaned the company the amount in question and the other stockholders loaned a similar amount. These were called stockholders' loans and there is evidence that it was understood and agreed that the loans were to be repaid when and if the enterprise made sufficient profit to make this possible. Business was bad for some years and in 1927, some two years after the death of Withington, the brewery was entirely destroyed by fire. It was rebuilt with money borrowed by the other incorporators, the Withington estate not participating. There is no evidence that it made any money and by 1932 the Mexican corporation owed large sums of money, including a very large claim of the Mexican Government. At that time another Aztec Brewing Company was incorporated in California, which established a brewery here and which is still operating. Some of the assets of the Mexican corporation were turned over to the California corporation and brought to this state. One half of the stock of the California corporation was issued to a trustee and is being held by that trustee for the benefit of the Carl Withington Estate, but there is evidence that it cannot be turned over to the estate until matters in connection with the claim of the Mexican Government, various debts and the contributions of the other stockholders after the fire are settled and adjusted. The president of the California corporation testified that this estate has some interest in that corporation but that he did not know the extent or amount of this interest.

[7] It is argued that the executor could have collected a part of this debt since a considerable amount of the assets of the Mexican corporation were turned over to the California corporation, and that the court should have charged the executor with the total loss of this debt because the estate's interest in the Aztec Brewing Company was reappraised at $35,000, and it follows that the corporation must have had assets of at least $70,000 in excess of all of its liabilities, including these stockholders' loans. There is ample evidence that this stockholders' loan was valueless at the time the testator died. The evidence would justify the inference that it has not increased in value since that time and that while the estate still has an interest in the reorganized company that interest probably does not exceed the original investment in stock in the Mexican company. The fact that the persons who formed the California corporation still recognize that the estate has some interest therein does not prove that the original Mexican corporation had assets sufficient to pay all of its debts, including these stockholders' loans. While a confused situation exists, whatever interest the estate had in the Aztec Brewing Company still exists and has been turned over by this executor to the new administrator of the estate, and the benefit of that interest, whatever it is, will accrue to the estate. Whatever else may be said about this stockholders' loan it cannot be held that the trial court was compelled to find that the value thereof was lost through any act of this executor. The evidence was insufficient to establish any loss occurring through his fault. Whatever the present situation, any possible asset still remains, and it neither appears that this debt could have been collected at any time nor that the obligation is now worth less than it was when the decedent died.

[8] It is next urged that the court should have charged the executor with the amount of two notes which it is said he permitted to outlaw. One of these notes was secured by a trust deed on real property in Kern County which, of course, has never outlawed. The trustor's interest in this property was purchased by one of the sisters, Mrs. LeMay. She later sold the property and kept the money, but she testified it was by mutual agreement. The other note was secured by a mortgage on certain lots in San Diego. The note was never worth more than the security. Mrs. LeMay also purchased the mortgagor's interest in these lots and testified that she

was holding this as "family property". The evidence, although conflicting, supports the court's action in this regard.

[9] It is next contended that the executor should have been charged with a $5,000 loss on account of an unauthorized loan to one Rodney Clarke. It appears that in his lifetime the deceased had loaned Clarke $10,500 on notes secured by 500 head of cattle. The executor subsequently loaned Clarke $5,000 in an attempt to save his cattle business, to the end that the entire debt could be collected. While the attempt was unsuccessful the $5,000 was loaned in Mexico from funds in the Mexican bank, which advanced the funds and kept the papers. Aside from any other considerations, this item is one for which this executor is accountable to the Mexican courts as a part of the estate being administered in that country.

[10] It is next contended that a certain $800 was withdrawn from the estate funds by the executor and should have been charged to him. This grew out of a transaction between the executor and his sister Mrs. LeMay concerning rentals from Kern County property in which the executor had a personal interest. Again, the evidence is conflicting but portions thereof support the implied finding that this money belonged to the executor personally.

[11] It is next argued that the executor should have been charged with the entire amount of rentals collected by him from "the Associated oil property", a portion of the property in Kern County in which the executor, his three sisters and the estate were all interested. For many years Mrs. LeMay had collected these rentals, none of which were paid into this estate. For some sixteen months, beginning in December, 1937, this executor collected these rentals. It appears, without question, that the estate's share of the rentals thus collected by him have been correctly accounted for by him. It is contended, however, that he should have put into the estate funds the entire amounts collected, letting the estate distribute to the various owners their respective portions. Since the interest of the estate is in no way affected we see no reason for disturbing the court's finding and conclusion in this matter.

[12] It is next urged that the court improperly allowed the executor credit for $5,000 paid to an attorney who filed a claim for legal services performed for the decedent during the last three or four months of his lifetime. This claim was filed within the time for presenting claims, was approved by the executor and by the court, and was paid. It was again approved by the court in the settlement of this account. It is argued that the only service was drawing the decedent's will and that the evidence on this hearing was too "meager". There is some evidence of other services included in the claim and nothing more than a conflict in the evidence appears.

[13] It is next urged that a payment of $5,000 on account of executor's fees and two payments of $5,000 and $850 for attorney's fees were unauthorized, and that the court erred in refusing to charge these amounts to the executor. The two $5,000 items were paid pursuant to an order of the court dated February 18, 1927. The $850 item was for certain special services in connection with a ten-year lease and was paid pursuant to an order of court dated July 9, 1937. The only argument with respect to these items in the opening brief is that the orders of court authorizing their payment were invalid under former section 1616, Code Civ.Proc. because no notice was given of the applications for such allowance. In their reply brief the appellants further argue, with respect to the two $5,000 items, that at the time these allowances were made a relatively small part of the work had been performed. No facts are set forth but we are invited to examine the voluminous record in the hope of discovering an abuse of discretion. Assuming that the original orders were irregular it appears that the matters were again thoroughly presented to the court on the hearing of this account, and since there is no clear showing of an abuse of discretion on the part of the court his conclusions on these matters may not be disturbed on this appeal. In re Estate of Hardenberg, 18 Cal.App.2d 307, 63 P.2d 1200.

It is next contended that the payment of $225,000 to the widow as her alleged share of the community property was unauthorized and illegal, and that the court should have charged the executor with that amount.

After the termination of the will contest in 1929 negotiations for settlement of the widow's community interest in the estate were conducted which resulted, in the spring of 1931, in an agreement under which the widow was to be paid and was to accept $225,000 in full settlement of all her claims. The evidence justifies the inference that all three sisters consented and agreed to this although Mrs. LeMay testified that she did not know of the arrangement until after the amount was paid. The agreement was made subject to the approval of the court. On March 30, 1931, the executor filed a "Petition For Partial Distribution" in which it was alleged that the estate was but little indebted and that the amounts in question could be distributed without loss to the creditors of the estate. It was prayed that the executor should be authorized and directed to distribute to the widow $225,000, being the amount of her share of the community property and that he be further authorized and directed to distribute the sum of $10,000 each to himself and to his three sisters. On April 10, 1931, the court entered a decree of partial distribution directing that $10,000 each be paid to the executor and his three sisters, and also finding that the widow was entitled to one half of the community property; that the sum of $225,000 is not greater than her one half share of the community property and that she was entitled to not less than $225,000 upon the final distribution of the estate; that these respective amounts might be distributed as prayed for in the petition without injury to the estate and that it is for the best interest of the estate and all of the heirs that the said amounts be distributed as prayed for. It was then ordered that these respective amounts were thereby distributed to these persons, respectively, and that the executor "is hereby authorized and directed to pay out of the funds of the said estate the amounts above set forth." Pursuant to that order $225,000 was paid to the widow and $10,000 each to the executor and his three sisters. The widow signed a receipt in which she agreed to pay any inheritance tax if one should ever be assessed against her interest in the estate.

Thereafter, and on July 24, 1933, the executor filed a petition alleging that while the will provided that the executor should serve without bond one had been required on request of the widow; that since that time the widow had received her full amount of the estate and had receipted therefor; that it was a burden upon the estate to continue to pay the premium on the bond; and that the only persons entitled to participate in the further distribution of the estate were the executor and his three sisters. It was then prayed that the bond theretofore issued be discharged. With that petition was filed a statement signed by the three sisters to the effect that they were the only persons interested in the estate with the exception of the executor, and requesting that an order be entered cancelling the bond as prayed for by the executor. On August 5, 1933, the court entered an order discharging the bond.

The decree of April 10, 1931, under which these payments were made, has not been set aside and was never appealed from or in any way attacked until this proceeding, more than ten years later. The appellants now contend that under the statutes then in force the court had no authority to enter any such decree, that the widow was not entitled to receive her community interest until the estate was finally closed, and that in any event the court had no jurisdiction to make the order of distribution because the inheritance taxes had not then been paid. In making this attack the appellants have not offered to return the $30,000 which they received under this decree and no mention is made of the fact that the estate has benefited through the stopping of the family allowance to the widow, which ceased when the decree was entered.

[14] The respondent, in view of the statutes then in force and a number of cases, including Gladding v. Superior Court, 7 Cal.2d 408, 60 P.2d 857, argues that the decree of April 10, 1931, is a valid adjudication which is binding and conclusive upon the appellants. It is unnecessary, however, to pass upon this contention. Assuming that this procedure was unauthorized by any statute then in force and that the decree entered was beyond the jurisdiction of the court we think these appellants are estopped from now insisting that the executor be charged with the amount thus paid to the widow. There are no interested parties except the executor and these appellants. It is stated in the respondent's brief that the inheritance taxes are now paid. This is not denied in the appellants' briefs, and that such is the fact appears in another appeal in this estate which is being considered herewith. There are no outside parties or interests which are affected. It rather clearly appears that these appellants consented to this compromise with the widow, to the entering of this decree, and to the making of the payment in question. If there can be any question that Mrs. LeMay did not fully approve of it in advance she admits

that she had knowledge of it when she joined in asking that the bond be discharged, and she thereby ratified what had been done. Moreover, there is no showing that these appellants have been in any way injured by this payment. Even after reappraisement, the inheritance tax appraiser's report filed on February 19, 1942, shows $254,371.44 as the "community exemption" of the widow. We are pointed to no evidence that the widow thus received more than she would receive had the matter been handled in a more regular manner.

[15] A further consideration in this connection is that these appellants in 1939, for a valuable consideration, entered into and signed an agreement in which they stated that they had had knowledge of and had acquiesced in all of the acts of this respondent as executor of this estate and that they released him from all claims which they might have arising from his said acts. This agreement has not been set aside and, so far as here appears, it presents a further ratification of the payment in question. In spite of any irregularity, since no third parties are involved, it would appear to be unjust in the extreme to permit these appellants to upset that decree, to which they consented, and to compel the executor to pay that amount into the estate while they themselves keep the $30,000 which they received through the decree which they are now attacking.

[16] It is next contended that the court should have charged the executor with six items totaling $9,750, representing advances made by the executor to Norma Withington and Mrs. LeMay on various occasions between 1934 and 1938. It is argued that these advances were made without decrees authorizing partial distribution and that such advances cannot be considered upon the hearing of an account but can only be allowed as a credit against the respective distributable shares upon final distribution. In re Estate of Ross, 179 Cal. 358, 182 P. 303, In re Estate of Willey, 140 Cal. 238, 73 P. 998, and In re Estate of Bennett, 13 Cal.2d 354, 90 P.2d 84, 126 A.L.R. 771, are cited. While it may be conceded that this is the general rule the situation is somewhat different here where it is not a mere matter of bookkeeping. The executor has been removed and if he is compelled to pay these amounts into the estate the assets of the estate would be increased that much and an ordinary final distribution would not protect his rights. On the other hand, these matters may easily be adjusted upon a final distribution. These payments were made to these appellants at their request and they still retain the advances of which they complain. Undoubtedly a creditor or a third party could object to the allowance of credit for such advances in an account where the matter could be better adjusted on final distribution, as indicated in the cases above cited. No rights of creditors or third parties are here involved, these appellants are in no way injured and, under the circumstances which here appear, they are estopped from contesting the allowance of these credits. As between these parties the respondent should not be charged with these amounts and compelled personally to again pay them to the estate. In re Estate of Kennedy, 120 Cal. 458, 52 P. 820; In re Estate of Guglielmi, 138 Cal.App. 80, 31 P.2d 1078.

[17] It is next contended that the respondent should have been charged with $35,000 represented by a cashier's check for that amount which was delivered to him in 1925 by the deceased in his lifetime. It is argued that this check was given "in a cover-up transaction by the deceased to avoid payment of federal income taxes," and that in reality it was property belonging to the deceased at the time of his death. While an attempt was made to establish such a fact it is readily apparent that the appellants were unable to produce the requisite proof. Assuming that there was a conflict in the evidence in this regard, the evidence amply supports the court's conclusion that this amount belonged to the executor personally.

Beyond question, this estate was handled in an irregular manner over a period of many years. While much of the fault lies with the respondent his sisters participated therein to a not inconsiderable extent. They had knowledge of and acquiesced in many of the things of which they or their representatives now complain. By common consent the estate was treated too much as a family affair and this seems to have been largely responsible for the confused situation which resulted. As finally presented to the trial court, things had been done which could not be undone and the court was faced with a difficult factual situation and with many practical problems. In our opinion, it did as well as could have been done under the existing circumstances and we find neither reversible error nor an abuse of that discretion which must rest in, and which here is peculiarly appropriate to, that court.

The decree appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

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60 Cal.App.2d 105

In re WITHINGTON'S ESTATE.

SWEITZER et al. v. WITHINGTON et al.

Civ. 3090.

District Court of Appeal, Fourth District, California.
Aug. 3, 1943.

1. Executors and administrators 🔑35(15)

Where evidence was sufficient to show that estate of testator had real basis for claim against estate of legatee, and that same individual was administratrix of both estates, and that administratrix was taking position that she was not required to proceed against the legatee's estate on behalf of the testator's estate, evidence justified order removing administratrix of testator's estate. Probate Code, § 521.

2. Executors and administrators 🔑35(19)

Although evidence justified order removing administratrix, failure of court to make finding required reversal of order.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of Carl Withington, deceased, wherein a petition was filed for the removal of Callie Belle Sweitzer as administratrix of the estate of Carl Withington, deceased. From an order of removal, Callie Belle Sweitzer, individually and as administratrix, and others appeal, opposed by Lysle Woodward Withington and others.

Order of removal reversed with directions.

Frank Pomeranz and Charles C. Crouch, both of San Diego, for appellants.

Frank A. Gazlay, of San Diego, Mathes & Sheppard and Wm. C. Mathes, all of Los Angeles, and Kay Parker, of Beverley Hills, for respondents.

BARNARD, Presiding Justice.

This is another appeal in the estate of Carl Withington, in which a decision involving the final account of the executor was this day filed. In re Estate of Withington, Cal.App., 140 P.2d 482. This appeal is from an order removing Callie Belle Sweitzer as administratrix with the will annexed of said estate.

Harriet LeMay died on April 15, 1942, leaving all her property to Callie Belle Sweitzer, who was appointed administratrix of her estate. She was also appointed administratrix of the Carl Withington estate. In August, 1942, the wife of Lysle Withington, to whom he had assigned all his interest in the estate of Carl Withington, filed a petition asking that Callie Belle Sweitzer as the administratrix of the Withington estate be required to cite herself as administratrix of the estate of Mrs. LeMay to render a full account of all moneys, rentals or property received by Mrs. LeMay during her lifetime which belonged to the estate of Carl Withington. An objection to this petition was sustained on the ground that jurisdiction over the acts of Mrs. Sweitzer, as administratrix of the LeMay estate, is in the probate court of Kern County where that estate is pending.

Thereafter, another petition was filed seeking the removal of Mrs. Sweitzer as administratrix of Carl's estate. It was alleged, among other things, that Mrs. Sweitzer was represented by the same attorneys in her separate capacities as administratrix of Carl's estate, as one of the beneficiaries of that estate, as executrix of the will of Norma Withington who had also died, as sole beneficiary of that estate, as administratrix of the estate of Mrs. LeMay and as sole beneficiary of that estate; that Carl's estate has a claim for rents, issues and profits against the estate of Mrs. LeMay; that Mrs. Sweitzer, as administratrix of Carl's estate has failed in and has no intention of, proceeding with the enforcement of this claim against Mrs. LeMay's estate, which is alleged on information and belief to amount to more than $20,000, exclusive of interest; that this claim can be prosecuted and collected only by Mrs.

Sweitzer in her capacity as administratrix of Carl's estate acting against herself in her capacity as administratrix of Mrs. LeMay's estate; and that the various capacities of Mrs. Sweitzer are adverse and inconsistent.

At the hearing of this petition, on September 4, 1942, the court pointed out that Mrs. Sweitzer, as the representative of Mrs. LeMay, was in the position of a trustee with respect to the Carl Withington estate; that she occupied conflicting and adverse positions in her various capacities; that it was to her personal interest to keep all property in the LeMay estate rather than have it turned over to the estate of Carl Withington; that her own statement in her affidavit in resistance to this petition disclosed that there could be no true adversary feeling in any type of litigation between her and the LeMay estate; that four months had gone by and no contingent claim had been filed by her against the LeMay estate; and that the time limit for filing such a claim was drawing near. The court then pointed out to Mrs. Sweitzer that she did not have to file a liquidated claim and that she could file a contingent claim so as to keep the LeMay estate responsible, whereas if she let the six months go by the claim might be lost. An order was then entered continuing the hearing and ordering Mrs. Sweitzer, as administratrix of Carl's estate, to file, within ten days, a claim for any moneys which might be due or to become due to the estate of Carl Withington by reason of moneys or property belonging to that estate which had gone into the possession of Mrs. LeMay during her lifetime.

Such a claim was not filed but on September 16, 1942, Mrs. Sweitzer filed an affidavit stating that she was unable to verify such a claim and for that reason could not comply with the order of the court without committing perjury and, further, that she was advised and believes that under the law of this state there is no obligation on the part of the administratrix of the LeMay estate to account for anything to the Withington estate.

On September 25, 1942, a further hearing was had on the petition for removal. At the conclusion of the hearing the court pointed out that the position taken by Mrs. Sweitzer would stop at the threshold any inquiry into the matters in question, that Mrs. Sweitzer had conflicting interests while representing both estates, and that there might well be a natural inclination on her part to keep the property in the estate in which she had a larger interest. An order was then entered removing her as administratrix with the will annexed of the estate of Carl Withington. Mrs. Sweitzer, in her various capacities, has appealed from that order.

Insofar as the merits of this appeal are concerned, it is contended that the evidence received at the hearing was not sufficient to establish that the estate of Carl Withington had any lawful claim against the estate of Mrs. LeMay, and that it was an abuse of discretion to order the removal of the appellant "because she was unwilling to commit perjury." With respect to the latter contention it may be observed that all that was required of Mrs. Sweitzer was that she file a claim within the time allowed in order to protect the interests of the other estate and it was made very clear to her that only a contingent claim need be filed. All that was required was that she set forth the facts and no element of perjury was involved. Elizalde v. Murphy, 163 Cal. 681, 126 P. 978. With respect to the power of removal possessed by the court in such a case section 521 of the Probate Code provides for such removal whenever a judge has reason to believe that mismanagement of the estate has occurred. In Re Estate of Bell, 135 Cal. 194, 67 P. 123, it was held, in effect, that an executor may be removed for mismanagement and neglect where he has an adverse interest and has assumed conflicting duties.

[1] There can be no question here that the evidence was sufficient to show that the estate of Carl Withington had a real basis for a claim against the estate of Mrs. LeMay, and it clearly appeared from the evidence that Mrs. Sweitzer, as administratrix of both estates, had adverse interests as well as conflicting duties and obligations. Many of the facts were well known to the court as it had only recently completed a prolonged trial in the account proceedings in the Carl Withington estate, where much evidence was received which was pertinent and material here. A great deal of this evidence was pointed out and referred to at the hearing here involved and the parties hereto have stipulated that the record on the appeal in the account proceeding may be used as a part of the record on this appeal. It appears that Carl Withington at the time of his death owned an interest in certain real property in Kern County, as a tenant in common with his

three sisters and his brother. The rentals from the common property averaged about $10,000 a year. For many years after Carl's death Mrs. LeMay collected these rentals and in large part either kept the proceeds or gave portions thereof to her two sisters. Only a small part of its share of these rentals seem to have been turned over to the Carl Withington estate. Mrs. LeMay testified in the accounting proceeding that she had collected these rentals, that she had kept no record because she was not required to do so by her brother and sisters, that she had never made an accounting for them, and that through the years she had kept this money except as she had given her sisters whatever they needed from time to time. She also testified that she had collected and kept three or four other amounts which would seem to have probably belonged to the estate of Carl Withington.

Assuming, but not holding, that certain affidavits and exhibits relied on by the appellant were sufficient to create a conflict in the evidence this is the most that can be said, and it clearly appears that the evidence is sufficient to sustain findings which would amply justify the removal of Mrs. Sweitzer as administratrix of the Carl Withington estate. A further consideration is that the record discloses that Mrs. Sweitzer was taking the position that she was not required to proceed in any manner against the estate of Mrs. LeMay on behalf of the estate of Carl Withington, that she had no intention of doing so if she could avoid it, and that she directly refused to carry out the order of the court in this regard. Without going into it more in detail it is sufficient to say, from a factual standpoint, that the evidence amply justified the order of removal. We are unable to see how the court could reasonably have reached any other conclusion.

[2] Unfortunately, however, the court failed to make any findings whatever. This was held prejudicially erroneous in Re Estate of Pendell, 216 Cal. 384, 14 P.2d 506. This requires a reversal of the order appealed from although the circumstances are such that no further hearing, as to the facts, is either necessary or desirable.

A special administrator of the estate of Carl Withington was appointed, upon the removal of Mrs. Sweitzer, and it is probable that many things have been done by him in that capacity. Should the court, after making findings, again desire to make an order removing Mrs. Sweitzer as administratrix of said estate, that order could well be entered nunc pro tunc as of the date of the order from which this appeal was taken, in order to preserve the status quo and to avoid further unnecessary proceedings.

The order of removal is reversed with directions to make and file findings, and to thereafter make and enter an appropriate order.

MARKS and GRIFFIN, JJ., concur.

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60 Cal.App.2d 110

WITHINGTON v. COLLINS et al.

Civ. 3093.

District Court of Appeal, Fourth District, California.
Aug. 3, 1943.

1. Partition 🔑65

Where disputes arise between parties to action for partition relating to their respective rights or interests, such disputes may be litigated and determined in that action. Code Civ.Proc. § 759.

2. Partition 🔑48

The statute regarding partition was intended to make judgment conclusive on all persons interested and not to permit the matter to be taken up piecemeal and therefore provision is made for bringing in persons having future rights or interests. Code Civ.Proc. § 759.

3. Partition 🔑62
Pleading 🔑362(1)

In partition action, action of court in striking from answer allegation that transfer of cotenant's interest in property to plaintiff was fraudulent as to other tenants in common, and in decreeing partition without passing on question whether plaintiff had any interest in property through transfer under which she claimed, was improper. Code Civ.Proc. § 759.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action for partition by Willa Hayes Withington against Patrick Collins, wherein Earl Raymond Prince filed a cross-complaint. From an interlocutory judgment, Callie Belle Sweitzer, individually and as executrix of the last will and testament of Norma Withington, and as administratrix of the estate of Harriet W. LeMay, and others, appeal.

Interlocutory judgment reversed and cause remanded with directions.

Charles C. Crouch, Frank Pomeranz, and Richard F. Kahle, all of San Diego, for appellants.

Borton, Petrini, Conron & Borton and Harry M. Conron, all of Bakersfield, H. R. Conklin and Frank A. Gazlay, both of San Diego, and Mathes & Sheppard, Wm. C. Mathes, and Paul M. Gregg, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is another appeal growing out of the affairs of the estate of Carl Withington. This action is one for partition, the plaintiff being the wife of Lysle Withington, the former executor of the Carl Withington estate.

So far as material here, the complaint alleged that the plaintiff is the owner of an undivided 11/60ths interest in certain real property in Kern County; that Norma Louise Withington, Harriet W. LeMay, Callie Belle Sweitzer and the estate of Carl Withington are the owners of the remaining interests in this property (subject to certain encumbrances about which there is no controversy); that Lysle Withington had been removed as executor of the Carl Withington estate; that on August 20, 1940, the plaintiff and her husband deeded their interest in the property to a title company in trust to secure their obligations of the defendants American Surety Company, the surety on the husband's bond as executor of the Carl Withington estate, and to Frank A. Gazlay who had rendered them certain services as an attorney; that they received back from the title company a declaration of trust providing that, after payment of these obligations, any remainder of the proceeds from the interest conveyed should be paid to the plaintiff; and that the property could not be partitioned without prejudice to the owners. It was prayed that the property should be sold, that the interests of the respective parties should be determined, and that the proceeds should be divided and distributed in accordance with the respective interests of the parties.

Harriet W. LeMay, Callie Belle Sweitzer, Norma Withington and Norma Withington as administratrix of the estate of Carl Withington filed an answer to the complaint in which, among other things, they denied that the plaintiff is the owner of an interest in this property alleging, in this connection, that Lysle Withington had been appointed executor of the estate of Carl Withington; that the American Surety Company had furnished a bond for him as such executor in the sum of $250,000; that on August 25, 1939, a citation was issued requiring Lysle Withington to render an account as executor of that estate; that on July 19, 1939, Lysle Withington had, without consideration, conveyed his interest in the property in question to the plaintiff; that this was done with full knowledge of both that Lysle Withington was short in his accounts with said estate and with the intention of avoiding any judgment that might be rendered against him on account of said shortage; that on July 10, 1940, Lysle Withington's powers as executor were suspended and he was later removed as such executor; that on August 20, 1940, the American Surety Company and Frank A. Gazlay, knowing that Lysle Withington was short in his accounts as executor of the Carl Withington estate, had caused and procured the plaintiff to convey her interest in this property to this trust company as security for their claims and for the purpose of encumbering the property so as to make it unavailable to pay any judgment that might be rendered against Lysle Withington for such shortage; that at the hearing in the probate court, on the account proceedings, Lysle Withington had admitted that he owed the Carl Withington estate about $40,000; and that judgment in the account proceedings in the Withington estate had not yet been entered.

The plaintiff moved to strike from this answer the allegations to which we have just referred and this motion was granted by the court. Thereafter, this action was tried. At the trial, very little testimony was taken, most of the evidence being documentary. Norma Withington and Mrs. LeMay having died in the meantime, their executrix and administratrix, respectively, had been substituted. The attorneys for the parties who filed the answer, to which we have referred, stipulated that referees might be appointed to partition the property and that the court might order the property sold, in the event that these referees reported to the court that a partition in kind was not practicable. These attorneys, however, reserved the right to attack on appeal any decree which might be entered on the ground that the court had erred in striking from their answer the matters which we have heretofore briefly summarized.

Although findings were waived the court entered an interlocutory judgment, which included findings. Among other things, the court found that the property in question belonged in fee to, and was owned by, the plaintiff, Callie Belle Sweitzer, the heirs and devisees of Mrs. LeMay, the heirs and devisees of Norma Withington and the heirs and devisees of Carl Withington, as tenants in common and in the respective proportions as set forth in the complaint. It was ordered that the referees who were therein appointed proceed with the partition of the real property in question and report to the court how it was divided between the parties, that if the referees should report to the court that the premises could not be partitioned the premises should be sold as required by law, and that after the payment of all costs, with the admitted encumbrances and attorney's fees to be later fixed, the proceeds should be distributed to the owners in accordance with their respective interests. It was then further ordered that the proceeds of the sale of the property, to the extent that the plaintiff would otherwise be entitled to receive the same, should be paid to the trust company above referred to for the purpose of carrying out the terms of the declaration of trust, whereby any such proceeds should be applied to any amounts that might be due to the American Surety Company and to Frank A. Gazlay and the remainder paid over to the plaintiff.

Callie Belle Sweitzer individually, as executrix of the last will of Norma Withington, and as administratrix of the estate of Harriet W. LeMay appealed from the interlocutory judgment. In their briefs, these appellants have been joined by the presently acting special administrator of the estate of Carl Withington.

It is contended that the court erred in striking from the answer of these appellants the allegations setting up the defense that the transfer of Lysle Withington's interest in this property to the plaintiff was fraudulent as to the other tenants in common, and in ordering the property partitioned without determining the question as to the plaintiff's interest in the property.

[1, 2] Section 759, Code Civ.Proc. provides, in part, that "The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action." In Morenhout v. Higuera, 32 Cal. 289, it was held that where disputes arise between parties to an action for partition relating to their respective rights or interests such disputes may be litigated and determined in that action and it was then said: "and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial." This rule was followed in Martin v. Walker, 58 Cal. 590; Emeric v. Alvarado, 64 Cal. 529, 2 P. 418; Fonner v. Martens, 186 Cal. 623, 200 P. 405; Varni v. Devoto, 10 Cal.App. 304, 101 P. 934; Buhrmeister v. Buhrmeister, 10 Cal.App. 392, 102 P. 221; Kuns v. Dias, 32 Cal.App. 651, 163 P. 1052; Middlecoff v. Cornise, 155 Cal. 185, 100 P. 232, 17 Ann.Cas. 1159; and Lent v. H. C. Morris Co., 25 Cal. App.2d 305, 77 P.2d 301. In Ivancovich v. Weilenman, 144 Cal. 757, 78 P. 268, it was held that the statutory provisions relating to partition were intended to make the one judgment of partition final and conclusive on all persons interested and not to permit the matter to be taken up piecemeal and that, accordingly, provision is made for bringing in not only tenants in common but persons having future rights or interests. In Ritzman v. Ritzman, 190 Cal. 505, 213 P. 493, in speaking of the provision of section 758, Code Civ.Proc., that a defendant in a partition action must set forth his interest in the property, it was held that this requirement was intended to be mandatory.

[3] The respondents concede that this is the law but argue that the defense which was stricken from the answer, in effect, merely alleged that the plaintiff and her husband had conveyed to this title company all of their interest in this real property "to be held in trust as security for payment of the claims of certain creditors, and otherwise for the use and benefit of the plaintiff." It is then argued, citing section 3432 of the Civil Code and certain

cases, that a debtor has the right to prefer one creditor over another, except where bankruptcy intervenes within four months of the conveyance, that the appellants here are criticising a conveyance operating as a preference of existing creditors on the ground that it may prejudice another possible creditor, and that since the plaintiff and her husband had the right to prefer certain of their creditors the allegations of the answer which were stricken presented no issue which required determination by the court.

Assuming that the respondents are correct in their contention that a valid preference was thus created in favor of the American Surety Company and Frank A. Gazlay, that the appellants may not now set the same aside, and that the allegations of the answer which were stricken constituted no defense insofar as the rights of the American Surety Company and Frank A. Gazlay as beneficiaries of the trust agreement are concerned, this does not cover the entire situation. The respondents overlook and ignore the fact that under the trust arrangement any balance remaining after these obligations are taken care of is to be paid to the plaintiff under the terms of the interlocutory judgment. So far as here appears, the plaintiff is given a part of the proceeds under the terms of the decree, although her right thereto has not yet been determined. While a judgment has now been entered in the account proceeding that judgment is not yet final and the amount or extent of the obligations to the American Surety Company and Frank A. Gazlay has not yet been determined and it cannot now be held that there will be no balance coming to the plaintiff or that she has no remaining interest in the property which is the subject of the partition action, insofar as the judgment appealed from is concerned. While she is thus given an interest in the property by that judgment her right to that interest was directly attacked by the allegations of the answer which were stricken therefrom, and the appellants were deprived of the opportunity of proving, if they could, their allegations to the effect that the transfer to the plaintiff from her husband of his interest in the property was fraudulent and void as against the rights and claims of the appellants. Her remaining interest, upon which the appellants might establish a claim, may be very substantial if the judgment against Lysle Withington in the account proceeding exceeds in amount the obligations to the American Surety Company and Frank A. Gazlay, as these are finally determined. It follows that the court erred in decreeing a partition and ordering any remaining balance to be paid over to the plaintiff without first passing upon and determining the question presented, as to whether or not the plaintiff had any interest in the property through the assignment under which she claims.

There was little or no controversy on the other issues which were tried, and the evidence on those issues can easily be resubmitted. The appellants should be permitted to amend their answer and to again allege the defense which was stricken from their former answer, and that issue should be tried with the rest of the cause and determined in connection with any decree of partition which is entered.

The interlocutory judgment is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

MARKS and GRIFFIN, JJ., concur.

22 Cal.2d 287

CALIFORNIA DRIVE-IN RESTAURANT ASS'N et al. v. CLARK et al.

L. A. 18093.

Supreme Court of California.
June 16, 1943.

Rehearing Denied July 15, 1943.

1. Officers 🔑103

Generally, rules for construction of statutes govern construction of administrative agencies' rules and regulations.

2. Statutes 🔑158, 159

The presumption is against repeals of statutes by implication, especially where prior act has been generally understood and acted upon, and to overcome such presumption, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that they cannot operate concurrently.

3. Statutes 🔑184

The purpose and object sought to be accomplished by legislation is important factor in determining legislative intent.

4. Master and servant 🔑69

The statute requiring employers to post notices that gratuities given their employees by patrons go to employer and are not shared by employees or notices of extent to which such gratuities are shared between employers and employees did not impliedly annul Industrial Welfare Commission's order prohibiting restaurant operators from including tips or gratuities received by their female and minor employees as part of legal minimum wages fixed by such order, as such statute and order were not irreconcilable, but entirely harmonious. St. 1937, pp. 202, 203, §§ 350, 352, 356.

5. Statutes 🔑219

While construction of statute by administrative agency charged with its enforcement must be considered by courts in ascertaining meaning of statute, a clearly erroneous administrative interpretation of unambiguous statute cannot alter clear meaning thereof.

6. Appeal and error 🔑842(2)

A trial court's finding that Industrial Welfare Commission acted in excess of its jurisdiction in adopting order prohibiting restaurant operators from including their female and minor employees' tips or gratuities as part of their legal minimum wages was "conclusion of law" not binding on Supreme Court.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

7. Constitutional law 🔑89(4), 276

In regulation of employees' wages and hours by legislative authority, constitutional guarantees of freedom of contract must give way to reasonable police regulations. Const.Cal. art. 1, §§ 1, 13; art. 20, § 18; U.S.C.A.Const. Amend. 14.

8. Constitutional law 🔑89(4), 276

The legislative power under Constitution to restrict freedom of contract by reasonable police regulations may be exercised in public interest with respect to contracts between employers and employees. Const. Cal. art. 1, §§ 1, 13; art. 20, § 18; U.S.C.A. Const. Amend. 14.

9. Master and servant 🔑10

In dealing with relation of employer and employee, legislature has wide field of discretion in order that health and safety may be suitably protected and peace and good order promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

10. Constitutional law 🔑70(3)

Legislative response to deep-seated conviction as to evil of inadequate wages and means adapted to check it, as evidenced by many states' enactment of minimum wage laws, cannot be regarded as arbitrary or capricious, which is all that court may decide, though wisdom of legislative policy be regarded as debatable and its effects uncertain.

11. Constitutional law 🔑70(3)

Whether employees' tips, from viewpoint of social welfare, should be counted as part of their legal minimum wages fixed by statute, is not for judicial decision.

12. Constitutional law 🔑48

The presumption is that legislature had adequate and reasonable basis for its police regulations and that statute providing for such regulations is constitutional, and only question for court to decide is whether legislature acted arbitrarily or capriciously.

13. Constitutional law 🔑89(4), 276

The Industrial Welfare Commission's order, prohibiting employers from including employees' tips or gratuities as part of their legal minimum wages fixed by such order, has reasonable basis and hence is not invalid as unconstitutional interference with "freedom of contract" between employers and employees. St. 1937, p. 215, § 1182; Const.Cal. art. 1, §§ 1, 13; art. 20, § 18; U.S.C.A.Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Contract".

14. Constitutional law 🔑208(7), 238(2)

The Industrial Welfare Commission's order, prohibiting restaurant operators from including their female and minor employees' tips or gratuities as part of their legal minimum wages fixed by such order, is not unconstitutional as making improper "discrimination" between different employers and employees, as classification is reasonable. Const.Cal. art. 1, § 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Discrimination".

15. Constitutional law 🔑208(7), 238(2)

Statutes applicable only to relation of employer and employee are not unconstitutional as "class legislation". Const.Cal. art. 1, § 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Class Legislation".

16. Constitutional law 🔑238(2)

"Equal protection of the laws" is not denied by classification of occupations on reasonable basis, and classification may be based on matters personal to individuals acting as employees. Const.Cal. art. 1, § 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of Law".

17. Constitutional law 🔑208(7), 238(2)

Classification of employees' occupations by statute may be based not only on employees' character, but on nature of employers' businesses. Const.Cal. art. 1, § 21; art. 4, § 25; U.S.C.A.Const.Amend. 14.

18. Constitutional law 🔑208(7), 238(2)

A statute dealing with employees in particular line of business does not create arbitrary "discrimination" merely because its operation is not extended to other lines of business having their own circumstances and conditions. Const.Cal. art. 1, § 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

19. Appeal and error 🔑907(3)

On appeal on judgment roll alone, all of trial court's findings must be deemed supported by evidence, and respondents are bound by such findings.

20. Master and servant 🔑69

In action to enjoin enforcement of and declare invalid Industrial Welfare Commission's order prohibiting employers from including restaurant employees' tips as part of their legal minimum wages fixed by such order, where trial court found that every act required by statute to be done by commission in promulgation and adoption of order was done within time and in manner and form required by statute, fact that no finding by commission that wages fixed were adequate to meet costs of proper living, as specified in Minimum Wage Law, appeared on face of order, did not invalidate it. St.1921, p. 380, § 6(c).

21. Master and servant 🔑69

The Industrial Welfare Commission's adoption of order, prohibiting employers from including female and minor restaurant employees' tips as part of their legal minimum wages fixed by such order, was within power and authority delegated to commission by statute authorizing it to fix wages of women and minor employees adequate to meet necessary cost of proper living and sustain their health and welfare. St.1921, p. 379, § 6(a); Const. art. 20, § 17½.

22. Master and servant 🔑69

The Industrial Welfare Commission's power to provide safeguards to insure employees' receipt of their minimum wages and prevent evasion and subterfuge is "implied power" flowing from power delegated to commission by statute to fix minimum wages. St.1913, p. 632, § 6(a), St.1921, p. 379, § 6(a); Const. art. 20, § 17½.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Power".

23. Officers 🔑103

While administrative agency, under guise of its rule making power, may not abridge or enlarge its authority or exceed powers given it by statute, an administrative board or officer has authority to adopt reasonable rules and regulations deemed necessary to due and efficient exercise of powers expressly granted.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the California Drive-in Restaurant Association and others against Margarete L. Clark, as Chief of the Division of Industrial Welfare of the Department of Industrial Relations, and others for an injunction against enforcement of a regulation of the Industrial Welfare Commission and a declaration of the invalidity thereof. Judgment for plaintiffs, and defendants appeal.

Reversed.

Prior opinion, 129 P.2d 169.

Robert W. Kenny, Atty. Gen., Earl Warren, former Atty. Gen., Burdette J. Daniels and Alberta Belford, Deputies Atty. Gen., and Leo L. Schaumer and E. A. Lackmann, both of Los Angeles, for appellants.

Thorpe & Bridges, Gerald Bridges, Frank R. Johnston, and E. R. Young, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs, operators of drive-in restaurants, successfully challenged in the superior court the validity of a regulation of the Industrial Welfare Commission, designated Order 12-A. Defendants, the Chief of the Division of Industrial Welfare of the Department of Industrial Relations and the members of the Industrial Welfare Commission of the Division of Industrial Welfare of the Department of Industrial Relations, appeal from the judgment entered for plaintiffs.

Plaintiffs are independent owners of establishments, serving food and beverages. Their patronage consists chiefly of motorists who are served while remaining in their vehicles, however, service may be obtained in the owner's restaurant buildings. Most of the employees are girls and women commonly referred to as "car hops." The employment arrangement contemplates that the tips received by the employees shall constitute their wages, except that the employers make up the difference if the tips received fall below the minimum wage for minors and adult females fixed by the Industrial Welfare Commission. Plaintiffs posted in their business establishments, the notices required by a statute of 1929, hereinafter set forth. In 1940, plaintiffs were advised by the Chief of the Division of Industrial Welfare that their employment arrangement violated Order 12-A, in that they could not consider the tips received by the minor and female adult employees in computing and paying the minimum wage, and that they would be required to comply with said order.

Order 12-A became effective on June 8, 1923. In section 1 it fixed a minimum wage of $16 per week to be paid to all female adult or minor employees in restaurants or other places where food and drinks were sold. Section 2 fixed the maximum amount the employer could deduct from the minimum wage for meals and lodging furnished the employee. Section 3, here in question, reads: "No employer may include tips or gratuities received by employees designated in section 1 hereof as part of the legal minimum wages fixed by said section of this Order." The remaining nine sections deal with hours of labor, working conditions, the employer's duty to keep records, and the like.

In 1929 (Stats.1929, p. 1971), a statute was passed by the Legislature, now appearing in sections 350–356 of the Labor Code, St.1937, pp. 202, 203. Section 351 of the Labor Code reads:

"Every employer or agent who collects, takes, or receives any gratuity, or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than forty-eight point black-face type, to the following effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees."

Section 352 specifies that the notice shall also state the extent to which employees are required to accept gratuities in lieu of wages or permit them to be credited against their wages. The provisions apply to all businesses having one or more persons in service. A gratuity "includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron." Section 350.

A penalty is imposed for violation of the act, and it is declared that: "The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and can not be contravened by a private agreement. As a part of the social public policy of this State, this article is binding upon all departments of the State." Labor Code, § 356.

[1-3] Whether the 1929 statute impliedly annulled section 3 of said Order 12-A must be determined in the light of the appropriate rules of statutory construction. Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. Miller v. United States, 294 U.S. 435, 55 S.Ct. 440, 79 L.Ed. 977. With reference to implied repeals of statutes this court stated in Penziner v. West American Finance Co., 10 Cal.2d 160, 176, 74 P.2d 252, 260: "The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed." See 23 Cal.Jur. 694 et seq. The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent. City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595.

[4] Applying those rules to the instant case we find no repugnancy. The statute of 1929 and section 3 of Order 12-A rather than being irreconcilable are entirely harmonious. The basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments. The subject of tipping is embraced only incidentally in the furtherance of that general purpose. Broadly, it was designed to deal with the industrial welfare of such employees, and the relation of their welfare to the general public interest. On the other hand the statute is concerned exclusively with tipping in respect to its relation to the public which patronizes not only restaurant establishments but many other businesses. The Legislature expressly stated that its purpose is "to prevent fraud upon the public," a policy underlying no part of the order. Section 3 of the order states that tips received by the designated employees may not be included in the minimum wage therein fixed. If it be conceded that the effect of said section is to prohibit the deduction of tips from the employees' wages, and that the statute impliedly authorizes such deduction as asserted by plaintiffs, such prohibition should be strictly limited, and said section would not be violated in instances where the employer retained the entire amount of all tips received *above* the minimum wage, or deducted the tips from the amount of any wages he agreed to pay in excess of the specified minimum. It does not apply to male employees or persons employed in businesses other than those mentioned.

Further, it is not necessary to conclude that the statute authorizes tipping. It does not purport to authorize or legalize the retention or deduction of the tips received by the employees. It is nothing more than a comprehensive regulation in respect to advising the public of the retention of tips by the employer whether such retention is legal or not, the essential requirement being that the public be informed of the practice. Fairly interpreted, the posting of the notice is required regardless of whether such retention or deduction is being made from the minimum legal wage fixed by section 3. It may be said that section 3, given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage, because if the employer could retain such tips he would be, in effect, accomplishing indirectly that which he could not do directly, namely, including the tips in the legal wage. It would be a subterfuge for him to receive all the tips and pay the minimum wage. The end result would be counting the tips as a part of the legal wage. That conclusion does not mean that section 3 and the statute are inconsistent to that extent. The purpose of the statute and section 3 are entirely different. The statute does not purport to cover the special field of tipping in regard to its effect on the minimum wage law. It is aimed at the protection of the public against fraud.

For the same reasons the historical arguments advanced by plaintiffs are not persuasive. True, a statute was enacted in 1917 (Stats.1917, p. 257) which made it unlawful for an employer to demand tips received by his employee in consideration of the latter's being hired or retained. That act, like the 1929 Act, was broad in its scope and did not purport to affect tipping in relation to minimum wages. It was declared invalid in Re Farb, 178 Cal. 592, 174 P. 320, 3 A.L.R. 301, and thereafter the 1929 Act was passed. Both of those statutes were aimed at the prevention of a fraud on the public and were not concerned with the effect on the inclusion of tips in minimum wages and the purpose of section 3 of said Order 12-A. If it be assumed that the Legislature in passing the 1929 statute was endeavoring to avoid the difficulty encountered with reference to the 1917 Act in In re Farb, supra, still it did not purport to authorize the deduction of tips from the minimum wage. It was regulating the retention of tips by employers regardless of whether such retention was or was not a violation of section 3 of Order 12-A. The statute and the order were designed for fundamentally different purposes.

[5] Plaintiffs urge that because the predecessors in office of defendants did not enforce section 3 of Order 12-A, they must have considered it annulled by the 1929 statute, and some of the plaintiffs having been so advised by executive officers of defendants predecessors, the statute should be interpreted to annul said section 3. It is undoubtedly a rule of statutory interpretation that the construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute. Los Angeles County v. Superior Court, 17 Cal.2d 707, 112 P.2d 10; 23 Cal.Jur. 776, 777. But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. Los Angeles County v. Superior Court, supra; 23 Cal. Jur. 776. We have seen that the 1929 statute does not purport to legalize the deduction or retention of tips by an employer, nor does section 3 of Order 12-A prohibit tipping; it merely prohibits the inclusion of tips in the minimum wage for certain employees. The alleged implied nullification which is not favored in the law does not exist.

[6] The trial court found: "* * * that in adopting section 3 of Order 12A * * * defendant * * * acted in excess of its jurisdiction." That finding is not, as claimed by plaintiffs, binding upon this court, inasmuch as it is a conclusion of law. In support of it plaintiffs challenge the constitutionality of section 3, and the validity of the adoption of the order.

Plaintiffs contend that section 3 is invalid because it is an unconstitutional interference with the freedom of contract as between employer and employee. United States Const. Fourteenth Amendment; Cal. Const. art. I, secs. 1, 13; art. XX, sec. 18. The main premise relied upon by plaintiffs is that section 3 prohibits an employer and his employee from agreeing that the former shall retain all tips received by the latter, citing In re Farb, supra, declaring unconstitutional the 1917 Act, supra, and denouncing such practice. It has heretofore been pointed out that the 1917 Act was not aimed at and did not involve any restrictions on such contracts directly as a part and in aid of the minimum wage requirements. The 1917 Act applied expressly to any and all employees without regard to whether a legal wage was fixed for them. For that reason we do not consider the Farb case as necessarily supporting plaintiffs' position. Furthermore, the reasoning of the Farb case is out of line with the later authorities upholding minimum wage legislation. See United States v. Darby, 312 U.S. 100, 657, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430, 1443; West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330; 31 Am.Jur., Labor, § 503; 130 A.L.R. 273. There is a distinct difference between a comprehensive prohibition of retention of tips by employers and the prohibition of such practice as a part of an order fixing minimum wages.

[7-11] It must be remembered that in the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. The Supreme Court of the United States in discussing the regulation of hours and wages of women employees stated in West Coast Hotel Co. v. Parrish, supra, 300 U.S. at page 392, 57 S.Ct. at page 582, 81 L.Ed. 703, 108 A.L.R. 1330:

> "This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55); in forbidding the payment of seamen's wages in advance (Patterson v. Bark Eudora, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as orginally produced in the mine (McLean v. Arkansas, 211 U. S. 539, 29 S.Ct. 206, 53 L.Ed. 315); in prohibiting contracts limiting liability for injuries to employees (Chicago, B. & Q. R. Co. v. McGuire supra, 219 U.S. 549, 31 S.Ct. 259, 55 L.Ed. 328); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann. Cas.1918A, 1043); and in maintaining workmen's compensation laws (New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A. 1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Chicago, B. & Q. R. Co. v. McGuire, supra, 219 U.S. 549, at page 570, 31 S.Ct. 259, 55 L.Ed. 328."

And at page 399 of 300 U.S., 57 S.Ct. at page 585, 81 L.Ed. 703, 108 A.L.R. 1330:

> "The Legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. *Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide.* Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment." (Emphasis added).

Many other illustrations could be given. In the recent case of Williams v. Jacksonville Terminal Co., 315 U.S. 386, 62 S.Ct. 659, 86 L.Ed. 914, the court had before it the question of whether the tips received by red caps could be counted as a part of the minimum wage under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. It was held that they could and that legally speaking such tips were wages under the agreement between the employer and employee. However, the court was careful to point out that the Fair Labor Standards Act did not prohibit the inclusion of tips in the minimum wage, and it recognized that such a prohibition might well be valid. It stated at page 388 of 315 U.S., 62 S.Ct. at page 662, 86 L.Ed. 914:

> "The Fair Labor Standards Act is not intended to do away with tipping. Nor does it appear that Congress intended by the general minimum wage to give the tipping employments an earnings-preference over the non-service vocations. The petitioners do not dispute the railroad's contention that, during the entire period, each red cap received as earnings—cash pay plus tips—a sum equal to the required minimum wage. Nor is there denial of increased pay to the red caps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. *The desirability of considering tips in setting a minimum wage, that is whether tips from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision. We deal here only with the petitioners' assertion that the*

wages Act requires railroads to pay the red caps the minimum wage without regard to their earnings from tips." (Emphasis added.)

[12, 13] The presumption is that the Legislature had adequate and reasonable basis for its police regulations and that a statute providing for such regulations is constitutional (5 Cal.Jur. 628, et seq.), and, as expressed in West Coast Hotel Co. v. Parrish, supra, the only question to be decided is whether it acted arbitrarily or capriciously. There may be others, but certain reasonable grounds appear for the policy established by section 3 of Order 12-A. As we have seen from the foregoing quotation from Williams v. Jacksonville Terminal Co., supra, that possibility is recognized where the court declared that whether the social welfare required that tips be not counted as part of the minimum wage was not for "judicial decision." It cited for that statement, Anderson, Tips & Legal Minimum Wages, XXXI American Labor Legislation Review 11, at page 13, where it was aptly said that if the tips received were to be counted as a part of the minimum wage "* * * the employee would be required to report to her employer the amount of tips received each week, in order that he in turn could know the amount of wage he must pay to make up the $16.

"If this practice were followed the purpose of the minimum-wage law would soon be defeated. It would not be long before employers discovered which of their employees were costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower that the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to the employer a greater amount of tips than actually is received. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation. To prevent just this kind of abuse, most State minimum-wage orders for hotels and restaurants contain a provision that under no circumstances shall tips be counted as a part of the legal minimum wage." In order that the welfare of the employees be advanced and the benefits of the minimum wage law be preserved, it may well be said that section 3 has a reasonable basis. If the employees may be induced, and in effect coerced, by fear of dismissal by an employment contract requiring the tips to be counted as a part of the minimum wage, to report their tips as equal to the minimum wage even though they are not, the minimum wage requirement is seriously undermined. By indirect method they would be forced into a position of receiving less than the standard fixed. If the employer is permitted to retain the tips in an amount equal to the minimum wage, which as seen would be a violation of section 3, the same condition would exist. The fear of dismissal might well coerce the employees to turn over as tips a portion of their own funds when the tips received were not equal to the legal wage. The effectiveness of the minimum wage law would be thus impaired. With the employer prevented from retaining tips in the amount of the minimum legal wage, a salutary result would follow. The benefits of the minimum wage law would be preserved, and the dignity of the laborer and his social position would be advanced by relieving him of the necessity of resorting to the undignified conduct encouraged by the tipping practice.

The Legislature clearly sets forth the purpose sought to be obtained by the fixing of minimum wages as that adequate to supply the necessary cost of proper living and to maintain the health and welfare of the employees. Labor Code, sec. 1182, St.1937, p. 215. We perceive that that purpose may be thwarted if tips may be included in the minimum wage.

The foregoing discussion does not mean that tips may not be considered wages under certain circumstances such as, computation of compensation under workmen's compensation laws. Hartford Acc. & Indemnity Co. v. Industrial Acc. Comm., 41 Cal.App. 543, 183 P. 234; 29 Cal.L.Rev.

774; Case of Powers, 275 Mass. 515, 176 N.E. 621, 75 A.L.R. 1223, and generally Williams v. Jacksonville Terminal Co., supra. An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation, but section 3 is aimed at the evils above-mentioned in connection with *minimum wages,* and merely because tips may be termed wages under certain circumstances does not mean that they may be counted as part of the minimum wage where to do so would contravene the policy of section 3 and permit the evils there denounced.

[14-18] In their contention that section 3 is not uniform and is discriminatory (United States Const. Fourteenth Amendment; Cal.Const. art. I, sec. 21; art. IV, sec. 25), plaintiffs suggest that section 3 would not be violated if the employment contract called for all tips to be retained by the employer, citing Setree v. Falkner, Ohio App., 50 N.E.2d 412, but in any event we are not persuaded by its reasoning. Section 3 does present such a situation.

Section 3 creates no improper discrimination in respect to employers or the employees affected. The particular evils at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed. A reasonable classification has been made. There are many instances where classifications with reference to wages and hours have been upheld. See Matter of Application of Martin, 157 Cal. 51, 106 P. 235, 26 L.R.A.,N.S., 242, hours of employment in underground mines; Matter of Application of Miller, 162 Cal. 687, 124 P. 427, hours of labor for women but not men. It is said in 31 Am.Jur., Labor, § 414: "The relation of employer and employee has long been the basis for specific legislation, and statutes applicable only to such relation are not subject to the objection that they constitute class legislation. Moreover, the equal protection of the laws is not denied by the classification of occupations if such classification has a reasonable basis. Such classification may be based upon matters which are personal to the individuals who are acting as employees. For example, statutory regulations with reference to labor of women or children or both may be sustained as against the objection that they constitute an arbitrary discrimination because they do not extend to men. Moreover, the classification may be based not only on the character of the employees but upon the nature of the employer's business, since the character of the work may largely depend upon the nature and the incidents of the business in connection with which the work is done. A statute dealing with employees in a particular line of business does not create an arbitrary discrimination merely because the operation of the statute is not extended to other lines of business having their own circumstances and conditions, or to domestic service."

[19, 20] It is contended that there was no finding by the Industrial Welfare Commission as a basis for its Order 12-A, and that such finding was necessary to the validity of said order; that is, that the wages fixed were adequate to supply the cost of proper living as specified in the minimum wage law at the time of its adoption. Stats. 1913, p. 632, as amended. That contention must necessarily be limited to the claim that such finding must appear in the order itself inasmuch as the appeal is on the judgment roll alone and hence all of the court's findings must be deemed to have been supported by the evidence. Plaintiffs, respondents herein, are bound by those findings. The trial court found that the order was adopted by the commission pursuant to and under the authority of the minimum wage laws; that on "June 8, 1923, the * * * Commission promulgated Order 12-A for the hotel and restaurant industries. That *prior to the formulation and adoption* of said Order 12-A, and in the manner and form prescribed by statute, a conference denominated a wage board of the employers and employees of the said hotel and restaurant industries was called by said commission; that thereafter and prior to the adoption of said Order 12-A, and within the time and in the manner prescribed by law a public hearing was called and held upon said proposed Order 12-A, at which said meeting and wage board conference the employers and employees of said restaurant industry of the State of California were regularly represented.

"That at said public hearing and other meetings witnesses were sworn, testimony taken, and evidence received. It is further true that *every act and thing required by statute to be done by said Commission in the promulgation and adoption of said Order 12-A was done by said Commission within the time and in the manner and* *form required by statute."* (Emphasis added.) It was also found that the order was in full force and effect except as otherwise found in the findings referring to its constitutionality and implied repeal by the 1929 statute.

There have been decisions by the United States Supreme Court both ways upon the question of the necessity of findings by an administrative agency as a basis for a rule or regulation issued by it. In Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446, findings were declared necessary to support a presidential order. The most recent holding by that court in Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853, is that no findings are necessary where the statute does not require them to support the order of the Department of Agriculture of the State of Oregon fixing the sizes for containers of horticultural products, although a violation of the order is a misdemeanor. That holding is a definite departure from the broad rule announced in Panama Refining Co. v. Ryan, supra. See 49 Harvard L.Rev. 828. Other cases have considered the question. See American Telephone & Telegraph Co. v. United States, D.C., 14 F.Supp. 121; Bayley v. Southland Gasoline Co., 8 Cir., 131 F.2d 412; Twin City Milk Producers Ass'n v. McNutt, 8 Cir., 122 F.2d 564. We have not been referred to and have been unable to find any case in California on the subject, and while some of the federal court cases indicate that the findings must appear in the order, plaintiffs have suffered no prejudice. The findings of the trial court show that if findings were required by the statute the commission made them. The mere fact that they do not appear on the face of the order is not therefore of importance. The statute did not require that the findings appear on the face of the order. Section 6(c) of the act states merely that the order shall specify "the minimum wage for women or minors in the occupation in question, the maximum hours * * * and the standard conditions of labor * * *." Stats. 1913, p. 632, as amended Stats. 1921, pp. 378, 380.

[21, 22] The adoption of section 3 of Order 12-A was within the power and authority delegated to the Industrial Welfare Commission by the Legislature. The Constitution authorizes the Legislature to provide a minimum wage for women and minors and for the comfort, health, safety and general welfare of employees, and to confer upon a commission the authority it deems necessary to carry out those purposes. Cal.Const. art. XX, sec. 17½. The act under which Order 12-A was promulgated empowers the commission to fix "a minimum wage to be paid to women and minors engaged in any occupation, * * * which shall not be less than a wage adequate to supply to such women and minors the necessary cost of proper living and to maintain the health and welfare of such women and minors," and to establish the maximum working hours and the standard conditions of labor. Stats. 1913, p. 632, sec. 6(a), as amended Stats. 1921, pp. 378, 379. In our previous discussion of the constitutionality of section 3 we have shown that it had a direct relation to minimum wages and was a natural and important incident thereof. It is an incident of the establishment of minimum wages similar to the provisions in Order 12-A, which specify to what extent board and lodging furnished by the employer may be considered wages. The power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge is necessarily an implied power flowing from the power to fix a minimum wage delegated to the commission.

[23] It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; California E. Comm. v. Black-Foxe Military Inst., 43 Cal.App.2d Supp. 868, 110 P.2d 729; Hodge v. McCall, 185 Cal. 330, 197 P. 86; Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784. However, "the authority of an administrative board or officer, * * * to adopt reasonable rules and regulations, which are deemed necessary to the due and efficient exercise of the powers expressly granted, cannot be questioned. This authority is implied from the power granted." Bank of Italy v. Johnson, supra, 200 Cal. 20, 251 P. 791. See, also, Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 P. 726; 21 Cal.Jur. 874. In the instant case the power to adopt section 3 may be implied as a power to make effective the order fixing the minimum wage. The power to fix that wage does not confine the agency to that single act. It may adopt rules to make it effect-

ive. Plaintiffs cite Adolph Coors Co. v. Corbett, Cal.App., 123 P.2d 74, decided by the District Court of Appeal. A hearing was granted by this court in that case and thereafter it was dismissed. It is not a controlling authority.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, and EDMONDS, JJ., concur.

TRAYNOR and SCHAUER, JJ., did not participate herein.

Rehearing denied: TRAYNOR and SCHAUER, JJ., not participating.

22 Cal.2d 685

CITY AND COUNTY OF SAN FRANCISCO et al. v. BOYD, Controller.

S. F. 16932.

Supreme Court of California.

Aug. 10, 1943.

1. Municipal corporations 🔑220(2)

A city charter provision that compensation of employees should be "in accord" with prevailing wages for like service in private employment or other comparable governmental organizations does not require that compensation be identical with or not higher than generally prevailing rates but that there be a reasonable or just correspondence between the rates established and those elsewhere prevailing, namely that they be in harmony with and substantially conform to such other rates, since "accordance" means "agreement", "harmony", "concord", "conformity".

See Words and Phrases, Permanent Edition, for all other definitions of "Accordance", "Agreement", "Concord", "Conformity", "Harmony" and "In Accord".

2. Municipal corporations 🔑63(1)

Whether proposed rates of compensation for city employees are in accord with generally prevailing rates is matter resting in discretion of rate-making authority and courts will not interfere unless determination of such authority is fraudulent or so palpably unreasonable as to indicate an abuse of discretion as a matter of law.

3. Municipal corporations 🔑213

Where it appeared that the generally prevailing rates of compensation for motormen, conductors, street car operators and bus operators was somewhere between 70 cents and 93½ cents an hour, the fixing of compensation for city motormen, etc., at 85 cents to 97½ cents an hour was not an abuse of discretion to fix rates "in accord" with generally prevailing rates of wages for like service in private employment or in other comparable governmental organizations.

4. Municipal corporations 🔑213

Where civil service commission set forth in official records a summary of wage recommendations and supporting data showing present rate paid by municipal railway, prevailing union wages and appropriate prevailing wage for all designated employees, which reflected findings of commission with respect to prevailing wages, there was a substantial compliance with charter provisions though not all data collected by commission was set forth in official records.

5. Courts 🔑207(4)

In original mandamus proceeding in Supreme Court by City and County of San Francisco and another against controller to compel audit and approval of wage claims, evidence showed that the proceeding was not "collusive" notwithstanding that fee of counsel of both sides would be paid from public funds.

See Words and Phrases, Permanent Edition, for all other definitions of "Collusive Action".

6. Action 🔑8

A suit is not condemned by law merely because it is friendly.

7. Action 🔑8

An action not founded upon an actual controversy between the parties to it, but brought for purpose of securing a determination of a point of law for the gratification of curiosity or to settle rights of third persons not parties is "collusive" and will not be entertained.

8. Municipal corporations 🔑1009

The controller of the City and County of San Francisco would be acting in violation of his public duty if he authorized payment of claims that involved an illegal expenditure of public funds.

CURTIS, EDMONDS, and TRAYNOR, JJ., dissenting.

In Bank.

Original proceeding by City and County of San Francisco and others against Harold J. Boyd, as controller, etc., for a writ of mandamus to compel the respondent to audit and approve wage claims of employees of the municipal railway.

Writ granted.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for petitioners.

Jesse H. Steinhart, John J. Goldberg, and S. A. Ladar, all of San Francisco, for respondent.

Leo R. Friedman, of San Francisco, amicus curiæ on behalf of respondent.

GIBSON, Chief Justice.

By this proceeding in mandamus the city and county of San Francisco and its Public Utilities Commission seek to compel respondent, as controller of the city and county, to audit and approve wage claims of certain motormen conductors, street car operators and bus operators employed by the municipal railway at the rates of compensation fixed in the Salary Standardization Ordinance (Ordinance No. 2184), effective July 1, 1943, and in the Annual Salary Ordinance for the year 1943–1944 (Ordinance No. 2148), also effective July 1, 1943. In support of his refusal to audit and draw warrants for these claims, the respondent contends that their payment would constitute an illegal expenditure of public funds for the reason that the cited ordinances are void as being in contravention of section 151 of the city charter.

So far as presently material, section 151, by virtue of an amendment effective January 11, 1943, provides:

"The board of supervisors shall have power and it shall be its duty to fix by ordinance from time to time, * * * all salaries, wages and compensations * * * for the positions, or places of employment, of all officers and employees of all departments, offices, boards and commissions of the city and county in all cases where such compensations are paid by the city and county. * * *

"In fixing schedules of compensation as in this section provided, the civil service commission shall prepare and submit to the board of supervisors and the board shall adopt a schedule of compensations which shall include all classifications, positions and places of employment the wages or salaries for which are subject to the provisions of this section; * * *. *The compensations fixed as herein provided shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state;* * * *."

The Annual Salary Ordinance for the fiscal year just expired (1942-1943) had provided rates of compensation for motormen, conductors and bus operators ranging from 80¢ to 87½¢ an hour depending on the type of work and the length of service.

Between January 15 and March 2, 1943, pursuant to the provisions of section 151 of the charter, the Civil Service Commission conducted a comprehensive investigation and by such survey obtained facts and data concerning wages paid to motormen, conductors, street car operators and bus operators for like service and working conditions in private employment and in other governmental organizations in this state. This survey extended to the rates of wages paid such employees in fourteen communities by some nineteen transportation systems or their branches, representing all of the street railway systems and comparable bus lines in the state. A schedule of the data thus considered by the commission discloses rates of pay ranging from 70¢ to 93½¢ an hour. It appears, however, that only operators of one-man cars and bus drivers received in excess of 87½¢ an hour. Based on such data and on changed economic conditions resulting in an increased cost of living, the commission, as required by the charter, after several public hearings at which all interested persons were heard, published its proposed schedule of rates of wage ranging from 85¢ to 92½¢ an hour, together with a comparison of existing schedules. Thereafter (and also as required by the charter) the commission transmitted the schedule to the board of supervisors with a summary of the facts and data obtained and considered by it in recommending the proposed rates.

Following many hearings the board of supervisors approved and adopted the rates of wage as recommended by the Civil Service Commission excepting only the rates proposed for bus operators. As to the latter class the board, under authority of the charter, amended the schedule proposed by the commission, and fixed the rates of pay at 5¢ an hour higher, the maximum rate being 97½¢ an hour. Thus, the board of supervisors in thereafter adopting the Salary Standardization Ordinance and the Annual Salary Ordinance, fixed rates of wages for motormen, conductors, street car operators and bus operators, ranging from 85¢ to 97½¢ an hour.

Respondent's principal contention is that these ordinances are invalid for the reason that the board of supervisors in fixing the rates exceeded the authority granted to it by section 151 of the charter. While conceding that the fixing of rates of compensation for municipal employees is a legislative function (citing to that effect San Diego Water Co. v. San Diego, 118 Cal. 556, 50 P. 633, 38 L.R.A. 460, 62 Am.St.Rep. 261; Contra Costa Water Co. v. Oakland, 159 Cal. 323, 335, 113 P. 668; Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819), respondent contends that the power of the board of supervisors in this respect is subject to the charter limitation that the compensations fixed "shall be in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state," and that the power of the Civil Service Commission is subject to the limitation that the rates recommended by it be "in accordance" with the prevailing rates of compensation. He argues that since the rates fixed in the ordinances exceed to the extent above noted the maximum rates paid elsewhere in this state to like employees for comparable work, they are not "in accord with" or "in accordance" with the generally prevailing rates. In other words, respondent contends that the quoted phrases as used in the charter, mean not higher than the prevailing rates of wages.

[1, 2] In our opinion, the phrases do not require that the rates of wages recommended by the commission or fixed by the board be identical with or not higher than the generally prevailing rates, but rather that there be a reasonable or just correspondence between the rates established and those elsewhere prevailing, i.e., that they be in harmony with and substantially conform to such other rates. (See Webster's Int'l. Dictionary; The Oxford English Dictionary; Roget's Thesaurus.) The word "accordance" is defined in Webster, supra, and in Black's Law Dictionary to mean in "agreement; harmony; concord; conformity." It should be noted that prior to its amendment in January, 1943, section 151 provided that the rates of compensation fixed "shall be not *higher* than prevailing rates for like service and working conditions." The amendment deleted that express limitation.

The determination whether proposed rates of compensation are in accord or in harmony with generally prevailing rates is within the discretion of the rate-making authority. The courts will not interfere with that determination unless the action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. See Hannon v. Madden, 214 Cal. 251, 257, 5 P.2d 4; see, also, Mann v. Tracy, 185 Cal. 272, 196 P. 484; In re City and County of San Francisco, 191 Cal. 172, 184, 215 P. 549; McQuillin, Municipal Corporations, 2d Ed., sec. 535, p. 227.

[3] Respondent concedes that this court is not required to determine the generally prevailing rates of compensation and admits that a writ of mandamus should issue unless it is concluded "that upon no conceivable basis under all of the evidence * * * can the rates as fixed be brought within the charter limitation." The evidence discloses that the generally prevailing rates of compensation are somewhere between 70¢ and 93½¢ an hour, the minimum and maximum rates paid by other transportation systems in the state. Under the facts of the present case we are not prepared to hold that the board of supervisors abused its authority to fix rates "in accord with" or in harmony with the generally prevailing rates of compensation.

Respondent also contends that the ordinances are invalid for the reason that the Civil Service Commission failed to comply with certain requirements of section 151 of the charter prescribing the procedure to be followed in formulating a proposed schedule of rates of compensation. This procedure is outlined in the following portion of section 151: "The proposed schedules of compensation or any amendments thereto shall be recommended by the civil service commission solely on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state. The commission shall set forth in the official records of its proceedings all of the data thus obtained and on the basis of such data the commission shall set forth in its official records an order making its findings as to what is the generally prevailing rate of pay for each class of employment in the municipal service as herein provided, and shall recommend a rate of pay for each such classification in accordance therewith. The proposed schedules of compensation recommended by the civil service commission shall be transmitted to the board of supervisors together with a compilation of a summary of the data obtained and considered by the civil service commission and a comparison showing existing schedules. Before being presented to the board of supervisors for consideration, the proposed schedules and a comparison with existing schedules shall be published once a week for two weeks. * * *"

[4] It is agreed that the commission proceeded in conformity with the requirements of the foregoing charter section except it is claimed that it did not set forth in the official records of its proceedings all of the data obtained in its investigation, nor did it set forth an order making its findings as to the generally prevailing rates. As before stated the commission made a survey of the rates of wages paid to conductors, motormen and bus operators in all street car and bus line operations of all street railway systems and comparable bus lines in the State of California. In formulating its recommendations to the board of supervisors the commission had before it and considered all the facts collected in such survey. Not all of this data was set forth in its official records but it did set forth therein a Summary of Wage Recommendations and Supporting Data. This summary listed among other things the present rate paid by the municipal railway, the prevailing union wages, and the appropriate prevailing wage for all such designated employees. These schedules reflected the findings of the commission with respect to prevailing wages and constituted a substantial compliance by the Civil Service Commission with the procedural steps enumerated in section 151. Moreover, the charter section provides that "The board of supervisors may approve, amend or reject the schedule of compensations proposed by the civil service commission." Thus it is clear that the rates of compensation are fixed by the board of supervisors and involve an exercise of the independent judgment of that body. A compilation of the data obtained and considered by the commission with its recommendations was transmitted to the board. The board thereupon held many hearings after which these ordinances were enacted fixing the rates of compensation pursuant to the schedule recommended by the commission and *amended* by the board.

The case of Sullivan v. McKinley, 14 Cal. 2d 113, 92 P.2d 892, 894, relied on by respondent, does not support his contention that the ordinances here involved are invalid. In that case certain persons employed as car painters by the municipal railway sought a writ of mandamus to compel the payment to them of a rate of wage of $10 a day as provided in the annual salary ordinance. Payment was resisted on the ground that a $9 rate of wage had been fixed for them in the budget and annual appropriation ordinance. In denying a writ this court held, in view of the provisions of section 71 of the charter that "All increases in salaries or wages * * * shall be determined at the time of the preparation of the annual budget estimates and the adoption of the annual budget and appropriation ordinances * * *," any effort of the board of supervisors to increase a wage scale in the annual salary ordinance over the amount provided in the approved budget was void. It was pointed out that "Once the budget is approved by the Board of Supervisors, the fiscal terms of the annual appropriation ordinance and the annual salary ordinance are automatically fixed beyond the power of change by any amendment." In the present case the increase was timely and was published as provided in the charter, thus affording opportunity to interested parties to object thereto. While an ordinance is invalid if the mandatory prerequisites to its enactment are not substantially observed (Sullivan v. McKinley, supra, 14 Cal.2d 117, 92 P.2d 892; McQuillin, Municipal Corporations, 2d Ed., p. 610, sec. 709), no attack is here made on the procedure followed by the board itself; and as there was substantial compliance by the commission with the procedural steps governing its action, we do not find it necessary to determine whether the validity of an ordinance enacted by the board of supervisors could be affected by irregularities or defects in the procedure followed by the commission.

[5] There is nothing in the record indicating that this proceeding is collusive. On June 29, 1943, an action was commenced in the superior court by a taxpayer to enjoin payment of the compensations provided in the ordinances in question. Because of the

pendency of that action respondent controller refused to audit and approve wage claims of employees of the municipal railway. This proceeding in mandamus was thereupon commenced by the city and its public utilities commission. The taxpayer, plaintiff in the superior court, filed a petition for leave to intervene *which was thereafter withdrawn.* It appears from the petition and the answer thereto that a sum of money was appropriated by the board of supervisors to employ and pay counsel to represent respondent controller in this proceeding. In his petition to intervene the taxpayer alleged that the present proceeding was "an amicable suit" and was brought to "by-pass" his superior court action. Upon the hearing of this proceeding, however, the attorney for the taxpayer declared, "I did state in my brief that this was an amicable suit. I have listened to [counsel for respondent] and he has made, as he always does, a very able presentation of his side of the matter. I have no desire to disrupt the agreed statement of facts in this proceeding, but I would like an opportunity to present my views so far as they are applicable to this charter. Whether that is done by the court granting my application [to intervene] is a matter of indifference to me so long as I have an opportunity to present the legal phase of it, as I see it." After orally presenting his views on the issues involved, and receiving permission to file a brief "as a friend of the court" (which brief has been since filed), he withdrew his petition for leave to intervene. It is evident from these facts and the contents of the brief filed on behalf of the taxpayer that he does not claim this proceeding is collusive.

[6-8] A suit is not condemned by law merely because it is friendly. Price v. Sixth Dist. Agricultural Ass'n, 201 Cal. 502, 516, 258 P. 387; Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 316, 5 P.2d 585. It is true, of course, that an action not founded upon an actual controversy between the parties to it, but which is brought for the purpose of securing a determination of a point of law for the gratification of the curiosity of the litigants, or the sole object of which is to settle rights of third persons who are not parties, is collusive and will not be entertained. Golden Gate Bridge, etc., Dist. v. Felt, supra; Collier v. Lindley, 203 Cal. 641, 644, 645, 266 P. 526; People v. Pratt, 30 Cal. 223. This is not such a case. Respondent, as a public officer, is bound by oath to faithfully perform and discharge the duties of his office. He would be acting in violation of his public duty if he authorized payment of claims that involved an illegal expenditure of public funds. Whether he could safely approve the payment of these claims depends upon the validity of the ordinances authorizing the compensation, and the determination of this question involves a construction of the charter and the application of its provisions to the facts of this case. His right to approve the payments had been challenged in a suit. A real controversy therefore existed as to respondent's duties in the premises.

The fact that the fees of counsel for both sides ultimately must be paid from public funds does not render the proceeding collusive. It has been held that in litigation involving only private parties and rights, payment of all counsel fees by one party to the litigation may give that party "such control over both the preparation and argument of the cause as to make the suit * * * collusive * * *." Gardner v. Goodyear, etc., Co., 131 U.S.Append. ciii, 21 L.Ed. 141. This does not apply, however, where, as here, the adversary parties are a municipal corporation and one of its officers. It is not uncommon for a public official charged with the auditing or disbursement of public funds to question expenditures directed by another officer, agency or department of government. His refusal to audit or pay claims frequently gives rise to controversies which usually can be settled only by judgment of a court. The fact that the opposing parties are authorized to employ attorneys who are paid from public funds does not render the suit collusive since the common source of such payment does not give one party control over the preparation and argument of the cause. There is nothing in the record before us which indicates that the board of supervisors selected counsel for respondent or exercised any control over the preparation or presentation of the case on behalf of respondent. There have been many cases in the courts of this state involving public officers similar to the present suit in which opposing parties were represented by attorneys who were paid from the same public source, yet no contention was made that the suits were thereby rendered collusive. See Parker v. Riley, 18 Cal.2d 83, 113 P.2d 873, 134 A.L.R. 1405; Swing v. Riley, 13 Cal.2d 513, 90 P.2d 313; Railroad Commission v. Riley, 12 Cal.2d 48, 82 P.2d 394; Vandegrift v. Riley, 220 Cal. 340, 30 P.2d

516; Heron v. Riley, 209 Cal. 507, 289 P. 160; Hecke v. Riley, 209 Cal. 767, 290 P. 451; Stockburger v. Riley, 21 Cal.App.2d 165, 68 P.2d 741. In Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 5 P.2d 585, 589, the district sought a writ of mandate to compel Felt, as secretary of the district's board of directors, to sign certain bonds proposed to be issued by it. Amici curiæ, representing certain taxpayers not parties therein, contended that the proceeding was collusive. This court disposed of the contention as follows: "It is conceded that respondent secretary is personally desirous of a decision in favor of petitioner. In other words, this is a friendly suit. It appears that the bridge district agreed to reimburse respondent for the expense incurred by him in the litigation, in the event that the contractors or the bidders for the bonds or other persons interested did not do so. * * * These facts, amici curiæ assert, show that the proceeding is fictitious and collusive, being a mere attempt to secure an advisory opinion without an actual contest. * * * Neither on principle nor authority does this position commend itself to us. * * * Nor is the fact that he [respondent] is removable at the pleasure of the board material * * *. A genuine controversy existed * * *. Able counsel were retained to present the case for respondent to this court, and it is not suggested that they were lacking in diligence or good faith in their preparation of the case. Under these circumstances this court can properly consider the petition and adjudicate the issues raised therein." The parties here were ably represented and the issues were fully developed and forcefully presented in evident good faith, and as before stated there is no evidence of collusion in this proceeding.

Let a peremptory writ of mandate issue as prayed, and pursuant to stipulation of the parties waiving the right to petition for rehearing and the statutory time within which such writ may issue, it is ordered that such peremptory writ may issue upon the filing of this decision.

SHENK, SCHAUER, and CARTER, JJ., concurred.

CURTIS, Justice.

I dissent. I agree with the conclusion reached by the majority opinion upon all questions discussed therein excepting that part which holds that this action is not collusive. The answer of the city and county, filed herein, to the petition for leave to intervene in this action, filed by a taxpayer of the municipality, admits that the board of supervisors appropriated a substantial sum of money to pay the attorney representing the controller in the defense of this action. This action, as shown by the majority opinion, is to sustain an ordinance of the board of supervisors. The plaintiff contends that this ordinance is a valid legislative enactment of the board. The defendant contends that it is unconstitutional and void. These admitted facts show conclusively that the action is collusive. The majority opinion goes far beyond any of the authorities cited therein in support of its ruling.

EDMONDS, Justice (dissenting).

I cannot join in a decision which, in my opinion, upholds an ordinance authorizing the payment of wages concededly larger than the highest amounts for like services paid elsewhere in the state, in defiance of express provisions in the city's charter.

In September, 1942, the Board of Supervisors of San Francisco ordered a proposed amendment to section 151 of the charter submitted to a vote of the people. Pursuant to the provisions of section 183 of the charter, the board then authorized the mailing of a statement to the voters under the heading: "Standardize Municipal Salaries In Accord With Private Employments. Vote Yes." The reasons for approving the proposed amendment were summarized as follows:

"It provides that municipal salaries shall be in accord with the general prevailing rate in private or other governmental organizations.

"It provides for all employees instead of a favored few.

"It provides for a minimum salary of $106 per month for a full time employee.

"It provides for periodic surveys to keep schedules in line with private employment."

In conclusion the statement added: "We must end favoritism in municipal salaries. We must put municipal and private salaries in accord."

The new section was adopted at the November election, and ratified by the Legislature of 1943.

Prior to its amendment, section 151 provided that compensations to be standardized "shall be not higher than prevailing rates for like services and working conditions in private employment or in other comparable governmental organizations in this state." By the amendment, the words "shall be in accord with" were substituted for "shall be not higher than." The reason for the change is clear. Before the amendment was adopted, the municipal employee had no assurance that he should receive the generally prevailing wage, for the charter only fixed a maximum limitation beyond which his compensation could not go. The amendment retains the limitation but also declares that the employee shall receive the generally prevailing wage, which is a fair and practical standard from the standpoint of both the employee and the taxpayer.

That this is the proper construction of the amendment clearly appears from the argument sent to the voters. Implicit in the statements that the proposed amendment "Provides for all employees instead of a favored few" and that "We must end favoritism in municipal salaries—we must put municipal and private salaries in accord," is the fact that under the provision then existing, prescribing only a maximum limitation upon the compensations of the city's employees, only those in a few classifications were receiving that wage and that they were the "favored few" with whom the salaries of the other municipal employees should be equalized. Thus the people, in voting for the charter amendment, were informed not only upon the authority of the board of supervisors, which had placed the measure upon the ballot "with favorable recommendation," but also by the wording of the proposed amendment, that the municipal salaries would be not higher nor lower than, but "in accord with" the rates prevailing in private employment, thereby enabling the city's employees to obtain the same compensation as the sometimes more-favored privately-employed workers performing the same duties.

There is nothing in either the amendment, or the reasons advanced in favor of its adoption, to indicate that the purpose of the new provision is to give the employee in public service an advantage over those privately employed, or to authorize the payment of a larger wage than the highest paid by any other employer in the state. The only authority which the board has to fix a rate of compensation higher than that prevailing in comparable employment is to provide a minimum wage in the municipal service of $106 per month. And the provision of the proposed amendment in this regard was one of the points emphasized in the statement to the voters. With the exception of this minimum standard, not only would the allowance to the municipal employee of a grater wage than that generally prevailing violate the limitation usually found in municipal charters that the taxpayer shall pay no more than private industry for the services of its employees, but it would also be contrary to the procedure of the proposed amendment, which, as construed by the statement to the voters, "provides for periodic surveys to keep schedules in line with private employment." And a court, in interpreting a charter provision adopted by the voters, should give it a construction consistent with the general and customary understanding of the words used.

Certainly the amendment was not adopted for the immediate benefit of the municipal street car employees, for they, at the time of the election, were included in the "favored few" who were already receiving the highest wage then prevailing for like services paid by any street car operator in the state. In fact, it may fairly be said that the salaries which they are receiving, prior to the adoption of the amendment, were being paid in violation of the charter. Far from the stipulated facts in this case, it appears that, in recommending rates to be paid the motormen and conductors of the municipal railway for the fiscal year 1942–43, the Civil Service Commission knowingly acted contrary to the plain limitation of the city charter with the acknowledged purpose of avoiding labor difficulties, for it justified increasing the rates of these employees to amounts larger than the highest paid elsewhere in the state for like services, upon the ground "that disruption of transportation service would interfere with production of vital war industries and would also seriously inconvenience a large portion of the population of the community." And as a further reason for its action, said the commission, it "is of the opinion that when the provisions of Section 151 of the charter were drafted by the freeholders and subsequently adopted by the people, they could not know of the problems that would be created by the war conditions which we now face." However, the commission concluded, its action "shall not be considered or construed in any sense as a precedent in future cases."

Yet despite the clear purport of the amendment to correct inequalities existing because most municipal employees were receiving less than the rates prevailing for like services in private employment and other governmental organizations, a majority of this court construe the amendment as authorizing a still higher rate of compensation for the "favored few" already receiving the highest prevailing rate, and declare that, because of it, the board of supervisors may now fix a wage "higher than the generally prevailing rates." I submit that their conclusion in this regard, and as applied to the facts of this action, is not justified in law or in fact.

The case is decided upon these two issues: (1) Are the compensations fixed in the schedule adopted by the board of supervisors "in accord with the generally prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in this state"; and (2) if so, did the failure of the Civil Service Commission to follow the requirements of the charter is establishing its recommended schedule of compensations render the ordinance invalid?

It is conceded that the charter provision requiring the compensation schedule to be "in accord with the generally prevailing rates of wages" is mandatory and that if the compensations for the municipal railway employees established by the ordinance under consideration are not so in accord, the ordinance is void. And the majority opinion admits that "The evidence discloses that *the generally prevailing rates of compensation* are somewhere between 70¢ and 93½¢ an hour, the minimum and maximum rates paid by other transportation systems in the state." (Italics added.) It also states that the rates fixed by the board of supervisors range from 85¢ to 97½¢ an hour, but does not break down these figures to reveal the fact that the proposed municipal wage is 5 cents higher than the highest amount paid by any other operator of street railway service in the state for comparable classifications of employees.

Is, then, a wage which is 5 cents an hour higher than the highest wage paid by any private corporation whose schedule is included in the survey relied upon by the commission, or which is 5 cents an hour lower than the lowest wage shown, "in accord with" the prevailing wage for such services? The definitions of "accordance" in Webster's International Dictionary and in Black's Law Dictionary, are quoted in the majority opinion as meaning in "agreement; harmony; concord; conformity." But the majority opinion's addition of the word "substantially," when speaking of the measure of conformity required by the charter, is an acknowledgment that its conclusion cannot rest upon the language of that instrument. To so qualify the people's requirement in this regard is judicial legislation in its plainest form.

The majority opinion reaches its conclusion as to the validity of the rates by treating the question as one within the range of legislative discretion. The legislative determination of what is "in accord * * * with" the prevailing wage is one which will be disturbed, says the majority opinion, only upon a showing of an abuse of authority by the legislative body. "The courts," it states, "will not interfere with that determination unless the action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." Such a rule would be applicable if the only duty of the commission and the board of supervisors were to fix a "reasonable" salary. See Graves v. Paducah, 89 S.W. 708, 28 Ky. Law Rep. 576. But the charter provision establishes a definite standard for legislative and administrative action.

None of the authorities in the majority opinion sustains the rule for which it is cited. Thus in Mann v. Tracy, 185 Cal. 272, 196 P. 484, the petitioner attacked a ruling of the Civil Service Commission, made prior to the giving of an examination, which limited to three years the maximum period during which an eligible list should remain effective. The court found no charter limitation preventing such action, and based a decision upholding the action upon a charter provision allowing the commissioners to strike the name of a candidate from the list after it had been there for more than two years. And in Hannon v. Madden, 214 Cal. 251, 5 P.2d 4, 6, the court considered an attack upon the determination of a city council upon the question of a contractor's compliance with a street improvement contract. Not only was there no standard or limitation provided by the charter or constitution, but a state law then provided that "All the decisions and determinations of said city council * * * shall be final and conclusive." St.1923, p. 114, § 1. Under such a statute, said the court, the decision of the council upon "such nonjurisdictional matters as the failure of the work to comply with the contract cannot be urged in a court action as grounds for invalidating the assessment," and it "may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law."

In the only other case cited by the majority opinion to support its statement, the action questioned was the wisdom of the city in entering into a contract with the county of Alameda for the latter's care of the former's tubercular patients. The court emphasized the fact that no charter provision or statute limited the right to make such a contract. On the contrary, said the court, "'The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine. * * * Whether, in the exercise of legislative powers the board acts wisely or unwisely is no concern of the courts.'" In the absence of a showing of want of jurisdiction or of bad faith, the court continued, it would not inquire into the question of whether the city had made a good or a bad bargain. In re City and County of San Francisco, 191 Cal. 172, 184, 185, 215 P. 549, 556.

Unlike the present action where the charter clearly establishes a definite standard for the legislative and administrative action, in all three of these cases there was no constitutional or charter limitation or standard governing or limiting the exercise of the area of discretion involved. And in the section of McQuillin on Municipal Corporations, cited by the majority opinion, appears the following statement of the principle: "If the salary is fixed by the proper authority and in the manner prescribed, the general rule is that the courts will not interfere. * * * Usually the council or governing legislative body is given power to fix salaries of municipal officers and employees, which is done generally by ordinance (a legislative act) and not by mere resolution. Ordinances providing for salaries must conform with charter and statutory provisions, and cannot provide a salary less or greater than that fixed by the charter or statutes. * * * Where a salary is to be fixed by an officer or board it is an administrative act and need not be fixed by ordinance." (2 McQuillin on Municipal Corporations, 2d Ed. 1939, sec. 535, pp. 303-306.)

The charter of a municipality is its constitution and to be valid, an ordinance must harmonize with its provisions. Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 373, 46 P.2d 308; In re Pfahler, 150 Cal. 71, 82, 11 L.R.A.,N.S., 1092, 88 P. 270, 11 Ann.Cas. 911; Platt v. San Francisco, 158 Cal. 74, 84, 110 P. 304; South Pasadena v. Los Angeles Terminal Ry. Co., 109 Cal. 315, 321, 41 P. 1093. As has been aptly stated, "An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the State Constitution." Marculescu v. City Planning Comm., supra., 7 Cal.App.2d page 373, 46 P.2d page 309. And, in considering a question arising under the San Francisco Charter, this court recently said that "the provisions of the charter * * * must control the actions of the Board of Supervisors and the Civil Service Commission in determining the salary to be received" by certain municipal employees. Banks v. Civil Service Comm., 10 Cal.2d 435, 438, 74 P.2d 741, 743.

Under the provisions of the charter, the "legislative" action of the board of supervisors is predicated upon prior administrative action by the Civil Service Commission, and although the procedure established by the charter is culminated by the "legislative" act of passing an ordinance, the basic steps in adopting the ordinance are what would generally be called "administrative" in character. In this respect the adoption of the standardization ordinance is unlike the determination of fact implicit in the action of a state legislature or the federal Congress (see People v. Western Fruit Growers, Cal.Sup., 140 P.2d 13), but is comparable to that of legislative and administrative agencies. And it is a rule of universal application that one adversely affected by such action is entitled to a judicial determination as to whether any facts exist to support the administrative determination. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 257, 258, 60 S.Ct. 544, 84 L.Ed. 732; Interstate Commerce Comm. v. Union Pac. R. Co., 222 U.S. 541, 547, 548, 32 S.Ct. 108, 56 L.Ed. 308; Northern Pac. R. Co. v. Department of Public Works, 268 U.S. 39, 44, 45, 45 S.Ct. 412, 69 L.Ed. 837; Booth Fisheries Co. v. Industrial Comm. of Wisconsin, 271 U.S. 208, 209, 210, 46 S.Ct. 491, 70 L.Ed. 908.

Obviously wide latitude must be allowed the commission in determining what is the "generally prevailing" wage within the limitations of the highest and lowest amounts paid by any other employer. But when the commission has obtained data showing the highest wage paid, there is no basis for saying that any greater sum is "prevailing," and the range of discretion is at an end; no wage exists with which the municipal rate may be "in agreement" or "conformity." Consequently no data before the commission supports the rates arrived at by it and adopted by the board of supervisors. For a majority of this court to refuse to enforce the plain language of the charter in deference to a determination unsupported by any evidence is, to me, indication of an unwillingness to check violation of constitutional or charter provisions. In my opinion, the use of the phrase, "legislative discretion," as applied to the facts of this case, is but an instrument of judicial self-abnegation for the avoidance of a constitutional function.

And if the decision of the majority of this court is, in reality, based upon the principle that a 5-cent deviation above the charter limitation comes within the principle of de minimis non curat lex, I must again disagree. For I am sure that the public employee would consider the payment of a wage of 5 cents an hour less than the lowest paid elsewhere in the state to be of definite importance to his standard of living. Nor is an excessive wage of 5 cents an hour a matter too small for judicial concern in the consideration of a salary standardization ordinance fixing compensation in an aggregate amount of $20,000,000 for a single fiscal year.

In addition, the interpretation of the majority opinion renders useless the charter provision as a standard which either the employee or the taxpayer may enforce. For by what rule is the reviewing court to decide that a compensation of 10, 15, 25 cents or more per hour higher than the highest, or lower than the lowest, wages paid for like services in private employment is either within or without the permitted administrative and legislative discretion? Can it be fairly said that such a result was contemplated or intended by the people in adopting the charter provision?

A consideration of the second issue serves only to emphasize the accuracy of my conclusion that the compensations established by the ordinance are not and were not intended to be "in accord with" the generally prevailing rate. The basic limitation upon the action of the commission in drafting a proposed schedule is that its recommendations must be made "*solely* on the basis of facts and data obtained in a comprehensive investigation and survey concerning wages paid in private employment for like service and working conditions or in other governmental organizations in this state." To insure that the commission's consideration be confined to such data, the charter commands, first, that it "shall set forth in the official records of its proceedings *all of the data thus obtained.*" Secondly, the section requires that "*on the basis of such data* the commission shall set forth in its official records *an order making its findings* as to what is the *generally prevailing rate* of pay *for each class* of employment in the municipal service." Finally, it "shall recommend a rate of pay for each such classification *in accordance therewith.* (Italics added.)

The obvious purpose of these limitations is to prevent such an administrative determination as is now before this court for review. The charter carefully delineates the scope of the discretion which the commission may exercise, and limits a determination by the data, and only the data, of wages paid by other employers which were before it for consideration. And to safeguard the interests of the municipal employee and also of the taxpayer, the charter requires the commission to include in the record of its action both the data considered and the findings made upon it.

In excusing compliance with the charter provisions, the city attorney insists that the word "shall" is not always to be construed as mandatory, and although ordinarily having that meaning, as here used should be held to be directory only. Under some circumstances, such a construction is permissible, but the test is whether the requirement is of such importance and materiality to the purpose of the statute being considered as reasonably to permit the conclusion that the Legislature intended to allow action to be taken only upon compliance with the specified procedure. In this connection a court should consider whether an undue advantage is gained from failure to follow the steps outlined or a benefit to the public or to an individual is impaired or lost by the failure to do so. See Cake v. City of Los Angeles, 164 Cal. 705, 710, 130 P. 723.

Applying these tests to the procedural requirements of section 151, supra, it is clear that each is material to the admittedly mandatory provision requiring the compensation to be in accord with the prevailing rates of wages for similar service. Their importance in confining the action of the commission to tangible data and in establishing a clear record of the basis of that body's determination, unquestionably operates to the advantage of both the public and the affected employee, for it affords those interested a satisfactory means of challenging any asserted departure from the standard set by the charter, both before the board of supervisors, and in any judicial review of the action taken. The word "shall" therefore should be given its normal connotation, and the procedural requirements interpreted as mandatory,

The majority opinion recognizes that, as stipulated by the parties, the commission did not comply either with the requirement that it set forth in the official records of its proceedings all of the data obtained in its investigation, or with the requirement that it set forth therein "an order making its findings" as to the generally prevailing rates. Moreover, the record of the commission shows that its recommendation was not based "solely" upon the data which it considered. For none of those data included a rate comparable to the ones contained in the proposed schedule. In addition, the majority opinion admits, the commission based the schedule of rates, at least in part, "on changed economic conditions resulting in an increased cost of living." This statement conforms to the agreement of the parties that the commission, as a basis for its recommendation, "took into consideration the fact that since July 1, 1942, economic conditions had changed and the cost of living had increased." Yet the charter authorizes the commission or the board of supervisors to consider changed economic conditions only for the purpose of determining whether a new survey is necessary to make certain that compensation paid the municipal employees is still in accord with that prevailing for like service elsewhere in the state, and not as a factual basis for the computation of new rates. (Sec. 151, as amended.)

Thus it appears that the commission complied with none of the three major procedural requirements for a determination of recommended compensation. Yet despite this fact, and the admissions of noncompliance implicit in the opinion of the Chief Justice and in the agreed statement of facts, it is decided that the action of the commission "constituted a substantial compliance * * * with the procedural steps enumerated in section 151." And the discussion in the majority opinion, upon which this conclusion is predicated, is too general and ambiguous for a clear understanding of the measure of compliance by the commission with the requirements.

The stipulation of facts shows that the *only* data concerning the rates of wages paid by other street railway operators in the state, which were considered by the commission in recommending the proposed schedule, were set forth in a schedule prepared by the Public Administration Service, a nonprofit organization of Chicago. This schedule lists the 19 California communities in which street cars or buses are operated and the minimum and maximum rates paid by each operator. Neither this schedule nor the data contained therein was placed in the official records of the commission.

The only schedule which the commission did include in its official records was one entitled "Summary of Wage Recommendations and Supporting Data." Except for the then current San Francisco Municipal Railway rates, this summary does not purport to contain or identify the rates of any employer, public or private, nor can it be determined from the summary what rate of pay was being paid to any particular class of employee by any employer other than the city and county of San Francisco. Unquestionably, the summary does not contain "all of the data" on the subject of the compensations here involved which were obtained and used by the commission and which the charter requires should be set forth in its official records. This is further emphasized by the fact that in the summary under the heading "Appropriate Prevailing Rates" are set forth rates for each of the four classes of employees included in the commission's recommendation, ranging from 80¢ to 87½¢ per hour. There is no means whatever, based on examining the summary alone, of determining how such "Appropriate Prevailing Rates" were arrived at, thus demonstrating that they are based on underlying data not set forth in the summary or in the official records of the commission's proceedings.

And not even a suggestion appears in the stipulated record that the schedule containing the factual data used by the commission was available to public examination in even unofficial form or that the commission purported to make an order including its finding as to the prevailing wage rate. Under such circumstances, I see no basis in fact for the conclusion of the majority opinion that "These schedules reflected the findings of the commission with respect to prevailing wages and constituted a substantial compliance by the Civil Service Commission with the procedural steps" of the charter.

Nor may the result reached in the majority opinion be justified by its statement that "the rates of compensation are fixed by the board of supervisors and involve an exercise of the independent judgment of that body." For the determination of the board, as well as the commission, is confined to data which have been considered by the commission, and the same limitations apply to the area of discretion it may exercise. Section 151, supra, provides that "the civil service commission shall prepare and submit to the board of supervisors and the board shall adopt" the schedule of compensations. The board of supervisors can only adopt a schedule of compensations "in accord with the generally prevailing rates of wages" for like services. The schedules recommended by the commission "shall be transmitted to the board of supervisors together with the compilation of a summary of the data obtained and considered by the civil service commission and a comparison showing existing schedules." In addition, the charter requires that, "before making any amendment" to the schedule of compensations recommended by the commission, "the data considered by the board of supervisors shall be transmitted to the civil service commission for review and analysis." Such provisions clearly show that the board, in adopting the schedule, is limited to specific data considered by the commission, and that the board's determination, as well as the commission's, must also be supported by such evidence.

If democracy is to continue to mean a government of law, then, as was said at an earlier time, "no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials." San Christina Investment Co. v. San Francisco, 167 Cal. 762, 141 P. 384, 388, 52 L.R.A.,N.S., 676. And, as I pointed out in City and County of San Francisco v. Linares, 16 Cal.2d 441, 448, 106 P.2d 639, certainly this should not be done in a suit between the city and one of its administrative officers, for it allows a question of public interest to be conclusively decided in a proceeding which is not brought in such form as to allow a full and fair judicial examination of the merits of the controversy. Especially is this true where, as in the present proceeding, the city officials, purportedly adverse to one another on the issues presented, have waived in advance the right to apply for a rehearing. Moreover, the city attorney has admitted that the board of supervisors appropriated the money to pay the fees of counsel who are appearing for the respondent city controller. The United States Supreme Court very recently dismissed an action instituted as a "friendly suit." Characterizing it as collusive, the court said: "Even in a litigation where only private rights are involved, the judgment will not be allowed to stand where one of the parties has dominated the conduct of the suit by payment of the fees of both." United States v. Johnson, 63 S.Ct. 1075, 1076, 87 L. Ed. 1413.

For these reasons, in my opinion, the writ of mandate should be denied.

TRAYNOR, Justice (dissenting).

It seems to me clear that the ordinance under review was adopted in violation of the provisions of the city charter. I cannot agree, however, with Justices CURTIS and EDMONDS that this is a collusive proceeding.

60 Cal.App.2d 268

BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al. v. TOWN OF ATHERTON et al.

No. 12347.

District Court of Appeal, First District, Division 1, California.

Aug. 23, 1943.

Hearing Denied Oct. 21, 1943.

1. Pleading ⚷214(1)

On demurrer all allegations of a complaint are deemed to be true.

2. Quieting title ⚷7(1)

An "action to quiet title" embraces every sort of a claim whereby the plaintiff might be deprived of his property or his title clouded or its value depreciated, or whereby the plaintiff might be incommoded or damnified by assertion of an outstanding title already held or to grow out of the adverse pretension.

See Words and Phrases, Permanent Edition, for all other definitions of "Action to Quiet Title".

3. Quieting title ⚷7(1)

Where building restrictions imposed by municipal ordinance limited use, obstructed sale, and greatly depreciated value of property, action to quiet title was proper remedy to determine validity of ordinance.

4. Constitutional law ⚷296(2)

"Zoning" is a deprivation for the public good of certain uses by owners of property to which their property might otherwise be put, and if the use is so far restricted and the value depreciated that it can be said that the regulation goes too far, it will be deemed a taking of the property, in which event the ordinance becomes unconstitutional because the taking is without "due process of law."

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Zoning".

5. Quieting title ⚷1

The use of the terms "removing cloud" and "preventing a cloud" does not represent a real difference, and those cases in which a cloud is "removed" and those in which it is "prevented" are not merely governed by the same principles, but are indistinguishable as to the form of relief, and also as to the circumstances on which relief is granted.

See Words and Phrases, Permanent Edition, for all other definitions of "Preventing a Cloud" and "Removing a Cloud".

6. Quieting title ⚷7(1)

Where action to quiet title was brought to determine validity of ordinance containing building restrictions which limited use, obstructed sale and depreciated value of property, relief sought was both preventive and remedial, so that action could not be dismissed on ground that cause sought to be removed must be an anticipated or apprehended danger to title.

7. Executors and administrators ⚷438(5)

Remaining heirs at law not joined in action by administrator and an heir at law to quiet title were not "necessary parties" to a determination thereof under statutes relating to administrator's right to sue. Code Civ.Proc. § 369; Probate Code, §§ 573, 581.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the Bank of America National Trust & Savings Association, administrator of the estate of Harry R. Fee, also known as H. R. Fee, deceased, Bessie M. Zapfee Forbes, individually and as executrix of the last will of Bessie Fee Chase, deceased, and Alice M. Lynch against the Town of Atherton, a municipal corporation, and others to have declared unconstitutional and void a zoning ordinance. From a judgment of dismissal, plaintiffs appeal.

Judgment reversed.

Dinkelspiel & Dinkelspiel and I. M. Peckham, all of San Francisco, and Edmund Scott, of Redwood City, for appellants.

Albert J. Dibblee, of San Francisco, and Ross & Ross, of Redwood City, for respondents.

KNIGHT, Justice.

The plaintiffs herein are respectively the administrator of the estate of Harry R. Fee, deceased, an heir at law of the deceased, and the assignee of an undivided one-quarter of the interests of three other heirs at law. As such they brought this action against the town of Atherton, a municipality of the sixth class, its mayor, councilmen, and chief of police, for the purpose of having declared unconstitutional and void a zoning ordinance embodying certain building restrictions, in so far as the ordinance purported to affect the tract of land described in the complaint which belongs to the estate of the decedent. Plaintiffs also ask for a permanent injunction to enjoin the enforcement of the ordinance against the estate's property. The trial court held that plaintiffs did not have capacity to sue, and upon that ground sustained the demurrer to the complaint without leave to amend. From the judgment of dismissal entered thereon plaintiffs appeal.

Section 573 of the Probate Code authorizes an administrator to maintain an action to quiet title to real or personal property belonging to the estate, or to determine any adverse claim thereon; and section 581 of the same code provides that the heirs may themselves or jointly with the executor or administrator maintain an action to quiet title to real property belonging to the estate against any one except the executor or administrator, but that they are not required so to do. The question here involved is whether the present action may be construed as an action to quiet title.

[1] On demurrer all of the allegations of the complaint are deemed to be true, and according to the allegations of the complaint herein the provisions of the ordinance not only unreasonably and unconstitutionally restrict and limit the use of the property so as to obstruct the power and right to sell or lease the same, thereby, so the complaint alleges, placing a cloud on the title, but they also have the direct effect of greatly depreciating the value of the property. Plaintiffs contend, therefore, that to all intents and purposes the action is one to quiet title, which, under the code sections above cited, they are authorized to maintain. We are of the opinion that the position so taken by plaintiffs must be sustained.

In brief, the following are the facts as they appear from the allegations of the complaint: The ordinance as amended divides the town into two zones, residential and commercial; and the residential zone is divided into three areas, A, B, and C, for which certain building restrictions are established. The Fee estate property is a parcel of unimproved and vacant land situate on the corner of Selby Lane and El Camino Real. It has a frontage on El Camino Real for a distance of 637.56 feet and runs back to a depth of 393.15 feet, and is located within area A of the residential zone so that by virtue of the provisions of the ordinance it may not be utilized for any commercial purpose; and any residential structure erected thereon must conform to the building restrictions prescribed for that area. Among those restrictions are that all dwellings erected therein must have a yard 20 feet wide on each side, a rear yard of 30 feet from the house to the property line, and a 30 foot set-back from house to front property line. El Camino Real is one of the main highways and arteries of commerce and travel in the state. It leads to and connects various cities and towns, and daily thousands of automobiles, buses, and heavily laden trucks with merchandise and produce pass the property in question. The highway forms the northeasterly boundary of the town of Atherton, and on the opposite side are unincorporated areas of San Mateo county, not subject to zoning or building restrictions of any kind. The area fronting on the opposite side of the highway has developed rapidly and solely into a commercial and industrial center, with the result that the Fee estate property is made unfit, unattractive, and useless as residential property. There are no residences or homes on the property fronting on the Atherton side of the highway in the area where the Fee estate property is located, save and except one residence situate at a considerable distance from the highway on property northwesterly of the Fee estate property; and there is not now nor has there ever been any residential building activity in the area in which the Fee estate property is situated; and no practical use can be made of the land for residential purposes. The northeasterly side of the highway opposite the Fee property is more or less closely built up with various kinds of commercial and manufacturing buildings, including "hot dog" and "hamburger" establishments, fruit and vegetable stands, gasoline filling stations, restaurants, night clubs, cocktail lounges, retail and wholesale liquor stores, etc.

The complaint then goes on to allege that a sale of the Fee estate property is necessary to pay the debts of the estate and expenses of administration; that some of the heirs other than plaintiffs are scattered and reside outside of the state of California; that the property is mortgaged, and that plaintiffs are informed and believe that the mortgagee will not be content longer to let the mortgage run, and that if the estate is not distributed at this time foreclosure proceedings will be instituted; that because of the existence of the zoning ordinance and the building restrictions prescribed therein it is impracticable and impossible to sell or lease the property; that the existence of said ordinance and building restrictions "scares away purchasers and lessees, and depresses the sale or rental price of said real property, and interferes with, obstructs and hinders the power and right of plaintiff administrator to sell or lease said real property and no one will purchase or lease the same * * *" to the great and irreparable damage of all the plaintiffs herein; that for commercial purposes the property is of the value of over $40,000, but that as residential property its value does not exceed $7,500, and that even at such price no sale can be made unless the alleged illegal limitations and restrictions established by the ordinance, as to this property, are removed; that the same operate as a cloud on the title.

[2, 3] As said in Akley v. Bassett, 68 Cal.App. 270, 228 P. 1057, 1064, "The nature and object of the action to quiet title have been often defined in most comprehensive terms. The statement has been made that it embraces every sort of a claim whereby the plaintiff might be deprived of his property or *his title clouded or its value depreciated.* Withers v. Jacks, 79 Cal. 297, 21 P. 824, 12 Am.St.Rep. 143."; and a broader definition is given in the case of Head v. Fordyce, 17 Cal. 149, wherein the court said: "The statute giving this right of action to the party in possession, does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, *or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension.*" (All italics ours.) Among the later cases wherein most of the above language has been quoted approvingly are Andrews v. Russell, 85 Cal.App. 149, 259 P. 113, and Hughes v. Beekley, 85 Cal.App. 313, 259 P. 337. Applying those definitions to the foregoing alleged facts, it would seem clear that the action herein falls within the classification of an action to quiet title, first, because the alleged illegal building restrictions doubtless operate as a cloud on the title to the property by limiting its use and obstructing the sale or the leasing thereof; and secondly, because, as alleged in the complaint, they have the direct effect of greatly depreciating the value of the property. If these same buildings restrictions were embodied in a deed or a contract, there would be no question that an action to quiet title would be the proper remedy to invoke to have determined the validity or invalidity thereof (Strong v. Hancock, 201 Cal. 530, 258 P. 60; Werner v. Graham, 181 Cal. 174, 183 P. 945; Moe v. Gier, 116 Cal.App. 403, 2 P.2d 852; Bernstein v. Minney, 96 Cal.App. 597, 274 P. 614; Strong v. Shatto, 45 Cal.App. 29, 187 P. 159), and there would seem to be no good reason why the same remedy may not be invoked where such restrictions are imposed by a municipal ordinance.

Defendants take the position that the adverse claim or cloud must arise from a written instrument of some kind; but in the following cases it is held in effect that they may emanate from the provisions of a municipal ordinance. City of Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, 580, 581, 20 S.Ct. 736, 44 L.Ed. 886; Los Angeles City Water Co. v. City of Los Angeles, C.C., 88 F. 720, 747, 748; Faulkner v. City of Keene, 85 N.H. 147, 155 A. 195. In the latter case the question presented was whether the claim made by the city, that the structure the plaintiffs were about to erect would violate a statute and a zoning ordinance, constituted an adverse claim by the city to plaintiffs' title; and in answering defendant's contention that it had made no claim of right adverse to plaintiffs' title the court said, 85 N.H. at page 152, 155 A. at page 199: "It appears that the position taken by the city as to the effect of the statute and ordinance has resulted in preventing the plaintiffs from making an advantageous disposal of the property. This result has come about because of doubt as to the plaintiffs' right to the unrestricted use of their land. According to the defendant's claim, their title is materially limited. If in a technical sense it may be said that certain of their rights have been extinguished, rather than transferred to others, yet in another and practical sense it is true that they have been transferred. That part of the public affected by the use of the land are the gainers by the limitation of that use. *The rights thus created, and the limitations imposed, are of a like nature to negative easements, which unquestionably limit titles.*" (Italics ours.)

[4] Defendants further contend that a zoning ordinance has its origin in the exercise of the police power, and that therefore the restrictions embodied therein are merely regulatory in character and do not impose any burdens on the land itself or the

title thereto. The courts have held, however, that zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put (Gilgert v. Stockton Port Dist., 7 Cal.2d 384, 60 P.2d 847) and that if the use is so far restricted and the value depreciated that it can be said that the regulation goes too far, it will be deemed a taking of the property, in which event the ordinance becomes invalid and unconstitutional, because the taking is without due process of law. Arverne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321. Whether or not that is the case here is a question to be determined upon the trial of the action on the merits.

[5, 6] The trial court's ruling was apparently based on the theory that under the principle of quia timet the cloud sought to be removed must be an anticipated or apprehended danger or threat to the title, and that this is not such a case. But as said in the note found in 78 A.L.R. 34, which is supported by ample authority therein cited, "Although the courts speak of removing a cloud and preventing a cloud as though the two were distinct, an examination and comparison of the cases suggests the conclusion that the use of the two terms does not represent a real difference, that the cases in which a cloud is 'removed' and those in which it is 'prevented' are not merely governed by the same principles, but are indistinguishable as to the form of relief and also as to the circumstances in which the relief is granted. * * * Whether the bill prays for the removal or prevention of a cloud, the decree is frequently both declaratory and injunctive. The distinction appears to be one neither of substance nor of form, but at most of emphasis; the court in one case referring to what has already occurred, and, in the other, to the next step in the sequence. In both cases, the relief granted is both preventive and remedial. The courts have said that the prevention and the removal of a cloud are but two aspects of the same thing, and in some of the cases have pointed out, what is believed to be implied in all the cases, that whenever a decree is granted for the prevention of a threatened cloud, there is a cloud already in existence." That is the situation here, the relief sought being both preventive and remedial.

[7] Defendants urge the additional point that there is a misjoinder of parties, in that the remaining heirs are not made parties plaintiff or defendant, it being claimed in this behalf that the absent heirs are necessary and indispensable parties to a determination of the action. There is no merit in the point, for as will be noted, under section 573 of the Probate Code an administrator alone may sue to quiet title, and under section 581 the heirs themselves or jointly with the administrator may bring such an action, "but they are not required so to do." Moreover section 369 of the Code of Civil Procedure provides that an administrator "may sue without joining with him the persons for whose benefit the action is prosecuted."

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

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60 Cal.App.2d 251

KIRKPATRICK v. TOWERS et al.

Civ. 6883.

District Court of Appeal, Third District, California.

Aug. 20, 1943.

Rehearing Denied Sept. 18, 1943.

Hearing Denied Oct. 18, 1943.

1. Fraudulent conveyances 🔑74(3)

In action to set aside transfers as made in fraud of creditors where evidence showed that at time of transfer property owned by defendants was in excess of $25,000 as against indebtedness of $11,156, and no actual fraud was shown, lack of consideration alone was insufficient to constitute fraud and transfers could not be set aside. Civ.Code, § 3442.

2. Appeal and error 🔑1010(1)

On appeal, Court of Appeal must uphold the findings of the trial court unless it can be said that there is no evidence to sustain them.

3. Appeal and error 🔑996

In action to set aside transfers as made in fraud of creditors, where no actual fraud on part of defendants was shown, if any inferences were deducible from the evidence as to their intent to defraud, such inferences were for the trial court.

4. Fraudulent conveyances ⚷297

In action to set aside transfers as made in contemplation of insolvency where ranch which was security for debt exceeded value of debt, evidence sustained finding that at time of transfer of property transfers were not made in contemplation of insolvency and hence were not void.

5. Fraudulent conveyances ⚷57(2)

Where security for note exceeded value of note, transfers by wife, who had no interest in security and was secondarily liable on note, were not transfers made "in contemplation of insolvency" as a matter of law which could be set aside by creditors.

See Words and Phrases, Permanent Edition, for all other definitions of "In Contemplation of Insolvency".

6. Fraudulent conveyances ⚷59

Amply secured debts are not to be taken into consideration for purpose of determining whether the financial condition of the grantor renders the conveyance presumptively fraudulent as to existing creditors.

◆

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Action by W. J. Kirkpatrick against Martha C. Towers and others to set aside transfers allegedly made in fraud of creditors. Judgment for defendants, and plaintiff appeals.

Judgment affirmed.

Van Dyke & Harris, of Sacramento, for appellant.

K. D. Robinson, of Auburn, and Fontaine Johnson, of Sacramento, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an action brought by appellant to set aside transfers alleged to have been made in fraud of creditors.

Prior to December, 1937, defendants Martha C. Towers, W. R. Towers and Maysie K. Towers, his wife, were indebted to Bank of America National Trust & Savings Association on a promissory note, which said note was secured by a deed of trust upon certain real property hereinafter referred to as the Newcastle Ranch property. Sale of this property on foreclosure of the deed of trust resulted in a deficiency of $5,924.16, for the collection of which appellant Kirkpatrick, as assignee of the bank, began suit May 3, 1938, and recovered judgment November 17, 1938.

Said judgment being wholly unsatisfied on January 30, 1939, appellant began this action seeking to set aside certain transfers of property made by Maysie K. Towers and her husband, W. R. Towers, which were alleged to have been made without consideration, and with intent to hinder, delay and defraud the creditors of said transferors, including plaintiff, and to have been accepted by the transferees with knowledge of said fraudulent intent and with the intent to assist the transferors. It was further alleged that at the time of said transfers said transferors were insolvent.

The transfers complained of were (1) the transfer on January 28, 1938, of what is referred to as the San Francisco property which belonged to Maysie K. Towers (she having, on December 17, 1937, acquired same by inheritance from her mother), which she and her husband conveyed to defendants Ralph E. Corbett and Margie L. Corbett, who, in turn, executed a trust deed conveying said property to trustees for the benefit of Maysie K. Towers as beneficiary, securing thereby the payment of their promissory note in the sum of $2,300 to said beneficiary, which note and deed of trust Maysie K. Towers assigned to her minor daughter; (2) the transfer, also on January 28, 1938, to said minor daughter, of what is called the Sacramento property (which also belonged to Maysie K. Towers, and had been acquired by her inheritance); (3) the transfer to said daughter on February 5, 1938, by Maysie K. Towers and her said husband, of what is referred to as the Newcastle town property.

The foregoing transfers were admitted by defendants' answers, and it was admitted that the first two were without consideration; but consideration for the transfer of the Newcastle town property was alleged to have been the sum of $450 which the parents owed the child, they having used that sum of her money for the improvement of said property some years before.

The action was tried in January, 1940, before the court sitting without a jury, and resulted in a judgment that plaintiff take nothing. The court found that the transfers above mentioned were made by W. R. Towers and his wife, but it further found that they were not fraudulent and void as to plaintiff; that it was not true that they were made without consideration and with intent to hinder, delay and defraud creditors of the transferors; that it was not true that at the time of making said transfers they were insolvent; and that it was not true that said W. R. Towers and Maysie K. Towers had no other land or property in this state out of which plaintiff could realize his claim evidenced by his judgment.

[1] Appellant's contention here is that the findings of the court are not sustained by the evidence; that, to the contrary, the evidence shows that said transfers were made with intent to defraud creditors and that they rendered defendants insolvent. Respondents counter by pointing out that the evidence shows that at the time said transfers were made Towers and his wife owned property worth in excess of $25,000, to wit, the Newcastle Ranch property, worth $12,500, exclusive of the mineral rights thereon; $2,300 due from the Corbetts on their note; cash in bank, $1,261.32; the Newcastle town property worth $1,000; the Sacramento property worth $5,000; a bond worth $1,000, and the property referred to as the Auburn property, worth $2,500, both of which were a part of Mrs. Towers' inheritance; that their total indebtedness at the time of said transfers was approximately $11,156 made up of $8,300, taxes and interest owing the bank (secured by the Newcastle Ranch), $450 due on an automobile, $1,250 owing one Ludwig (secured by mortgage on the Auburn property), household bills $150, a note of $371 which was an obligation of the estate of Mrs. Towers' mother, and an obligation of $600 to their attorney; and that after the conveyances to their daughter they still had a clear net worth in excess of the indebtedness to the bank, as the automobile balance, the household bills and the note for $371 had then been paid, and the indebtedness to their attorney secured by a chattel mortgage on the automobile; and that in any event, as the value of the Newcastle Ranch was in excess of the amount of indebtedness to the bank, they had property of sufficient value to satisfy claims and were free to make transfers. Birkhauser v. Ross, 102 Cal.App. 582, 283 P. 866. They assert that lack of consideration alone is insufficient to constitute fraud, sec. 3442, Civ. Code; and that as no actual intent to defraud was shown, the transfers could not be set aside. Burton v. Mullenary, 147 Cal. 259, 81 P. 544.

[2, 3] We are of the opinion that these claims of respondents must be sustained. On appeal it is the duty of this court to uphold the findings of the trial court unless it can be said that there is no evidence to sustain them. Reay v. Butler, 95 Cal. 206, 30 P. 208; Badin v. Gaugh, 5 Cal. App.2d 185, 186, 42 P.2d 394; Herrlein v. Tocchini, 128 Cal.App. 612, 619, 620, 18 P.2d 73. No actual fraud on the part of defendants was shown, and if any inferences were deducible from the evidence as to their intent to defraud, such inferences were for the trial court (Lufkin v. Patten-Blinn Lumber Co., 15 Cal.App.2d 259, 261, 59 P.2d 414) and have been drawn in favor of defendants.

[4] As to appellant's contention that the transfers were made in contemplation of insolvency and were therefore void, the case of Norton v. Blenkiron, 138 Cal.App. 66, 31 P.2d 807, appears to be directly in point. There it was sought to set aside conveyances made by defendant Wolter to his sister. Wolter owed plaintiff on a promissory note for $26,500 secured by a mortgage, which mortgage plaintiff brought action to foreclose. While said action was pending Wolter made a transfer to his sister of practically all other property owned by him. Plaintiff obtained a deficiency judgment of some $5.000, and, execution being returned unsatisfied, brought this action. Whether there was any consideration from the sister was an issue at the trial, but on appeal the court said that issue need not be considered, as plaintiff had failed to show that Wolter's indebtedness to him was not fully secured. Wolter testified that the mortgaged property was worth $31,000, and plaintiff made no showing as to its value (except that he had a deficiency judgment). The court said that the mere showing that plaintiff purchased the property on foreclosure sale for an amount inadequate to discharge the indebtedness was insufficient, citing McMillan v. McMillan, 42 Idaho 270, 245 P. 98, and Craig v. Partridge, 48 Idaho 471, 282 P. 940.

Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350, is also pertinent. There a trust deed securing a note for $12,500 was given by defendants in August, 1929, in connection with the purchase of certain property. On January 11, 1930, notice of default and election to sell was given defendants. On February 21st defendants conveyed to a sister four parcels of land and declared a homestead on their one remaining piece of real property. Plaintiff sold under his trust deed for about $1,500 and thereafter secured a deficiency judgment of $12,239.36 and costs; he then instituted action to set aside the transfers to the sister, as having been made in fraud of creditors. On June 16, 1931, the Wottons were adjudged bankrupts on a voluntary petition. Fross filed the only substantial claim and the trustee in bankruptcy intervened. A judgment of nonsuit was entered and the intervenor appealed. Respondent contended that there was a complete absence of proof that the property was conveyed with intent to defraud creditors, and that the judgment of nonsuit should be sustained because of the failure to show that the security for the note was insufficient at the time the conveyances were made. Reliance was had upon the Blenkiron and McMillan cases, supra. The court said that what they held in those cases was that where there is no other evidence to show a fraudulent intent in making the conveyance complained of, or where reliance is had upon a presumption of fraud from the making of a voluntary conveyance during or in contemplation of insolvency, and the only debt is a secured debt, the security must be shown to be insufficient to meet the obligation at the time the conveyance was made. And it was held that under the authority of the Blenkiron case the failure of plaintiff to make a showing of the insufficiency of the security at the time of the conveyance was fatal to his contention that he had made out a case under Section 3442 of the Civil Code. The court then considered whether on the record a case of actual fraud had been made out under Section 3439 of the Civil Code, and on the ground that it had, the judgment was reversed.

In Hibernia Savings & Loan Society v. Belcher, 4 Cal.2d 268, 48 P.2d 681, it appeared that on the day before a foreclosure sale under a mortgage, the Ellis Estate Company, mortgagor, made an assignment of rents to defendant Belcher. Plaintiff, having secured a deficiency judgment, sought to set aside the assignment on the ground that it was without consideration and made with intent to defraud creditors. The trial court found the assignment had been made in good faith, in payment for legal services. The appellate court held that plaintiff must fail as there was evidence that the value of the mortgaged premises was in excess of the indebtedness which it secured, and plaintiff introduced no evidence to show that at the time the assignment was made or at the time of the action its value had declined to the extent that it was worth less than the indebtedness to plaintiff. Citing Norton v. Blenkiron, supra.

In Cain v. Richmond, 126 Cal.App. 254, 14 P.2d 546, an action brought to quiet title to property attached by defendants, and by them alleged to have been acquired by plaintiff through fraudulent conveyances after recovery of a deficiency judgment against plaintiff's grantor on sale of property under a trust deed, the question on appeal was the sufficiency of the evidence to sustain the judgment quieting plaintiff's title. Conveyance was to a daughter and her husband, and it was contended to have been without consideration and to have rendered the grantor insolvent. On appeal the court said that whether a conveyance is with intent to defraud creditors is a question of fact (12 Cal.Jur. 1045, sec. 87) except that under section 3442 as amended in 1895, insolvency and lack of consideration were made conclusive evidence of intent to defraud creditors. It said, however, that the price of the mortgaged property was presumed to be its value, in the absence of other evidence of value, and as it exceeded the indebtedness leaving an equity in the grantors, they could not be said to have been insolvent.

In the instant case there was not a failure of plaintiff to adduce evidence that the value of the Newcastle Ranch property was less than the indebtedness upon it at the time of the transfers by Mr. and Mrs. Towers. Apparently recognizing the applicability of the foregoing cases, plaintiff introduced evidence of its value. One of his witnesses, Mr. Wisner, district manager of California Lands, Incorporated, which handled the bank's properties, appraised it at $4,107 (exclusive of mineral values); he also testified that they sold the property for $2,500, but reserved oil, gas and mineral rights. Another witness for plaintiff appraised it at $3,650 (exclusive of mineral values), and a third at $3,267 (also exclusive of mineral values).

But defendants also introduced evidence of value. Defendant W. R. Towers testified that prior to the sale, Mr. Kellogg, manager of the Newcastle Branch of the bank, told him he had recommended that the bank take a deed to the property in satisfaction of the indebtedness against it, and that such a deed was drawn up; that Kellogg said the ranch was worth the debt, that he would gladly give $10,000 for it, and also that he was interested in the mining values. Towers also testified that he believed the ranch without the mineral values was worth $15,000 in 1938, as it was then in good shape; that he had asked $20,000 for the mining rights. A mining engineer called by defendants, who had taken assays from the property, fixed the cash value of the mineral rights at $2,500, and said that he had discussed with Mr. Werner, of California Lands, Incorporated, the purchasing of the property, and that Werner wanted $17,500 for the mineral rights on a ten year bond and lease. Another witness for defendants, a former Federal Land Bank appraiser, said that if the ranch was in fair condition in June, 1938, he would say its value would be $12,000 or a little better. Another witness for defendant, who had mined a portion of the ranch, said the "forty" they were on had a fair value of five or six thousand dollars. Another witness fixed the market value of the property in 1938 at $10,000 and testified that he, too, had discussed the purchase of the ranch with Mr. Werner in January, 1938, and the bank then wanted $10,000 for it, reserving mineral rights. R. W. Towers, brother of defendant Towers, familiar with fruit ranches in that neighborhood, fixed the market value in January, 1938, at between $14,000 and $15,000; and another former appraiser for the Federal Land Bank fixed a value of $12,250, exclusive of mineral values.

There was, therefore, a sharp conflict of evidence as to the value of the property at the time the transfers were made; but it was for the trial court to weigh the evidence, and it cannot be said that its implied finding that the value of the Ranch exceeded the indebtedness against it is without substantial support in the evidence. That the bank considered its security adequate may be inferred not only from the evidence that its representative had so stated, but from the fact that though the original indebtedness was incurred in 1930, and though interest and taxes had not been paid since the early part of 1936, it delayed foreclosure until December, 1937, after Mrs. Towers' inheritance.

[5, 6] Appellant particularly contends that the transfers must be held to have been in contemplation of insolvency on the part of Mrs. Towers, because she was subsequently without means and because she owned no interest in the Newcastle Ranch property. However, in support of the finding of the trial court we note that after the three transfers made by her and her husband to the daughter, Mrs. Towers still had the Auburn property valued at $2,500 and a bond for $1,000 which came from her mother's estate. It is true that $1,250 was borrowed on the security of the Auburn property but this money was used to clear the indebtedness on her automobile and to pay all other outstanding debts except attorney's fees, which were then secured by a chattel mortgage on the automobile. Not until after the transfers to the daughter was the declaration of homestead on the Auburn property made. It is true that Mrs. Towers owned no interest in the Newcastle Ranch, but it is conceded by appellant that her obligation on the note was only secondary, and as the court has found that the security therefor was sufficient, her transfers did not endanger the mortgage security; and it cannot be said as a matter of law that said transfers were made by her in contemplation of insolvency. Her transfers were not fraudulent any more than her husband's if the security was sufficient to pay the debt. The court said in Norton v. Blenkiron, supra [138 Cal.App. 66, 31 P.2d 808], that "it was essential for plaintiff to show that defendant's indebtedness to him was not fully secured in order to establish his right to have the conveyances set aside as fraudulent." The validity of the transfers did not depend upon future events. 27 C.J. 498. And it was said in Fross v. Wotton, supra, 3 Cal.2d at page 388, 44 P.2d at page 351, "that amply secured debts are not to be taken into consideration for the purpose of determining whether the financial condition of the grantor renders the conveyance presumptively fraudulent as to existing creditors."

Appellant cites and relies upon Allee v. Shay, 92 Cal.App. 749, 268 P. 962; Keeley v. Anderson, 14 Cal.App.2d 467, 58 P.2d 410, and Knox v. Blanckenburg, 28 Cal.App. 298, 152 P. 59; but they are not in point as the facts are not comparable and in none of them was the debt secured.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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60 Cal.App.2d 298

PHILLIPS v. HARPER et al.

Civ. 3105.

District Court of Appeal, Fourth District, California.

Aug. 26, 1943.

1. Automobiles 🔑244(20)

In action for death of one riding in defendant's automobile driven by codefendant, evidence *held* to justify findings that deceased was "guest" not "passenger for compensation", at time of fatal accident while he and defendant driver were returning to their places of abode near their place of work after week-end vacation and that deceased's loan of tire on automobile to driver was not considered as compensation for ride.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest" and "Passenger for Compensation".

2. Automobiles 🔑245(24)

Evidence of driving of automobile at high speed does not necessarily prove driver's "willful misconduct" rendering driver liable for resulting injuries to guest.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

3. Automobiles 🔑245(24)

In action for death of guest in defendant's automobile driven by codefendant, evidence as to speed of automobile and defendant driver's testimony that he had no recollection of accident because he probably fell asleep *held* not to show that he was guilty of "willful misconduct" as matter of law.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Grace Phillips against James C. Harper and another for the death of Jack D. Christiansen as the result of an automobile accident. Judgment for defendants, and plaintiff appeals.

Affirmed.

Laurenz J. Krueger, of San Francisco, and Kendall & Howell, of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondents.

GRIFFIN, Justice.

Jack D. Christiansen, aged 19, son of plaintiff and appellant Grace Phillips, was killed on February 2, 1942, on U. S. Highway No. 99, 13 miles south of Bakersfield, while riding in a 1936 convertible Ford coupe owned by defendant and respondent Ruth H. Harper and driven by her son, defendant and respondent James C. Harper, aged 19, with the consent of his mother. Defendant James C. Harper, called as a witness under section 2055 of the Code of Civil Procedure, testified generally that he lived in Whittier; that Jack lived in Los Angeles; that he and Jack were employed as civilian employees at Minter Field, about 15 miles west of Bakersfield; that each took a Ford automobile owned by their respective mothers to Bakersfield with them; that since January 5, 1942, they had been living in Bakersfield as roommates; that on Saturday, January 10, 1942, they both drove home to Los Angeles in their respective cars and returned in Jack's car; that the next week-end they went to Los Angeles in Jack's car; that each took his own car back to Bakersfield that week-end; that on the following week-end, January 24, 1942, they went to Los Angeles in James's car but that Jack drove; that on January 31, they went home to Los Angeles in James's car and returned Sunday night, February 1, leaving Jack's home about 11 p. m.; that Jack wanted to leave at an earlier hour but that he, James, wanted to go to a party; that they picked up another boy named Harold; that all three boys were seated in the front seat and that James was driving; that at around 1:20 a. m. they arrived at Gorman and all had "cokes"; that it had not been raining; that the road was "absolutely dry"; that he had not used his windshield wiper; that his lights were good and that he could see ahead without any trouble; that the brakes on his car were good. He then testified that in the second week in January he obtained a spare tire from Jack in Whittier; that he asked him if he could borrow the tire and he said "sure"; that the borrowed tire had been on his car since that time; that they didn't have any understanding in regard to the use of their respective cars. He testified that there was nothing said by Jack or him as to any compensation due for the loan of the tire; that he would have given him a ride just the same; that up to Gorman and thereafter he had traveled around 50 or 55 "maybe up to 65" miles per hour except for the turns where he slowed down; that his dashlight was not on; that Jack and Harold both went to sleep just north of Gorman; that he didn't feel drowsy but that he guessed he "must have been". When asked as to whether or not he fell asleep he said: "I don't know for sure, I guess so, I don't remember anything about the accident * * * so I guess I did"; that the next thing he knew he awakened in the hospital where he remained until April 12. He suffered a fractured pelvis, concussion of the brain, fractured nose, and scratches all over him; that he told his mother he thought he went to sleep at the wheel.

Paul S. Smith testified that he was proceeding north on Highway No. 99 in his car and near the scene of the accident he was traveling about 35 miles per hour in the right-hand lane of the four-lane highway; that several cars had passed him; that one of them, while overtaking him, struck his car lightly near the left rear fender, passed on ahead of him and apparently veered off to the left-hand side of the road and struck a tree. The car was wrecked. The passengers were thrown out ahead of the wrecked car. One was underneath it and the other two boys were 25 to 40 feet from it. He testified that he went for help, which took 15 to 20 minutes; that an officer arrived on the scene. The officer found James severely injured. Harold and Jack were killed in the accident.

The officer testified that he spoke to James and asked him what caused the accident and that James said "just too damned much speed"; that he thought he was going between 55 and 60 miles per hour but did not know; that "he possibly had fallen asleep". James testified that he was unconscious and did not remember making any such statements to him. The officer further testified that at the scene of the accident the road was "wet"; that it had been raining; that in going to the scene of the accident he traveled around 60 miles per hour and had no trouble in holding the road at that speed; that the pavement at that place was of asphalt and concrete mixture and was not as slippery as other types. The witness Smith then testified that he observed James until the time he was taken away in the ambulance; that he was groaning and mumbling and seemed to be entirely incoherent; that he didn't hear James tell the officer about the speed of the car as above related; that as to the weather, the road was wet, there "might have been a fog"; that he was using his windshield wiper. However, he testified that when James's car hit the palm tree he saw a big cloud of dust that rose from the tree, presumably from the car, obstructing the details for some little time".

The trial of the issues here presented was had without a jury. The case was submitted to the trial court without argument. It found: (1) That Jack Christiansen was riding as a guest and not as a passenger for hire in the automobile operated by James C. Harper; (2) that Harper negligently drove his automobile and as a proximate result thereof Jack D. Christiansen was killed, but that his death did not proximately or otherwise result from any wilful misconduct of defendant Harper. Judgment in favor of all defendants followed.

[1] Plaintiff appealed and argues that the uncontradicted testimony shows, as a matter of law, that Jack was a passenger for compensation, citing such cases as Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023; and Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651. The trial court, under the evidence, might well have believed that the automobile trip during which the decedent Jack D. Christiansen was killed was a pleasure trip and not a business trip; and, too, that the evidence established that the automobile tire was not loaned to Harper as a consideration or compensation for riding in his car. The abstract propositions of law stated in the cited decisions seem to be sound

and do apply reasonably to the facts there involved. However, each case must stand upon its own set of facts and the propositions of law which the courts declare must necessarily be applied to the evidence in each particular case. The evidence in this case shows that the boys had established places of abode in Bakersfield. It was only for a week-end vacation that they journeyed to Los Angeles. The trip upon which the decedent was killed does not therefore come under the classification of business, such as might a trip from the boarding house in Bakersfield to Minter Field. The guest cases draw a sharp distinction between business trips and pleasure trips, and these authorities have been collected in the case of McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. Under the authority of that decision the trial court was fully justified in this case in holding that the deceased was a guest and not a passenger for compensation, that the loan of the tire was not considered as compensation for the ride, and that there was no agreement, express or implied, between the parties to that effect.

[2] It is next contended that even if the deceased were a guest, the uncontradicted evidence shows that James was guilty of wilful misconduct as a matter of law. In the first place the evidence is not uncontradicted. The speed at which James was traveling is open to conjecture. Speed alone does not necessarily of itself prove wilful misconduct. Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165; Robertson v. Brown, 37 Cal.App.2d 189, 99 P.2d 288.

[3] The testimony of James indicates that he had no recollection of the collision itself. He attributes such lack of knowledge to the assumption that he fell asleep. This may have been a conclusion of the witness. A person who has suffered a severe concussion of the brain may have a lapse of memory as to the blow or impact causing the concussion and as to the facts and circumstances occurring shortly thereafter or even before the impact. Hoppe v. Bradshaw, 42 Cal.App.2d 334, 339, 108 P.2d 947.

Wilful misconduct has been so many times defined by the appellate courts of this state that further definition is probably redundant. See Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194; Lennon v. Woodbury, 3 Cal.App.2d 595, 40 P.2d 292. In Rode v. Roberts, 11 Cal.App.2d 638, 642, 54 P.2d 498, 500, it is said: "On the trial it was the theory of the plaintiff that because defendant got up at 4 o'clock she had become tired and worn-out and had become drowsy. Conceding such to be the fact, if she drove the car while drowsy such fact might indicate negligence, but not wilful misconduct." See also Forsman v. Colton, 136 Cal.App. 97, 28 P.2d 429.

Upon the authority of the cases cited and under the evidence, it seems to us that the conclusion is inescapable that the trial court was fully justified in holding that there was substantial evidence that the defendants were not chargeable with wilful misconduct. Since it cannot be said that the evidence shows wilful misconduct as a matter of law, the trial court's finding will not be disturbed on appeal.

Judgment affirmed.

BARNARD, P. J., concurs.

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60 Cal.App.2d 349

ALPHA STORES, Limited, v. CROFT et al. (two cases).

Civ. 6922; Sac. 5579.

District Court of Appeal, Third District, California.

Aug. 28, 1943.

1. Estoppel 🔑58

An "estoppel" may not be set up to defeat title to realty of one who has made representations concerning the state of his title unless he was appraised of true state of his title and made admission with express intention to deceive or with such culpable negligence as to amount to constructive fraud and the other party had neither knowledge nor means of obtaining knowledge of true state of the title and relied directly on such admission and would be injured by allowing its truth to be disproved.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

2. Gifts 🔑49(4)

Though equity may, under extreme circumstances, support an oral promise to convey realty contrary to provisions of statute of frauds, an oral gift of realty can be sustained only upon clear and satisfactory proof of identity of the property and of an intention of donor presently to convey title thereto. Civ.Code, § 1091.

3. Judgment 🔑251(1)
Trial 🔑396(1)

There was a "fatal variance" between cross-complaint seeking to quiet title to mining claim allegedly acquired by oral gift and described in cross-complaint as lots 60 and 63 of designated section, township, and range, and findings and judgments quieting title to a tract in designated township, section, and range describing it by metes and bounds and identifying it as a portion of lots 60 and 63 and four other enumerated lots.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

4. Gifts 🔑49(4)

Donee's statement that he was given a named hill which he described as including everything between the divide and named canyon did not sufficiently identify the land to sustain oral gift thereof contrary to statute of frauds. Civ.Code, § 1091.

5. Gifts 🔑49(4)

Uncorroborated testimony of alleged donee and evidence as to conduct of parties were insufficient to sustain findings that president and chief stockholder, whose authority to give away mining company's claims was not shown, made an oral gift to cousin of a claim which alleged donee thereafter worked under agreement to pay mining company a royalty. Civ.Code, § 1091.

6. Fraud, statute of 🔑158(4)

Clear and satisfactory evidence of donor's intention presently to part with title to realty and that donee in reliance upon gift made valuable improvements and so changed his situation and conditions that it would be inequitable not to enforce conveyance are necessary to sustain an oral gift of realty in violation of statute of frauds. Civ.Code, § 1091.

Appeal from Superior Court, Nevada County; Warren Steel, Judge.

Action by Alpha Stores, Limited, and another, against F. Ross Croft, also known as Frank R. Croft, and others, to quiet title to a mining claim, wherein named defendant filed a cross-complaint asking that title be quieted in him. From a judgment quieting title in named defendant, named plaintiff appeals.

Judgment reversed and cause remanded with directions.

H. Ward Sheldon, of Nevada City, for appellant.

James Snell, of Grass Valley, for respondent.

THOMPSON, Justice.

The plaintiffs and cross-defendants have appealed from that portion of the decree which was entered in this case quieting title in the defendant and cross-complainant Frank Ross Croft to a certain mining claim alleged to have been acquired by him April 15, 1934, by oral gift from the predecessor in title of the litigants in this suit.

This action to quiet title to certain gold-bearing placer properties was brought by Alpha Stores, Ltd., a private corporation, and Nevada Irrigation District, as co-owners, against F. Ross Croft and other defendants as lessees of Croft. Subsequent to the entry of judgment, the issues affecting the lessee defendants, concerning certain machinery and equipment, were settled and are now eliminated from consideration. Also, since the entry of judgment, plaintiff Alpha Stores, Ltd., succeeded to all of the interest and title of its co-plaintiff, Nevada Irrigation District. The only remaining question concerns the title to a portion of the land described in the complaint, as between the appellant, Alpha Stores, Ltd., and the respondent, F. Ross Croft.

The land is located in the You Bet Mining District, Nevada County, California. The evidence discloses that title to all of the land claimed by plaintiffs was acquired by early mining locators by patents issued to them from the United States Government, and all of these mining claims had vested through mesne conveyances in the You Bet Mining Company, a corporation. In 1935, through purchase at Sheriff's sale upon execution issued on a judgment against the You Bet Mining Company, the plaintiffs and appellants acquired title.

Respondent's answer does not deny the validity of the Sheriff's sale proceedings but, by way of affirmative defense and cross-complaint, it asserts that on or about the 15th day of April, 1934, prior to the initiation of appellant's claim against the You Bet Mining Company, he received title by parol gift from the owners "Ogden C. Chase and * * * You Bet Mining Company", to a portion of the land then owned by them. Respondent's answer and cross-complaint particularly describe the parcel of land subject to the oral gift as follows: "Lot sixty (60), Brown Brothers Placer Mine, and Lot sixty-three (63) Washington Heydliff Placer Mine, all in Section 31, Township 16, North Range 10 East, M.D.B.& M; that said Lots are sometimes designated in part as the Shorty Jeffurs Placer Mining Claim."

The answer of respondent further asserts that since the 15th day of April, 1934, he has been in open, notorious, exclusive, and adverse possession of the property described, and that in reliance upon said parol gift, he made valuable and expensive improvements to the dwelling house and to the land, of which the appellants were well aware, having had knowledge that said improvements were being made by respondent under a claim of title to said property.

[1] The trial court rendered judgment in favor of respondent to the extent of quieting title in him to the land alleged to have been received as a gift. The findings of the court determine that Ogden C. Chase and the You Bet Mining Company made a valid gift of the particular property to F. Ross Croft on or about the 15th day of April, 1934, and that he immediately took possession of the land. The court also made a finding that "plaintiffs and cross-defendants" by their conduct encouraged respondent to make expenditures on account of and improvements to the property. This finding in effect is that plaintiffs and cross-defendants are estopped from asserting title to this particular mining property. The defense of estoppel was pleaded by the lessees of the defendant Croft. Consequently, even though the findings appear to invoke the doctrine of estoppel in support of the judgment determining the ownership of the real property as between the parties to this appeal, we assume that defense was considered only on behalf of the lessee defendants who are no longer parties to this action. We shall therefore disregard that issue. If it be contended that the findings are to be construed as supporting the doctrine of estoppel with respect to the title to real property as between respondent and appellant, we are of the opinion that finding is unsupported by the evidence. The law in California is very strict in applying the doctrine of estoppel to defeat title to real property, and in applying that doctrine to defeat the title to real property it is necessary for the innocent party to show culpability, consisting of actual fraudulent intent or culpable negligence amounting to constructive fraud. The leading case in California on that subject is Boggs v. Merced Min. Co., 14 Cal. 279. It holds that where an individual made representations concerning the state of his title, no estoppel can be set up against him unless: (a) He was apprised of the true state of his own title; (b) he made the admission with the express intention to deceive, or with such culpable negligence as to amount to constructive fraud; (c) the other party had neither knowledge nor means of obtaining knowledge of the true state of the title; (d) the other party relied directly on such admission and would be injured by allowing its truth to be disproved. The rule of the Boggs case, supra, has been consistently reaffirmed in later California decisions. As indicated, the evidence introduced at the trial in the present suit fails completely to support any theory rendering applicable the doctrine of estoppel with respect to the title to the mining property involved herein.

Respondent did not claim title to the lots on the theory of adverse possession thereof for the statutory period of time, and the court did not purport to adopt findings in support of the judgment on that ground. The only issue, therefore, which is before us at this time concerns the question of the sufficiency of the evidence to support the finding that a parol gift of the real property was made to F. Ross Croft.

Appellant contends that the evidence is insufficient to support a conclusion that a valid gift of the real property was consummated, as (1) the language used by the donor does not disclose an intention to transfer the property; (2) the property was never clearly identified (judgment gives respondent land not claimed by the pleadings or by the evidence); (3) the donee did not accept the land as a gift, but instead paid a royalty or rent to his donor; (4)

donee did not enter into possession in reliance on a gift, and the mining company continued to work the ground after the alleged gift; (5) no explanation was given why the alleged gift was not consummated by the execution of a conveyance; and (6) the donor, as president of the corporation, had no title to give to respondent.

At the time of the alleged gift Mr. Chase was the president and general manager of the You Bet Mining Company, and during the trial it was indicated by statements made that he owned a total of 223,000 shares of stock of the corporation out of a total of 224,000 issued shares. No evidence of the corporate organization was introduced during the trial. Ogden C. Chase did not testify at the trial. Respondent argues that Ogden C. Chase's authority to make the alleged gift is disclosed by the evidence which indicates that Chase was the alter ego of the You Bet Mining Company; that he operated all of the properties as his own, and that authorization by the board of directors for the gift of the property was therefore not necessary. Respondent also contends that the appellants' title being that of purchasers at an execution sale, they may not question the legality of that gift of property or the transaction by means of which the respondent became vested with the title.

[2] We are of the opinion the findings and judgment quieting title in the defendant and cross-complainant, F. Ross Croft, to the parcel of land described therein by metes and bounds as "a portion of the said Lots numbered 60, 63, 10, 64, 71 and 58," of Section 31, T. 16, N.R. 10 East, M.D.B.& M., are not supported by the evidence, for the reasons that there is a fatal variance between the pleadings and the judgment in respect to the description of the land alleged to have been acquired by oral gift, that the subject of the alleged gift was not sufficiently identified, and that there is an absence of satisfactory proof of the asserted gift or conveyance of the land. The respondent, Croft, in support of the judgment, relies on proof of an implied conveyance of real property as the result of an alleged oral gift, in conflict with the provisions of the statute of frauds. Section 1091 of the Civil Code provides that the transfer of any interest in real property must be in writing subscribed by the party to be charged. It is true that under extreme circumstances equity may support an oral promise to convey real property, contrary to the provisions of the statute of frauds. This exception to the ordinary rule is based on the doctrine of estoppel and is invoked in order to prevent an injustice to the donee. An oral gift of real property has, however, been sustained only upon clear and satisfactory proof of the identity of the property and of an intention on the part of the donor to presently convey title to the real property.

[3, 4] In the present case there is a lack of proof of the identity of property in question, and there is a fatal variance between the allegations of the pleadings and the determination of the findings and judgment with respect to the subject of the alleged gift. The respondent's answer and cross-complaint specifically describe the property which is the subject of the alleged gift, as Lots 60 and 63 of section 31, township 16, N.R. 10 East, M.D.B.& M., "sometimes designated in part as the Shorty Jeffurs Placer Mining Claim." The findings and judgment quiet title in the respondent to a tract of land in the same township, section and range, describing it by metes and bounds, and identifying it as "a portion of the said lots numbered 60, 63, 10, 64, 71 and 58." The pleadings were not amended to conform to the proof. We are directed to no evidence supporting an alleged gift of the portions of the six lots which are specifically described by metes and bounds in the findings and judgment. We find no reference in the evidence to the designation of the location referred to in the pleadings as "Shorty Jeffurs Placer Mining Claims." On the contrary, the respondent testified that Mr. Chase said to him, "You can have Brown's Hill, go ahead and do what you want with it." The mere reference to the property as "Brown's Hill" is too indefinite and uncertain to meet the requirements of the law with respect to the identity of land claimed to be the subject of an oral gift. The respondent identified Brown's Hill as follows: "It is a general term that they use out there, that took in the hill. * * * No boundaries, no. * * * Brown's Hill is conceded to be everything between the divide and Bird's Eye Canyon." That description is certainly too indefinite to support an alleged oral gift of specific real property.

We are also of the opinion the finding and judgment upon which the respondent's title to the lots in question are based, to the effect that said mining claims were orally given to Croft by Ogden C. Chase and You Bet Mining Company, on April 15, 1934, are not supported by the evidence. On the date of said alleged oral gift the last mentioned mining company was the owner of the lots in question. Ogden C. Chase was the president, managing agent and chief stockholder of that corporation. The respondent Croft is his cousin. In the fall of 1933, Mr. Croft was employed by Mr. Chase and worked on the You Bet Mining Claims prospecting until the following spring. He occupied and improved a cabin belonging to the company which was situated on the lots in question. April 15, 1934, he had a conversation with Mr. Chase, in which he contends the lots in question were orally given to him. The only testimony of that conversation between Chase and Croft regarding the alleged parol gift of the lots, was given by the respondent himself. Chase was not called as a witness. A fair and reasonable construction of that testimony, together with the acts and conduct of the respective parties, convinces us there was no intention on the part of plaintiffs' predecessor in title to give those lots to the respondent. Respondent's own testimony and his conduct indicate that the respective parties understood that Croft was to occupy and prospect the Brown's Hill mining claims as a lessee in consideration of the payment to the owner, You Bet Mining Company, of twenty-five per cent of gold or other precious metals recovered by him. The conduct of the respondent appears to verify that fact. Moreover, there is absolutely no evidence that a promise was made by Chase or anyone else to execute a conveyance of those lots to the respondent. Nor is there any evidence that the You Bet Mining Company authorized Chase to make any oral gift of the lots. No conveyance was subsequently executed or demanded by the respondent. The evidence of this case does not warrant the conclusion that the alleged gift is valid and binding on the theory that Chase was the alter ego of the company. In June, 1934, after the respondent had taken possession of the mining claims, Mr. Chase posted on said lots a formal notice of location of mineral claim, bounding the property exactly as it was described in respondent's answer and cross-complaint. September 7, 1935, and again on November 5, 1935, while the respondent was working said claims, the You Bet Mining Company, by Ogden C. Chase, as president, executed mortgages to one James F. Peck, covering all of said property. Also on September 7, 1935, the You Bet Mining Company executed a mortgage covering the property in question, in favor of Mr. Chase. Subsequently Chase commenced an action to foreclose that last mentioned mortgage. These and other circumstances appear to refute the theory that the mining claims were orally given to the respondent.

On cross-examination, the respondent testified regarding the alleged oral gift of lots by Mr. Chase, as follows:

"Q. You came back then in the first part of the year 1934? A. Yes.

"Q. And went back to work for Mr. Chase? A. That is correct.

"Q. You continued to work for him until approximately the middle of April? A. Yes.

"Q. Then you worked and paid him a royalty? A. I paid him twenty-five per cent of what we recovered, yes. That is, I paid that to Magee. Chase told me he never got it.

"Q. You had an understanding with Chase that he would let you work the property for your own account and you would pay the royalty? A. He never asked for that. I suggested that and he said, 'We will try it and see how you make out.' I told Magee to hold out the twenty-five per cent. * * *

"Q. How long did he hold it out? A. Probably from spring until fall. I know that when Chase told me not to pay Magee any further royalties, I didn't pay him any more.

"Q. You are claiming lot sixty and lot sixty-three were given to you by Mr. Chase? A. Yes.

"Q. What did he say at the time he gave you those lots? A. He said, 'You can have Brown's Hill, go ahead and do what you want with it.'

"Q. Is that the expression he used, 'Brown's Hill'? A. Yes. * * * I understood that Brown's Hill took in that,—it is a general term that they use out there, that took in that hill. * * *

"Q. You felt you were the owner of that property ever since Mr. Chase gave it to you in 1934? A. Yes. * * * He gave it to me in the spring.

"Q. But you paid him a twenty-five per cent royalty after that? A. Yes, as payment for the property.

"Q. Did he ever give you any written agreement or sign any deed or other conveyance? A. No."

Again the respondent testified regarding the alleged oral gift of lots, in response to the inquiry of the trial judge, as follows:

"Q. How did he [Chase] tell you the same thing the second time? A. Due to the fact that he hadn't received,—I kind of crabbed about paying the twenty-five per cent. I said if I didn't have to pay for this ground I could make some money. He hadn't received the payments that were held out of our clean ups. He said, 'What the hell are you paying Magee for, I haven't received any money. Go ahead and work it.'"

[5] We are unable to construe the foregoing testimony of the respondent so as to uphold the finding and judgment to the effect that an oral gift of the lots in question was made to Mr. Croft. The evidence clearly indicates that both parties understood the transaction to be a mere oral lease or license to prospect the property for the consideration of the payment of royalties to the owners thereof in an amount equivalent to twenty-five per cent of the gold or mineral recovered. The record is uncontradicted that the mining claims belonged to the You Bet Mining Company. Chase had no authority to give them away. The subsequent conduct of the parties refutes the theory of an oral gift of the lots. The evidence does not support that finding.

[6] The California cases which have upheld judgments sustaining oral gifts of real property are not numerous. An examination of those cases discloses that very clear and satisfactory evidence of the elements required in support of a valid transfer of real property by parol gift must be proven in order to relieve the transfer from the statute of frauds. Burlingame v. Rowland, 77 Cal. 315, 19 P. 526, 1 L.R.A. 829; Bakersfield Town Hall Ass'n v. Chester, 55 Cal. 98; Kinsell v. Thomas, 18 Cal. App. 683, 124 P. 220; Peixouto v. Peixouto, 40 Cal.App. 782, 181 P. 830; Kennedy v. Scally, 62 Cal.App. 367, 217 P. 96. It must appear to have been the intention of the donor to presently part with his title to the land. It must also appear that the donee, in reliance upon such gift, makes valuable improvements and so changes his situation and conditions that it would be inequitable to fail to enforce the conveyance. The facts of this case fall far short of such requirements.

We find nothing in the authorities cited by the respondent in conflict with what we have previously said regarding the principle applicable to suits involving alleged oral gifts of real property.

In view of our conclusion regarding the insufficiency of the evidence to sustain the findings and judgment based on an alleged oral gift of the property in question, it is unnecessary for us to pass upon the other issues raised by the appellant.

The judgment is reversed and the court is directed to render judgment quieting title to the lots involved on this appeal in the appellant, Alpha Stores, Ltd.

ADAMS, P. J., and PEEK, J., concur.

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60 Cal.App.2d 291

BAILEY v. BAILEY.

Civ. 14071, 14109.

District Court of Appeal, Second District,
Division 1, California.
Aug. 25, 1943.

1. Divorce 🔑183

Record on appeal from interlocutory divorce decree failed to show any waiver of a demand for findings of fact and conclusions of law.

2. Divorce 🔑286

Where that portion of divorce decree making an award of community property, from which an appeal was taken, was not severable from portion of decree which awarded appellant alimony, it was proper for district court of appeal to review the alimony award along with the portion of the decree contested.

3. Divorce 🔑252

In determining division of property in divorce proceeding, trial court properly considered land held in joint tenancy by husband and wife as the separate property of the parties.

4. Divorce ⚷252

An award of money in lieu of a specific interest in community property was proper in determining division of property and alimony in divorce proceeding.

5. Divorce ⚷286

In divorce action where trial court failed to make findings as to extent of community property and evidence was insufficient to justify appellate court making any findings thereon, and without having ascertained such value an equitable division of property or compensation in lieu thereof was impossible, a money award in lieu of division of property was an abuse of trial court's discretion and cause would be remanded for new trial on issue of value of property.

6. Divorce ⚷286

A separate appeal from order allowing costs on appeal in divorce action may be disregarded where the decree making a division of community property and providing for alimony was reversed, since prevailing party is entitled to costs on appeal.

7. Divorce ⚷286

In divorce action an order allowing $50 attorney's fees for the appeal would not be disturbed where, in making the award, trial court apparently took into account the total amount of attorney's fees awarded in the case.

◆

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for divorce by Ernest De Witt Bailey against Laura H. Bailey, wherein defendant was granted a divorce on her cross-complaint alleging extreme cruelty. From that portion of the decree which purported to make an award of the community property of the parties, defendant appeals; and from an order awarding defendant the sum of $50 for costs on her appeal from the decree and the sum of $50 for attorney's fees on appeal, defendant takes a separate appeal.

Affirmed in part, and reversed and remanded in part.

Oscar S. Elvrum, of Los Angeles, for appellant.

John K. Ford, of Los Angeles, and Paul Briskin, of Lancaster, for respondent.

DORAN, Justice.

In the court below defendant and appellant was granted an interlocutory decree of divorce from plaintiff and respondent upon the ground of extreme cruelty as set up in appellant's cross-complaint. Both parties concede the propriety of the decree of divorce, but appellant has taken this appeal from that portion of the decree which purports to make an award of the community property of the parties. The portion of the decree from which this appeal is taken reads as follows: "It is further ordered adjudged and decreed that Laura H. Bailey the Cross-Complainant herein, be awarded any and all monies deposited in the name of Laura H. Bailey at the Bank of America, Lancaster Branch, Lancaster, California, and the caracul sheep, numbering 11 head more or less, now in the possession of the said cross-complainant. It is further ordered, adjudged and decreed, that plaintiff and cross-defendant is hereby awarded all of the community property interest of the parties hereto in any and all real or personal property of the parties hereto and that from this day henceforth said interest shall be the separate property of said plaintiff and cross-defendant." Appellant also contests the recital in the decree that findings of fact and conclusions of law were duly waived by the parties. Appellant has also taken a separate appeal from an order awarding appellant the sum of $50 for costs on her appeal from the interlocutory decree in question and the sum of $50 for attorney fees on appeal. Counsel for the respective parties have stipulated that these two appeals may be consolidated.

[1] The contention that findings of fact and conclusions of law were not waived is supported by the reporter's transcript, certified as correct and settled by the trial judge, wherein the following appears:

"Mr. Elvrum (appellant's counsel): There will be findings of facts?

"The Court: I don't know as you need them unless you want them.

"Mr. Briskin (respondent's counsel): I don't think so.

"Mr. Elvrum: This court is not deciding as to that joint tenancy matter?

"The Court: I cannot touch it.

"Mr. Briskin: We will have findings and conclusions of law, and facts.

"Mr. Elvrum: Yes. * * *"

The record does not subsequently show any waiver of this demand for findings.

[2] Appellant's principal contention as to the error of the trial court in the disposition of the community property of the parties is based upon the proposition that in granting a divorce for extreme cruelty the innocent or prevailing spouse is entitled to more than one-half of the community property. In presenting her argument, however, appellant has ignored the fact that the record clearly indicates that the trial court made an award of $100 per month alimony to appellant in lieu of appellant's interest in the community property in question, although the decree did not recite that the award of alimony was in lieu of community property. No appeal has been taken from that portion of the decree, which reads as follows: "It is further ordered adjudged and decreed that cross-defendant shall pay to cross-complainant the sum of $100 per month commencing upon the 6th day of October, 1942 and payable $100 per month on the 6th day of each and every month thereafter until further order of court." At the trial the court expressly stated that this award was being made instead of an interest in the community property. The court also indicated that the state of appellant's health was a factor in fixing the amount of the monthly payments. That portion of the decree from which the appeal is taken is plainly not severable from that in which appellant was awarded alimony; and it is therefore proper here to review the award of money to appellant along with the portion of the decree contested by appellant. Milo v. Prior, 210 Cal. 569, 571, 292 P. 647.

Respondent and his brother are farmers, operating as partners upon some 240 acres of land, engaged in the business of raising alfalfa hay. This partnership was formed prior to the marriage of appellant and respondent. Before the marriage respondent and his brother as partners acquired 40 acres of land by purchase and took another 40 acres under lease, and have farmed both parcels as partners ever since. After the marriage of appellant and respondent and during coverture another 40 acres was purchased by the partnership and 160 acres was acquired in joint tenancy, in the name of respondent's brother, as a single man, and respondent and appellant, husband and wife. The bulk of the real and personal property in which appellant claims a community interest is involved in the farming operations of the partnership. Appellant and respondent were married in 1930. The farming operations appear to have lost money until 1941. The partners each drew $50 a month from the partnership. The value of the real property, other than the 160 acres in joint tenancy mentioned above, was not established, nor was any evidence given as a basis for the establishment of its value. The personal property, live stock and farm machinery connected with the farming operations at the time of the trial appears to have had a value of between four and five thousand dollars. At that time the partnership had about $1200 in the bank, subject to the payment of the month's bills. There was no evidence of the amount of profits derived from the farming operations since 1941, though there was some basis given for an estimate. Respondent in his complaint alleges a community property interest of the parties in the approximate sum of five thousand dollars. In passing, attention should be called to section 2419(2) (e) of the Civil Code, wherein it is provided that a partner's right in specific partnership property is not community property.

[3] As to evidence of property other than that involved in the partnership, respondent has a 20 payment policy of life insurance, the face value of which is not shown by the record. The policy was taken out when respondent was 15 years of age. The annual premium thereon is $70.71, and during the marriage of appellant and respondent the total sum of $777.81 was paid in premiums on the said policy. There is a 1942 Chevrolet automobile purchased by respondent, but there does not appear to be any equity therein. During their marriage the parties acquired a certain Bentonite mining claim located in the County of San Bernardino. There is some evidence that the necessary assessment work has not been kept up on this claim. The proceeds derived from a lease on this claim were divided equally between the parties as the same were received. The evidence reveals that the bank account in the Bank of America, Lancaster Branch, was derived from appellant's share of the proceeds from the Bentonite mine and from the proceeds of the sale of butter and eggs made by appellant. It is apparent from the record that the parties intended this money to be appellant's separate property. The caracul sheep were purchased

by appellant partly from funds out of this account and partly through a loan from appellant's father. It is thus apparent that the sheep also constitute the separate property of appellant. The record reveals that the trial court considered the 160 acres held in joint tenancy as the separate property of the parties; and in this view the court appears to have been correct. Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003.

[4] An award of money in lieu of a specific interest in community property is a proper one for the court to make. Webster v. Webster, 216 Cal. 485, 488, 14 P.2d 522; Marshall v. Marshall, 196 Cal. 761, 765, 239 P. 36; Meyer v. Meyer, 184 Cal. 687, 195 P. 387. In Webster v. Webster, in lieu of awarding a portion of the property in kind to the plaintiff wife, the interlocutory decree granted to her a lump sum of money, represented by a promissory note in the sum of $3,500 to be executed by the defendant husband and to be secured by a mortgage on the real property awarded to the defendant husband. Plaintiff was also awarded $40 a month for her support and maintenance, to be paid by the defendant until such time as the plaintiff remarried. The court there said [216 Cal. 485, 14 P.2d 523]: "A reasonable construction of the interlocutory decree readily discloses that plaintiff was awarded a portion of the community property, her share being awarded to her in money rather than in kind, the same being secured by a mortgage on the real property. The fact that the decree awards said sum 'for the maintenance and support of the plaintiff,' does not make it any the less an award of a portion of the community property. In addition thereto, plaintiff was awarded support money, payable monthly, until such time as she remarried. This is a proper method of distribution of the property and is a matter to be determined in the sound discretion of the trial court." In Marshall v. Marshall, supra [196 Cal. 761, 239 P. 37], wherein alimony was awarded the wife in addition to a division of the community property, the court said: "The trial court in the divorce proceeding (which was upon the ground of extreme cruelty) had jurisdiction and power to divide the community property between the spouses or to award all of it to the wife, or to award her alimony in lieu of a division of the property, or in addition thereto, regardless of the question of the existence of children of the marriage of said parties." In Meyer v. Meyer, supra, there was community property consisting of real estate of the value of twenty-five thousand dollars. This real estate was not divided by the decree nor ordered sold, but the defendant was directed to pay the plaintiff eighteen thousand dollars, and its payment was made a charge upon the property by requiring the defendant to give a mortgage upon it for that amount. In Johnston v. Johnston, 33 Cal.App.2d 90, 91 P.2d 142, the trial court found and concluded that "plaintiff is entitled to the sum of Five Hundred Dollars ($500.00) which said sum is to be paid by defendant to plaintiff in lieu of plaintiff's right to any alimony, maintenance and support and in lieu of plaintiff's right to any interest in the community property * * *", and "that upon the payment of said sum of Five Hundred Dollars ($500.00) by defendant to plaintiff, all of the right, title and interest in and to the above described real and personal property is awarded to defendant". The interlocutory decree was entered accordingly; and this decree was affirmed.

[5] In the case at bar the trial court has failed to make any findings as to the nature and extent of the community property interest. This defect might be remedied by the appellate court, except for the fact, as already indicated, that the evidence is not sufficient upon which to make a finding as to the value of the community property interest of the parties. Without first having ascertained the value of the community property interest involved, it would be impossible, under the circumstances of this case, to make any just or equitable award as to division of the property or compensation in lieu thereof. Upon the record presented, it is impossible to state what proportion of the community property interest the monthly payments of $100 represent. Nor is it possible to determine what proportion of the $100 payments is to apply to the community property interest and what proportion thereof is to apply to alimony, awarded because of the state of appellant's health and her consequent need for support. Under the circumstances here presented, the trial court must be held to have abused its discretion in attempting to make an award of money in lieu of a division of property in kind, without first having found the value of the community property interest.

Appellant contends that it was the duty of respondent to render a true and accurate account of the partnership affairs subsequent to the date of marriage of the parties and disclose all community property in his possession or under his control to appellant, so that a fair and equitable division of the same can be made by the court. The record reveals that in many instances respondent professed an inability to render any accurate accounting; but it does not clearly appear from the record that respondent's failure in this respect was due to any desire on his part to hinder, delay or defraud appellant, and no such inference can be drawn by this court from the evidence presented. Appellant, on the other hand, does not appear to have made an attempt to obtain any positive or competent evidence in order to remedy the defect in this regard. In view of the insufficiency of the evidence as to the value of the community property and the impracticability of trying the issue of community property in this court, in the interests of justice and equity the case must be remanded for a new trial upon the question of the value of the community property involved.

[6] Upon the appeal from the order awarding costs and attorney's fees, the record shows that the motion for such costs and fees was heard upon affidavits of the respective parties. Appellant's affidavit, which alleged certain facts pertaining to plaintiff's ability to pay and defendant's lack of such ability, was disputed by counter affidavit. So far as the appeal from that portion of the order allowing $50 costs on appeal is concerned, it may be disregarded. The judgment being reversed, the prevailing party is entitled to costs on appeal.

[7] With regard to the question of attorney's fees, the record reveals that counsel had been awarded a total of $500 as attorney's fees, which fact the court in all probability took into account in fixing attorney's fees for the appeal. In the circumstances, notwithstanding the opportunity for a difference of opinion with respect to such matters, the showing is insufficient to warrant any interference with such order on appeal.

The portions of the interlocutory decree from which appeal has been taken, together with that portion of the decree awarding the sum of $100 per month alimony to appellant, are, and each of them is reversed; and the cause is remanded for a retrial of the issues as to the community property interest of the parties, with directions to the trial court to make findings thereon. The order awarding appellant counsel fees on appeal is affirmed.

YORK, P. J., and WHITE, J., concur.

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60 Cal.App.2d 275

FLETCHER v. DEXTER, Superintendent of Public Instruction, et al.

Civ. 3094.

District Court of Appeal, Fourth District, California.

Aug. 24, 1943.

Appeal and error 🔑781(4)

Appeal and error 🔑781(4)

Where period during which a series of textbooks were to be printed and sold had expired, appeal from judgment restraining defendants from printing, or causing the series to be printed, was dismissed as presenting "moot questions".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Ed Fletcher against Walter F. Dexter as Superintendent of Public Instruction of the State of California, and others, for an injunction to restrain defendants from printing, or causing to be printed, a certain series of textbooks. Judgment for plaintiff, and defendants appeal. On motion by plaintiff to dismiss the appeal.

Appeal dismissed.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson and Theo. A. Westphal, Jr., Deputy Attys. Gen., for appellants.

Curtis Hillyer and W. W. B. Seymour, both of San Diego, for respondent.

PER CURIAM.

This was an action for an injunction to restrain the defendants from printing or causing to be printed a certain series of textbooks. The court found for the plaintiff and entered judgment accordingly, from which judgment the defendants appealed.

The plaintiff, after due notice, has moved to dismiss the appeal on the ground that a controversy no longer exists and that all questions involved herein have become moot. On the hearing of this motion it appeared that all of the defendants except one, who was merely a nominal defendant, have requested a dismissal of the appeal and counsel for the defendants stated that they would not oppose the same. It further appeared that the textbooks in question were to be printed and sold in accordance with the provisions of a certain contract entered into between the State Board of Education and a third party; that under the terms of that contract these textbooks were to be printed and sold only during a period of six years; and that such six-year period expired on July 1, 1943. Upon the record before us, no question remains which presents any present controversy or which calls for consideration and determination. The appeal is dismissed upon that ground.

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60 Cal.App.2d 338

PROVIDENCE WASHINGTON INS. CO. v. HOTEL MARYSVILLE, Inc.

Civ. 6891.

District Court of Appeal, Third District, California.

Aug. 28, 1943.

Hearing Denied Oct. 25, 1943.

1. Innkeepers 🔑11(11)

Under statutes relating to innkeeper's liability, strict rule of common law that innkeeper is insurer of property of guest is modified to impose liability of a depositary for hire. Civ.Code, §§ 1859, 1860.

2. Innkeepers 🔑11(11)

Purpose of statutes relating to liability of innkeepers for property of guests was to relieve innkeepers of burden of common law liability, to limit liability in absence of special contract, and to provide a method by which innkeeper may relieve himself from liability as a depositary for hire for guest's articles of unusual value. Civ. Code, §§ 1859, 1860.

3. Innkeepers 🔑11(11)

One who seeks to impose upon innkeeper, who has given notice that he has a vault, the liability of an insurer of articles of unusual value, must make known to innkeeper that his baggage contains such articles and that they are being deposited for special safe-keeping. Civ.Code, § 1860.

4. Innkeepers 🔑11(11)

Evidence that bellboy assumed that hotel guest was jewelry salesman and that luggage consisted of sample cases, and fact that guest acceded to suggestion that luggage be placed in vault and accepted baggage check, were insufficient to constitute a "deposit" of valuables within meaning of statute relating to innkeeper's liability for valuables deposited for special safe-keeping. Civ.Code, § 1860.

See Words and Phrases, Permanent Edition, for all other definitions of "Deposit".

5. Innkeepers 🔑11(11)

Where an innkeeper has relieved himself of liability for guest's valuables by giving statutory notice that a vault is provided, a guest who desires to impose liability upon innkeeper must notify innkeeper that baggage placed in innkeeper's custody contains valuables and is being deposited as such and cannot rely upon mere appearance of baggage as giving such information. Civ.Code, § 1860.

6. Innkeepers 🔑11(11)

A brass baggage check given by bellboy to a hotel guest for luggage containing valuable jewelry was not a "consent in writing" by hotelkeeper to assume greater than statutory liability for loss of luggage, within statute limiting liability unless hotel keeper consents in writing to a greater liability. Civ.Code, §§ 14, 1859.

See Words and Phrases, Permanent Edition, for all other definitions of "Consent in Writing".

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Providence Washington Insurance Company against Hotel Marysville, Inc., to recover value of two jewelry cases and their contents left with defendant by plaintiff's insured. Judgment for plaintiff for statutory limit of innkeeper's liability for luggage deposited with innkeeper without special contract, and plaintiff appeals.

Affirmed.

Justin M. Jacobs, of San Francisco, Loyd Hewitt, of Yuba City, and Warren A. Palmer and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, for appellant.

Rich & Weis and Richard H. Fuidge, all of Marysville, for respondent.

ADAMS, Presiding Justice.

Plaintiff, insurance carrier for Measer-Straus Co., brought this action, seeking to recover the value of certain jewelry owned by Measer-Straus Co. which Leo R. Straus, vice president of said company, had taken with him on a selling trip contained in two valises or cases which were lost while said Straus was a guest at Hotel Marysville.

The evidence shows that Straus registered as a guest at said hotel about 6:45 p. m. on November 20, 1939. He had with him in his automobile three pieces of luggage in the nature of valises, two of which were sample cases weighing from 25 to 30 pounds each, which, he testified, contained jewelry and precious stones of large value. Straus delivered his baggage to Malone, the bellboy on duty, who asked him if he desired the sample cases placed in the vault. On being advised in the affirmative, Malone gave to Straus two brass checks numbered 31 and 41, bearing also the words, "Marysville Hotel, Marysville, Cal.," and attached the duplicates to said cases which were then placed in the vault of the hotel. Said brass checks were similar to baggage checks in use generally throughout the land in the ordinary course of checking miscellaneous items of personal property, and were commonly used by Hotel Marysville for that purpose. After delivering his baggage to Malone, Straus registered with the clerk of the hotel but did not state to the clerk or to Malone or to anyone else, either directly or indirectly, that the cases were other than ordinary baggage. Malone had seen Straus on two or three previous occasions as a guest in the hotel, but did not know his name or occupation. He testified that from the appearance of the cases he had assumed them to be sample cases, and Straus a jewelry salesman, though he was not so informed.

On the morning of November 21st, about 9:15 o'clock, Straus presented the brass checks to the bellboy on duty, asking him to bring the cases from the vault; but they were missing and were not thereafter found.

Plaintiff's complaint is in two counts. In the first it is alleged that defendants engaged in the business of depositaries for hire and maintained a vault and safe deposit boxes for use in connection with their business; that Straus deposited with defendants, as depositaries for hire, two jewelry telescope cases, and 2971 rings, including precious stones, to be stored for safekeeping; that at the time said cases were so delivered to defendants they were informed and knew that said cases contained valuable jewelry and accepted said cases and jewelry for deposit, and gave to Straus two "receipts in writing" therefor. The reasonable value of the cases and jewelry is alleged to be $40,112.42.

In the second count it is alleged that defendants maintained a vault and safety deposit boxes and that they gave a notice to guests that they would not be liable for money, jewelry, etc., if not deposited with the proprietor to be placed therein, nor in any case for more than $250 unless they had "given a receipt in writing therefor." Then follow allegations similar to those in the first count as to the deposit of the cases by Straus, that defendants were informed and knew that they contained valuable jewelry, and that defendants gave Straus two instruments in writing therefor, to wit, the two brass checks hereinbefore described. It is further alleged that defendants by their conduct "represented to Straus that defendants intended said receipts in writing to be receipts in writing for said two jeweler's telescope cases and the rings therein contained"; and that in reliance upon said representation Straus left the cases and rings in the possession of defendants.

The action was tried before the court sitting without a jury upon the complaint of plaintiff and the answer of defendant Hotel Marysville, Inc., findings of fact and conclusions of law were filed, and thereafter judgment rendered for plaintiff, as the assignee of Measer-Straus Co., in the sum of $100—$50 for each of the two lost cases. The court found that defendant maintained a vault and safety deposit boxes for use in connection with its business and gave notice to guests that it kept a fireproof safe and would not be liable for money, jewelry, documents, furs, fur coats and fur garments or other articles of unusual value and small compass unless placed therein, etc.; that defendant had a large number of safe deposit boxes but that Straus did not rent any of them; that Straus delivered the two valises to the bellboy, Malone, who asked if he desired them placed in the vault, and, on being answered in the affirmative, placed them in the vault and gave Straus the two brass checks; that at no time did Straus make any statement to the bellboy or to anyone else, directly or indirectly, that the valises were other than ordinary baggage; that there was no evidence that when Straus gave his valises to the bellboy he intended the deposit to be received and cared for other than in the usual and ordinary manner concerning ordinary luggage; and that until after the loss was discovered defendant was not informed by Straus, nor did it have reason to know, that said valises and contents were other than ordinary baggage or were of a value in excess of $50 each; and that defendant did not, by word or conduct, make any statement or representation whatsoever to Straus or to anyone in his behalf, with reference to the two brass checks; that defendant stored in its vault books and properties of its own, and kept said two valises and contents under similar circumstances, and used ordinary care for the preservation and safety thereof, and that said property was not taken by defendant or by any of its employees; that on at least one prior occasion Straus had been in the vault maintained by the hotel and was aware of the fact that during certain business hours it was the custom of the hotel to allow the doors of same to remain open. It was also found that the valises contained approximately 75 per cent of the stock of merchandise of Measer-Straus Co., a larger proportion than Straus had ever carried before, that on May 15, 1939, that company had procured from plaintiff insurance in the amount of $25,000, but that the travel limit thereon had, by an endorsement on November 16th, been increased to $35,000 for fifteen days; that plaintiff insurance carrier had paid to Measer-Straus Co. the amount of its liability for said loss, to wit, the sum of $30,624.94, and that plaintiff had been subrogated to the rights of said Measer-Straus Co.

However, the court further found that defendant did not consent in writing, or otherwise, with Straus to assume a greater liability than that prescribed by section 1859 of the Civil Code, nor did it give Straus a receipt in writing for the two valises or their contents; that from the evidence the matter was covered by the provisions of said section 1859 and not by those of section 1860 of the Civil Code; and that if the latter section were to govern, the conduct of Straus would preclude any recovery.

On this appeal, if we understand appellant's contentions they are that the provisions of section 1859 of the Civil Code do not apply to the case, but that it should have been decided under the provisions of section 1860 thereof, that the burden of proof was upon defendant to establish its freedom from negligence, and that it did not meet that burden. Section 1859 of the Civil Code provides that the liability of a hotel-keeper for losses of personal property is that of a depositary for hire; but it is provided that in no case shall his liability exceed $50 for each valise or traveling bag and its contents unless he shall have consented in writing with the owner thereof to assume a greater liability. Section 1860 provides that if a hotel-keeper keeps a fireproof safe and gives notice to a guest that he keeps such safe and will not be liable for money, jewelry, documents, furs, fur coats and fur garments, or other articles of unusual value and small compass unless placed therein, he is not liable, except so far as his own acts shall contribute thereto, for any loss of such articles if not deposited with him to be placed therein, nor in any case for more than $250 for any and all such property of any individual guest unless he shall have given a receipt in writing therefor to such guest.

[1, 2] It is said in Muehlebach v. Paso Robles Springs Hotel, 65 Cal.App. 634, 640, 225 P. 19, that these sections have changed the strict rule of the common law that an innkeeper is an insurer of the property of his guest, and that the liability of an innkeeper is now that of a depositary for hire who must use at least ordinary care for the preservation of the thing deposited (sec. 1852, C.C.). And in Baxter v. Shanley-Furness Co., 193 Cal. 558, 561, 226 P. 391, the court said, regarding sections 1859 and 1860, supra, that together they were intended to relieve innkeepers in this state of the burden of their common law liability; that section 1859 changed that liability from that of insurer to that of a depositary for hire as to personal property of every kind

and description other than money, and, in addition, limits his liability, even though the evidence shows the innkeeper to be liable under the rule applicable to such a depositary, to fifty dollars for each valise or traveling bag and contents. It also said that section 1860 goes further than section 1859 and provides a method by which the innkeeper may relieve himself even of his liability as a depositary for hire of money, jewelry, etc., if he complies with the conditions provided therein and his guest fails to deposit such articles with him; and that as a depositary for hire under section 1859 an innkeeper is liable only when he has been guilty of some negligence, and that he is chargeable only with ordinary care and diligence in safeguarding his bailor's property. 3 R.C.L. secs. 22, 23, p. 96.

It thus appears that if we apply section 1859 to this case, even though defendant may have been negligent, its liability for Straus' two cases must be limited to $50 each unless defendant consented in writing with Straus to assume a greater liability; and that if we apply section 1860, defendant was not liable at all unless (1) Straus deposited his cases with defendant to be placed in its safe, and (2) then for not more than $250 unless Straus was given a receipt in writing.

Apparently appellant's contention is that Straus met the conditions of the latter section, that he deposited his cases with defendant to be placed in its safe, and that he received therefor a "receipt in writing."

[3] We shall consider first whether the evidence compels the conclusion that Straus dealt with his two cases as such property as is contemplated under section 1860, and deposited them as such with defendant to be placed in its safe. The evidence shows and the court found that Straus did not at any time make known to anyone that his two cases contained anything other than ordinary baggage, nor did he request that same be placed in defendant's safe. He was purely passive in the matter, merely acceding to the inquiry of the bellboy as to whether he wanted them put in the vault, and accepting without question only the two baggage checks therefor. He did not state that they were other than ordinary luggage or that they contained jewelry or articles of unusual value. While it is alleged by plaintiff that defendants were informed and knew that the cases contained valuable jewelry, for proof of this allegation it relies solely upon the fact that the cases were such as are carried by jewelry salesmen, and the statement of Malone that he assumed that the cases were sample cases, and Straus a jewelry salesman. We think this was insufficient to show knowledge on defendant's part that the cases contained articles of unusual value. As every lawyer knows, the fact that one seeking access to his office carries a lawyer's brief case is no evidence that the carrier is a lawyer or that his case contains legal documents. One who seeks to impose upon an innkeeper who has given the notice provided for by section 1860, supra, the liability of an insurer of articles of unusual value must make known to such innkeeper in some more definite fashion than this, that his baggage contains such articles and that they are being deposited for special safekeeping. The fact that Straus assented to the placing of the valises in the vault does not compel the inference that they contained articles of unusual value. Straus knew the "set up" as he put it, and may well have preferred that even his ordinary luggage be put in the vault rather than in the ordinary baggage room. His nonchalance alone is sufficient to support an inference that he did not consider the contents of his luggage of sufficient importance to call for greater concern on his part.

[4] We are of the opinion that Straus' acts did not constitute depositing "money, jewelry," etc., within the meaning of section 1860, supra. It is said in 14 Cal.Jur. 324, that a guest may not make an innkeeper a compulsory depositary of any amount of goods or treasure which he may desire to keep secure, citing Mateer v. Brown, 1 Cal. 221, 52 Am.Dec. 303; and in Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681, 119 A.L.R. 788, in construing a statute similar to our section 1860, supra, the court said that such statute intended to create mutual and reciprocal duties and rights between the hotelkeeper and his guests, and in that way to prescribe and maintain a fair and reasonable balance of protection to both. In Stoll v. Almon C. Judd Co., 106 Conn. 551, 138 A. 479, 482, 53 A.L.R. 1042, it is said that: "It is necessary and proper that the intent of the guest to deposit property for safe-keeping be brought home to the innkeeper in some reasonable and intelligible manner and that he should be given such notice of its character that he may know that it is valuable and to be safely kept and regulate

the extent of his care accordingly and with a view to the liability which would attach to him in case of loss." In Horton v. Terminal Hotel, etc., Co., 114 Mo.App. 357, 89 S.W. 363, plaintiff, while a guest with defendant, lost a gold-filled locket containing an ivory miniature, the value of the two being alleged to be $221. The innkeeper had given notice of a safe, and that it would not be liable for loss of money or jewelry unless they were delivered to it for deposit in the safe. Plaintiff had handed a box containing the locket to the clerk, requesting him to keep it for him, but gave no notice of its contents. It was held that the hotel was at most a gratuitous bailee and was liable only for gross negligence; that it assumed no liability as an innkeeper for the reason that the article was one that, under the statute, it was plaintiff's duty to entrust to the defendant to be deposited in the hotel safe.

Under the English statutes, which require a deposit "expressly for safekeeping," something more than merely handing the goods to the clerk is required. O'Connor v. Grant International Hotel Co., Q.B.D., 2 Ir.R. 92; Whitehouse v. Pickett, H.L. [1908] App.Cas. 357, 12 Ann.Cas. 96. In the latter case the plaintiff's salesman had been accustomed to stay at the defendant's hotel, whenever he was in the city, over a period of eighteen years; on these occasions he always deposited his jewelry case in a particular recess behind the bar of the hotel; but on the occasion in question he gave his case to the porter without any communication to the latter or the hotelkeeper, and it was left in its usual place. It was held that, under such circumstances, no deposit "expressly for safe-keeping" had been made, and that the innkeeper could not be held liable under the innkeepers' act for loss of the jewelry. The court said, in the opinion of Lord James of Hereford: "My view is that the legislature intended that, before the innkeeper should be liable, proof should be given that he had received into his charge goods with the intention of making himself liable for their safety; that he should possess, or at any rate have opportunity of possessing, knowledge of the nature and value of the goods deposited, so that he might regulate the extent of his control over and care of them with some relation to the liability that would attach to him if the goods were lost."

[5] As above stated, the trial court found that there was no evidence that when Straus gave the valises to the bellboy he intended the deposit to be received and cared for other than in the usual and ordinary manner concerning ordinary luggage, and that until after the loss was discovered defendant was not informed nor did it have reason to know that said valises were other than ordinary baggage. There is no evidence that Straus made any representation that his cases were jewelry cases or that they contained jewelry of great value. On the contrary, his conduct in turning them over to Malone, the bellboy, and his acceptance of only ordinary baggage checks therefor carries an implication to the contrary. We believe that where an innkeeper relieves himself of liability by giving the notice provided for by section 1860, supra, a guest who desires to impose liability upon him must, in some manner, bring to the notice of such innkeeper that he is doing so; and that he cannot rely upon the mere appearance of his baggage as giving information to the innkeeper that it contains jewelry, etc., and is being deposited with him as such.

[6] We are further of the opinion that defendant did not in this case "consent in writing" to assume a greater liability than that provided for by section 1859, supra, nor did it give to Straus "a receipt in writing" for the jewelry contained in his cases. Appellant relies upon Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 258 P. 155, 157, but the facts in that case are in no wise similar. There plaintiff, a member of the club and a resident at its club house, delivered to one of defendant's clerks a package containing money, for deposit in the fireproof safe which the club maintained for the safekeeping of packages deposited therein by members of or lodgers in the club house. Plaintiff's package was placed by the clerk in an envelope specially prepared for such purposes, upon which was printed: "Directions for Using this Envelope. After the depositor has placed his money or valuables in the envelope and sealed it, have him sign his name in full on check A, and then tear off and give him check B, to keep as a receipt. When he calls for his deposit, cause him to put his signature on check B, and then compare it with that on check A; if the result is satisfactory, deliver the envelope, and date and file the two checks as receipts." The por-

tion of the paper referred to above was delivered to the plaintiff at the time of making his deposit and was in words and figures as follows: "Check B. Date———, 192—, Los Angeles Athletic Club. No. 304. Los Angeles, Calif. Depositor is to sign here only when he withdraws his deposit ———. Deliverable to the owner only." The evidence shows that at the time the plaintiff deposited his package with one of the clerks in the office of the defendant there was delivered to him the above slip of paper which was detached from the envelope in which the deposit was placed. The portion of the envelope taken by plaintiff bore a number corresponding to the number on the envelope retained by the club. It was not there denied that the deposit was made especially for deposit in defendant's safe, nor was it denied that it was accepted by defendant with knowledge that it was being so deposited; defendant's contention was that no receipt was given. But the court said that the paper given to Greer was such as was prepared by the club for use by persons depositing money or valuables in the safe and was regarded and considered as a receipt by all parties to the action.

The evidence in the case before us shows that defendant used a similar envelope for deposit of articles of value by its guests, and that Straus was aware of it, and had, on at least one other occasion, deposited articles with the clerk of the hotel and received a similar receipt. However, he did not request any such receipt for his sample cases on the occasion of his visit on November 20, 1939, and because in the Greer case the printed slip given plaintiff was held to be a sufficient receipt under the circumstances of that case, it does not follow that the brass checks given to Straus under the circumstances of this case constitute or were intended to constitute receipts in writing for articles of unusual value, within the contemplation of section 1860, supra. If such brass checks be held to constitute receipts in writing under that section, they may, as well, be held to constitute "consent in writing" under section 1859; and to hold the latter true would, in effect, nullify the limitation of liability provided in the latter section, and would render an innkeeper liable for the full value of any article of baggage for which such a baggage check were given, regardless of where it was placed, whether in its vault or its ordinary baggage room. Conceding, as is argued by appellant, that a baggage check is evidence of the receipt of baggage, and that "writing" is defined by section 14 of the Civil Code to include "printing and typewriting," it does not follow that the brass checks given to Straus constituted receipts in writing for jewelry deposited for safe-keeping sufficient to impose liability upon defendant for the full value of the contents of Straus' valises.

In McFarland v. Spengler, 199 Cal. 147, 248 P. 521, it was held that under the election statutes permitting the voting for a candidate by writing in of such candidate's name on the ballot, a printed sticker pasted on the ballot with the candidate's name printed on the sticker was not a compliance with the requirements of the statutes. The court said that the use of the words "writing", "written in" and "written" used in the statutes evidenced an intention on the part of the legislature to exclude other methods, that the printed pasters were not writings, etc., and that the provision of sections 16 and 17 of the Political Code to the effect that "writing includes printing and typewriting" did not apply.

In Norris v. Manischewitz Broadway Cent. Hotel, 129 Misc. 329, 221 N.Y.S. 363, a hotel-keeper accepted a guest's money belt and put it in a tin box, delivering the key to the guest stating it was his receipt. The court said this was not a special agreement in writing within the provisions of the applicable statute. But it said that had plaintiff informed defendant of the contents of the package and that he was depositing a sum of money in excess of $500, and the defendant had told plaintiff, upon the latter's request for a receipt, that the key was his receipt, there might have been a question for the jury to determine whether by such action defendant had waived the provision of the statute as to its responsibility beyond $500.

In the instant case the determination of questions of fact and the inferences to be drawn from the evidence were for the trial court, and being of the opinion that the evidence is sufficient to sustain the findings made, and that Straus did not make a deposit of his cases with defendant as articles of unusual value to be placed in its safe nor receive a receipt in writing therefor, within the meaning of section 1860 of the Civil Code, it follows that plaintiff was not entitled to recover under the provisions of that section. The most that it was entitled to recover was the amount allowed by the trial court, to the allowance of which defendant interposes no objection.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

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WEINER v. MULLANEY et al.

Civ. 13692.

District Court of Appeal, Second District, Division 3, California.

July 9, 1943.

Hearing Denied Sept. 1, 1943.

1. Trusts 🔑305

In action by beneficiary against trustee for an accounting finding that plaintiff was entitled to one-third of landowner's royalty and to one-third of proceeds from sale of the 2½ per cent. landowner's royalty was sustained by the evidence.

2. Trusts 🔑30½(2)

Initialed letters from brother to sister stating that one-third of deceased mother's property belonged to sister and asking for directions as to what should be done with sister's third and reports concerning the matter and transmission of moneys as due to sister on account of such interest sufficiently disclosed an intent to create a valid "trust". Civ.Code, §§ 1052, 2221.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

3. Trusts 🔑25(1)

No particular language or terminology is necessary to create a trust, nor need the word "trust" or "trustee" be used. Civ. Code, §§ 1052, 2221.

4. Trusts 🔑21(1)

All the conditions of the trust need not be expressed in a single paper. Civ.Code, §§ 1052, 2221.

5. Trusts 🔑17(2)

A trust in personal property need not be in writing. Civ.Code, §§ 1052, 2221.

6. Trusts 🔑25(1)

A "trust" whether of real or of personal property is created as to the trustor and beneficiary by any words or act of the trustor indicating with reasonable intent an intention on the part of the trustor to create a trust and the subject, purpose and beneficiary of the trust. Civ.Code, § 2221.

7. Property 🔑4

A landowner's royalty or per cent is an "interest in real property".

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property".

8. Trusts 🔑22

Under statute providing that no trust in relation to real property is valid unless created by a written instrument subscribed by the trustee or his agent, what constitutes a subscription is a matter of intent and must be determined by the circumstances. Civ.Code, § 852.

9. Trusts 🔑22

Where brother did not deny writing letters and subsequently conducted himself in accordance with many declarations therein contained and adopted his initials as signature, letters were sufficiently signed although some of the initials were typewritten within statute requiring written instruments to be "subscribed" by trustee. Civ.Code, § 852.

See Words and Phrases, Permanent Edition, for all other definitions of "Subscribe".

10. Signatures 🔑2

An instrument is deemed "signed" although the signature is typed, lithographed, rubber-stamped or printed.

See Words and Phrases, Permanent Edition, for all other definitions of "Signed".

11. Trial 🔑396(1)

Findings that plaintiff's mother owned certain shares of stock and assigned and transferred one-third of them to plaintiff and that defendant directed broker to sell shares owned by plaintiff were inconsistent with defendant's allegations that defendant transferred such shares to plaintiff without consideration.

12. Trial 🔑404(1)

Findings are liberally construed in support of the judgment.

13. Trusts ⚷305

In action by beneficiary against trustee for breach of trust findings that plaintiff's deceased mother owned certain shares of stock and had signed or transferred one-third of them to plaintiff and that defendant had directed broker to sell shares owned by plaintiff were sustained by the evidence.

14. Trusts ⚷218(2)

Where trustee failed to make full disclosure of facts surrounding use of beneficiary's shares in stock transactions contrary to instructions, that it was no longer within beneficiary's power to rescind transaction when she finally learned the true situation and her only recourse was to salvage what stocks were left, such action on her part did not amount to a "ratification" of trustee's conduct.

See Words and Phrases, Permanent Edition, for all other definitions of "Ratification".

15. Trusts ⚷217(4)

Where trustee was expressly instructed not to sell or deal in stocks for beneficiary, his action in dealing in stock was a "breach of trust" for which he was liable.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach of Trust".

16. Principal and agent ⚷48

An agent may not do anything which a trustee is forbidden to do. Civ.Code, § 2322.

17. Trusts ⚷179

In all matters connected with his trust a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. Civ.Code, § 2228.

18. Trusts ⚷231(1)

A trustee may not use or deal with trust property for his own benefit or for any other person unconnected with the trust in any manner. Civ.Code, § 2229.

19. Trusts ⚷231(1)

A trustee who uses or disposes of trust property may at the option of the beneficiary be required to account for all profits so made, and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest. Civ.Code, § 2237.

20. Trusts ⚷218(1)

Where trustee speculated in stocks contrary to beneficiary's direction resulting in loss to beneficiary of $5,868.84, beneficiary was entitled to judgment for such amount. Civ.Code, § 2237.

21. Appeal and error ⚷931(1)

On appeal from judgment for beneficiary against trustee where beneficiary testified that she first knew of brokerage account opened by trustee contrary to instructions in January, 1938, such testimony must be accepted rather than trustee's testimony that beneficiary was informed of the matter in 1937.

22. Trusts ⚷218(2)

Where beneficiary learned from broker in January, 1938, that instructions to trustee not to deal in stocks had been violated, beneficiary was put upon inquiry at that time and was charged with "notice" of all that an inquiry would have disclosed.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

23. Trusts ⚷218(2)

A beneficiary who learned that trustee had disobeyed instructions not to speculate in stocks was required to act within a reasonable time thereafter and could not wait and hold trustee for subsequent decreases in value of stocks in the account.

24. Trusts ⚷305

Beneficiary made a "prima facie case" by showing amount salvaged from brokerage account wrongfully opened by trustee and value of stocks and money in the account when she should have acted in regard to it, and burden was on trustee to show any changes thereafter affecting the amount of beneficiary's damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

25. Trusts ⚷305

In action by beneficiary for an accounting against trustee findings that beneficiary's mother owned certain shares of stock and just prior to her death she assigned certain shares to beneficiary and on certain date trustee caused such shares to be recorded on books of corporation in beneficiary's name and certificate issued in her name therefor and that by use of power of attorney from beneficiary and without beneficiary's consent or knowledge trustee caused shares to be transferred to himself and sold and converted proceeds to his use were sustained by the evidence.

26. Corporations ⚷114

Where brother was acting for sister in all matters relating to disposition and handling of their mother's property, the delivery to brother was a sufficient delivery to pass title to certain shares of stock to sister.

27. Evidence ⚷589

The trial court was not bound to believe testimony of defendant.

28. Appeal and error ⚷1009(1)

Trial court's finding on facts in equity suit were binding on appellate court.

29. Trusts ⚷305

Findings that plaintiff's mother owned certain shares of stock and assigned part of them to plaintiff and that the defendant without authority transferred them to himself were inconsistent with defendant's allegation that shares were placed in plaintiff's name by defendant without consideration and merely for convenience.

30. Evidence ⚷591

Trial court was not required to believe defendant's testimony contrary to prior written declarations.

31. Trusts ⚷305

In action by beneficiary against trustee for breach of trust evidence showed that shares sold by trustee belonged to beneficiary who was entitled to money received by trustee on sale thereof.

32. Trusts ⚷305

In action by beneficiary against trustee for breach of trust finding that mother of the parties and the parties agreed that income from certain parcels should be divided in equal parts between mother and such parties was sustained by the evidence.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Marcella Mullaney Weiner against George J. Mullaney and Marie E. Mullaney for an accounting. From a judgment for plaintiff against George J. Mullaney for $14,887.04 together with interest, which judgment also contained certain alternative provisions for recovery of certain stock or value thereof, both defendants appeal.

Judgment affirmed.

Henry G. Bodkin and Charles S. Gass, both of Los Angeles, for appellants.

Herzbrun & Chantry, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff instituted this action to obtain an accounting from her brother, George J. Mullaney, hereinafter referred to as "the defendant." Also joined as a defendant was her sister, Marie Mullaney, sued as such because of her refusal to join as plaintiff. A prolonged trial resulted in the entry of findings and judgment in favor of plaintiff and against defendant George J. Mullaney, requiring said defendant to pay to plaintiff the sum of $14,887.04, together with interest, and certain alternative judgments for recovery of Exeter Oil Company and Mt. Diablo Oil Company stock or the value thereof in case delivery of said stock could not be had, from which judgment both defendants appeal.

The parties to this action are the surviving children of Agnes Mullaney, a widow, who in her lifetime owned certain real and personal property, consisting of an oil lease, stocks and cash. In 1927 the plaintiff married and left home, but the defendants continued to live with their mother until her death. Defendant Marie Mullaney taught school and was away a great deal of the time, but defendant George J. Mullaney, because of a "sleeping illness" requiring him to sleep 12 to 14 hours out of every 24, was unemployed for several years prior to his mother's death, and remained at home at all times. By reason of his constant attendance at home he became familiar with and was fully advised of his mother's finances and business affairs. He testified that when his mother became seriously ill in the early part of 1936 he conducted and managed her business for her and continued to do so until her death in January, 1937, at the age of 72 years; that during that time she gave him various sums of money without any restriction or limitation. In 1933 plaintiff and her family moved to London, England, and remained there continuously until November, 1937, except for two visits to the United States which plaintiff made in 1936 and 1937. While in England, plaintiff corresponded with her family regularly and they likewise with her. In the many letters which plaintiff received from her brother he continually advised her that their mother was going to put all of her property into the names of her children in equal shares, to wit, one-third each, in order to avoid probate and payment of inheritance taxes upon her death, and on several occasions stated that he needed plaintiff's power of attorney to properly record and protect her interests, pay taxes, bond assessments, etc. In reliance upon these representations the plaintiff executed and delivered to her brother a power of attorney. He, in turn, forwarded to plaintiff in England various sums of money representing her one-third share in the proceeds received from a sale of a 5% landowner's royalty interest under an oil lease and, after the death of their mother, she was forwarded one-third of the royalty received from the lease. In 1938, after plaintiff's return to the United States, she requested of her brother additional money. He refused and stated that it was gone and that he had lost it in the stock market. She then discovered, among other things (a) that the real property hereinafter referred to as Parcel 1 had been deeded one-half to her brother and one-quarter each to herself and her sister, instead of equally, (b) that he had sold 184 shares of Union Oil stock belonging to her and converted the proceeds to his own use, (c) that he had used the power of attorney vested in him to speculate on the stock market contrary to her instructions, and (d) had converted her share of the money due from her mother's estate. In June, 1938, she revoked the power of attorney and thereafter requested defendant to give her an accounting. Upon his refusal so to do, she commenced the present action.

The trial court proceeded on the issues joined on the amended complaint, which alleged among other things, that Agnes Mullaney during her lifetime owned certain real and personal property, consisting of parcels of land in Kern and Los Angeles Counties, of an oil lease on property located in Kern County [Parcel 1], of stocks of the Union Oil Company, Consolidated Steel Company, Exeter Oil Company, Mt. Diablo Oil Company, and other corporations, and of cash, which properties were owned by the three children, plaintiff and defendants, in equal shares after their mother's death and one-third of which was held by defendant "in trust" for plaintiff; that on November 5, 1928, Agnes Mullaney "signed and acknowledged" a deed to Parcel 1 "purporting" to convey one-half to George J. Mullaney, and one-fourth each to the plaintiff and Marie Mullaney, which deed was recorded by George J. Mullaney on April 24, 1936 to avoid probate proceedings and the payment of inheritance tax; that defendant "acknowledged in writing * * * by instruments subscribed by him, that said real property [Parcel 1], all the proceeds of oil and gas produced therefrom, and all personal property belonging to said Agnes Mullaney were held by him, one-third for the plaintiff, one-third for himself and one-third for the defendant Marie E. Mullaney"; that defendant sold a 2½% landowner's royalty on Parcel 1 and refused to deliver plaintiff's one-third to her; that prior to her death Agnes Mullaney assigned 184 shares of Union Oil stock to plaintiff, which George had recorded in plaintiff's name on the company's books and subsequently transferred these shares out of plaintiff's name into his own, sold them and converted the proceeds; that Agnes Mullaney assigned to plaintiff and each of the defendants one-third of 1500 shares of Consolidated Steel stock owned by her; that George opened a marginal brokerage account, contrary to plaintiff's instructions and by using the power of attorney, and sold plaintiff's 500 shares of Consolidated Steel and with its proceeds purchased 3500 shares of Exeter Oil and 1000 shares of Electrical Musical Industries, which last mentioned shares were to be held as security by the broker for the unpaid balance; that subsequently defendant had 500 shares of the Exeter Oil Company withdrawn from plaintiff's account and deposited to Marie Mullaney's account; that on February 4, 1939, plaintiff was advised of this brokerage account through a demand upon her by the broker to pay a portion of the unpaid balance on said stock or he would sell it to satisfy the unpaid balance; that in order to salvage a portion of the property purchased with the proceeds of the Consolidated Steel Company stock, plaintiff sold sufficient shares to satisfy the unpaid balance.

The answer of Marie Mullaney denied, on information and belief, the allegations of the amended complaint.

Defendant George J. Mullaney's answer to the amended complaint, among other denials and allegations, denied that Agnes Mullaney deeded all the real property to the parties in equal proportions and alleged that on November 5, 1928, she signed, acknowledged "and delivered" a deed to Parcel 1, conveying one-half to defendant and one-fourth each to plaintiff and Marie Mullaney; admitted he sold the 2½% landowner's royalty and refused to deliver one-third to plaintiff, alleging she was entitled to only one-fourth thereof; admitted he recorded a certificate of stock in plaintiff's name on the books of the Union Oil Company, subsequently transferred and sold same, alleging that the stocks were placed in plaintiff's name "without consideration and merely for convenience"; admitted he opened the brokerage account, transferred 500 shares of Consolidated Steel to plaintiff, and subsequently sold said stock for $7,204.85, of which sum he invested $6,350 cash in 1000 shares of Electrical Musical Industries; that he then purchased "on margin" 3500 shares of stock of Exeter Oil Company and deposited the 1000 shares of Electrical Musical Industries, together with $894.95 cash, as security for said purchase; that the market price of both stocks decreased and the Electrical Musical Industries stock was insufficient security for the Exeter Oil Company stock purchased on margin, and it became necessary for him to purchase 500 shares of said Exeter Oil Company and deposit $200 in cash of his own funds as well as to personally guarantee the remaining 3000 shares of Exeter Oil Company; that through his acts plaintiff became the owner of 1000 shares of Electrical Musical Industries, 3000 shares of Exeter Oil Company stock and 545 shares of stock in Exeter Refining Company, which last mentioned shares were stock dividends declared by Exeter Oil Company in December, 1937; that plaintiff ratified the acts of defendant when she made certain sales from this account and is estopped from complaining thereof. As a second defense, he alleged he paid plaintiff "more than she was entitled to receive." His third defense alleged that his written acknowledgments with reference to plaintiff's alleged interest in Parcel 1, in the proceeds of oil and gas produced therefrom, and in all the personal property belonging to their mother, were made without consideration.

The findings of the court were, in the main, in accord with the allegations and averments of the complaint. The case is before us on a bill of exceptions wherein the testimony set forth is somewhat meagre, but contains therein many of the plaintiff's exhibits, numbered 1 to 40, and defendant's exhibits, numbered A to Z and "AA".

As one of the grounds for reversal, defendants urge that the findings, conclusions and judgment that plaintiff was entitled (a) to one-third of the landowner's royalty and (b) to one-third of the proceeds from the sale of the 2½% landowner's royalty is contrary to the evidence and law. The court found that on April 24th, 1936, George Mullaney recorded the deed to Parcel 1 and informed the plaintiff that the property had been transferred to plaintiff and defendants. At that time and thereafter George J. Mullaney stated to plaintiff in writing that one-third of said real property and one-third of the rents and profits thereof belonged to plaintiff, one-third to Marie Mullaney and one-third to himself. Upon the mother's death, and until the institution of suit herein, George J. Mullaney, collected the oil royalties from said real property and distributed them, except as to $153.81, one-third to each of them, pursuant to a written statement and promise that one-third of said royalties belonged to plaintiff and one-third each to Marie Mullaney and defendant; that on March 1, 1936, George J. Mullaney sold a 5% landowner's royalty on Parcel 1 and forwarded to plaintiff in England one-third of the proceeds; that on January 30, 1937, he sold an additional 2½% landowner's royalty for $10,000; that said defendant acknowledged in writing, prior to and after the receipt of said sum, that one-third belonged to plaintiff and it was being held by him for plaintiff, subject to her further desire and direction; upon plaintiff's demand said defendant refused to deliver her one-third interest and converted it to his own use and benefit.

The court concluded from these findings that plaintiff was entitled to (1) recover $3,225.00, with interest, from George J. Mullaney because of the conversion of the proceeds from the 2½% landowner's royalty sale and (2) to a judgment providing that plaintiff was entitled to the net income permanently from Parcel 1.

[1] We believe that the findings are fully supported by the evidence and the inferences reasonably deducible therefrom. George testified, regarding the landowner's royalty transaction, that he sold a 5% royalty interest on Parcel 1 for $24,000 and later a 2½% for $10,000; that he never

sent plaintiff any of the money received from the 2½% royalty sale; that he did not pay any of the royalties received for the months of December, 1936 and January, 1937 out of the money received from the lessee, Gilmore, but that he did pay said royalties out of other moneys, but he could not say from just what income the moneys were received; that in October, 1937, plaintiff received one-third of the royalty check and has received one-third of all other royalty checks received since that time because the royalty checks were made payable to all three and plaintiff refused to endorse the checks unless she received one-third; that the deed to the oil land, Parcel 1, was delivered to him by his mother, was kept in his safe deposit box and recorded April 24, 1936; that he has known since 1926 that there was oil on the property; that he did not tell plaintiff that the deed to the oil property gave him one-half and his sisters one-quarter each until the present action was filed; that in November, 1937, he burned all his mother's cancelled checks, but on cross-examination he did not remember whether the cancelled checks were burned prior to plaintiff making a request for accounting. Defendant identified certain letters as those he had written and mailed to plaintff while she was in London, which letters were received in evidence as plaintiff's exhibits. Only the pertinent parts of several of these exhibits are set forth herein:

(a) Typewritten letter, dated April 20, 1936, containing typewritten initials "G. J. M." at the end: "* * * there isn't very much of the estate left but what little there is *I thought we should have* and Ma wanted to put the ranches and house in our names before she ever got sick at all * * * We don't need any attorneys to look after our enormous holdings but if this is the way you want it, you can have all you want for your third * * *. Ma wanted to put them in our name so that in case anything did ever happen to her that they would not have to be probated. * * * *I have no idea of gyping you, as you are entitled to as much as I am, one-third, and one-third rightfully belongs to Marie, the same as it does to you and I.* I wanted your power of attorney so that you wouldn't be troubled with the bills, taxes, bond assessments and other expenses that come with them. * * * However, *I didn't see anything to your debits* if the property was put in our names. * * * I hope I haven't insulted you or got you sore, as after all, *in all matters I think I am doing what is best for you* * * *." (Italics added.)

(b) Typewritten letter, dated August 6, 1936, containing typewritten initials "G. J. M." at the end: *"I'll do whatever you say with your third* (and not pressing the fact, but you already got your third out of the grand) don't want to intimidate myself or influence you, but I think I could invest the amounts to advantage *but you will have to say so first.* Otherwise, *I'll just take your third* and put it in your account at the Wilshire-Western Branch of the Bank of America. * * * I can sell the rest of our percents at the same price but I think we have sold enough." (Italics added.)

(c) Typewritten letter, written in October, 1936, containing typewritten initials "G. J. M." at the end: "I was kind of surprised to get the second payment of the royalty dough last Thursday. * * * so as per your instructions *I sent you your third of it* ($1600.00) and through the same bank. * * * How does it suit you if we split this, or these checks four ways * * * and the other fourth, or Ma's part we'll use for running the house? * * *" (Italics added.)

(d) Letter, dated February 25, 1937, containing no signature or initials: "This is 1100 berries and I am sending you two more envelopes registered at different times so that all three will make Wednesday's Normandie as I cabled you. * * * I am sending two more letters, one with 1100 more and the other with 1000 making a total of 3200 or two $1600.00 payments, the last two out of the 5% I sold at 5000 each percentage less 1000 for the commission & escrow & permit charges. * * * Instead of making money for you as I could if you gave me a chance, I was trying to save you paying out half of it to get it. But *its yours & I had it put aside for you awaiting your orders* & the cable today for the Dec. & Jan. checks. Can't send you them as I haven't got them yet, but *will instruct Gilmore to mail you your third* of the amount and copy of the run sheets and mail it to you every month." (Italics added.)

(e) Letter, dated February 27, 1937, not signed or initialed: "* * * All the estate consists of is 600 bucks in one bank and 1500 cash in another and one mortgage that isn't assigned, *the rest of the stuff I* *transferred last spring,* about the first of May *into all three of our names.* * * * I have the copies of all the run sheets and when Gilmore releases the Jan. Dec. & rest of the checks, *I'll have them mail you your third directly* with a copy of the run sheets for you, if you want it that way. *I'd rather have it that way and then theres no chance of you not getting your third.* I have a chance to sell 2½ per cent more than 10,000 and that would leave *us* six per cent, but I don't know what to do with the cash. I could have yours working to good advantage as I have Marie's and mine, but that I told you was up to you, *& since you didn't instruct me to invest it, or put it to work I just left it in the bank.* * * * *Well, it is your dough & you can do with it what you want."* (Italics added.)

(f) Letter, dated March 1, 1937, not signed or initialed: "The administrator is allowed so much by the court and the attorney so much too. Of course I'll take what they allow me, as it is exempt from taxes, *but I, of course, will divy it up three ways as I have done with everything.* * * * The places in Bakersfield and the place in Pasadena was deeded to us in 1928, and I didn't record the deeds until April of last year. * * * There was some Union Oil stock, some Consolidated Steel and some Exeter Oil stock, *but I also fixed that up last April, and it is alright, divided three ways* * * *. I have the dividends and also the rents from the places on the ranch and the proceeds of our cotton rent from the ranch, all deposited in a special account that is now about 1200 berries; *and of course one-third of it is yours.* * * *" (Italics added.)

Also identified by defendant was a copy of his 1937 federal income tax return, which was admitted over his objection that it was an attempt to vary the terms of the deed to Parcel 1, containing a statement that he had sold certain landowner's royalties in which he had a one-third interest. He further identified a copy of Marie Mullaney's 1936 California income tax return and testified that the writing on the copy was his writing, to wit: "Sale of 1/3 interest in 5% landowner's royalty from oil land 6400." The defendant was then shown the California inheritance tax department's report, on file in his mother's estate, which report showed the inheritance tax department's opinion of the value of the estate each of the heirs was to receive, to wit, and undivided one-third interest in and to the oil and gas lease on said Parcel 1.

George J. Mullaney contends that the statements contained in his letters do not create a trust because they do not evince an intent to create a trust; that they are simply statements of past events. Plaintiff, on the other hand, claims that she is not attacking the validity of the deed to Parcel 1, but maintains that these letters establish the fact that defendant intended to and did create a trust in one-third of the property left by their mother, whether probated or not, and that defendant is now estopped to deny her one-third ownership.

[2-6] Despite the informality of the language, we believe the letters initialed by defendant sufficiently disclose a trust intent. It is well settled that no particular language or terminology is necessary to create a trust; nor need the word "trust" or "trustee" be used; nor need all the conditions of the trust be expressed in a single paper; nor need a trust in personal property be in writing. Luco v. De Toro, 1891, 91 Cal. 405, 417, 18 P. 866, 27 P. 1082; Booth v. Oakland Bank of Savings, 1898, 122 Cal. 19, 24, 54 P. 370; Root v. Kuhn, 1921, 51 Cal.App. 600, 604, 197 P. 150; Hellman v. McWilliams, 1886, 70 Cal. 449, 452, 11 P. 659; Civ.Code, sec. 1052. A trust, whether of real or personal property, is created "as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." (Civ.Code, sec. 2221.) There is a concurrence of these elements so as to indicate with reasonable certainty that a trust was created by defendant and so intended by him. There was nothing equivocal or vague in defendant's statements of his intention when he said, "I have no idea of gyping you, as you are entitled to as much as I am, one-third, and one-third rightfully belongs to Marie, the same as it does to you and I." The subject of the trust was all the property of which their mother had been seized during her lifetime; the purpose was to acknowledge a one-third interest in the beneficiaries, to wit, plaintiff and her sister Marie. Not only is defendant's intention to create a trust evident by his declarations, but his subsequent acts in forwarding one-third of the 5% royalty sale and royalties from Parcel 1, and otherwise dealing with the other property as though

one-third belonged to plaintiff, establish beyond reasonable certainty his intent. In Lynch v. Rooney, 1896, 112 Cal. 279, 283, 284, 44 P. 565, 566, the following declaration in a letter was held to create a trust: "My dear Aunt: * * * Some time after Uncle Bryan's property was deeded to me I heard that Uncle Patrick was still living, and I resolved that he should have half of the estate, though the law does not compel the division. * * * Your affectionate niece, Mary Rooney." The court, at page 285 of 112 Cal., at page 566 of 44 P., states: "Upon a careful consideration of this letter, we are satisfied that an intention upon the part of Mary Rooney to create and declare a trust appears therefrom with reasonable certainty. The subject of the trust is disclosed by the letter to be the land. The purpose is to acknowledge an undivided interest therein in fee in the beneficiaries, and the beneficiaries are the heirs of Patrick Lynch, deceased. * * * When Mary Rooney wrote this letter she recognized the fact that a moral obligation rested upon her to give the heirs of Patrick Lynch that portion of the estate which would have gone to him by the decree of distribution, if Mary had known that he was then in life; and it was to satisfy this moral obligation resting upon her that, as an honest woman, she desired Patrick's heirs to have his interest in the estate. She declared this trust for that reason, and with that end in view * * *."

[7] The next point raised by the defendants is that the letters, insofar as they relate to the landowner's royalty or percent, are not sufficiently "subscribed" to come within the provisions of Section 852 of the Civil Code, because some of the letters contain only initials and others are not signed at all. Section 852 of the Civil Code provides that "no trust in relation to real property is valid unless created or declared: 1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing * * *." That a landowner's royalty or percent is an "interest in real property" is now well settled in California. Callahan v. Martin, 1935, 3 Cal.2d 110, 43 P.2d 788, 795, 101 A.L.R. 871; Dabney v. Edwards, 1935, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822; Standard Oil Co. v. John P. Mills Organization, 1935, 3 Cal.2d 128, 43 P.2d 797. This being true, have defendant's letters been "subscribed" within the purport of Section 852 of the Civil Code when they contain only his initials? We have under consideration personal letters between a brother and sister written during a period when there was considerable affection between them. It is not unusual to find in such letters that the full name has been omitted in the signature and in its place has been substituted only the given name, an abbreviated name, a humorous pet name, and sometimes even initials. The defendant does not deny writing the letters; his complaint is that the initials are an insufficient subscription. While he used his initials only, we cannot say that he entirely omitted his name, he merely abbreviated it and used a combination of letters which were a part of his full name. The initials having been placed at the end of the letters, the accepted place for a signature, it is difficult to arrive at any other conclusion but that they were *meant* by him to be his signature and to thus identify himself in his letters. In Re Walker's Estate, 1895, 110 Cal. 387, pp. 391, 392, 42 P. 815, 816, 1082, 30 L.R.A. 460, 52 Am.St.Rep. 104, in discussing the words "subscribe" and "sign," the court uses this language: "It will be noted in the section of the Code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign *his name as a witness.* The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing. The same liberality of construction and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign. There are thus numerous cases under such statutes which hold, in effect, that any signing by which alone, or by which, aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute." And

again, at page 393 of 110 Cal., at page 816 of 42 P., 30 L.R.A. 460, 52 Am.St.Rep. 104: "To *'subscribe'* is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. * * * To *'sign,'* in the primary sense of the word, is to make any mark." In Re Estate of Manchester, 1917, 174 Cal. 417, 421, 163 P. 358, 360, L.R.A.1917D, 629, Ann.Cas.1918B, 227, the court states: "The declarations in these cases are entirely consistent with the rule stated in Re Walker's Estate, supra, that: 'To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made.' * * * The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears."

[8-10] As in all cases where the intent is the test, there can be no hard and fast legal rule as to form. The statute here required that the instrument be "subscribed," and what shall constitute a subscription must be determined in each case by the circumstances. Where, as in the instant case, defendant does not deny writing the letters, subsequently conducts himself in accord with the many declarations in his letters, and adopts the use of his initials "G. J. M." as a signature when also writing to his sister Marie, we can but conclude that he intended his initials to constitute his signature. Signature by initials has been held to be sufficient under the Statute of Frauds and the Statute of Wills. The fact that some of the letters in this case were typewritten rather than handwritten by defendant does not alter the situation. An instrument is deemed signed although the signature is typed, lithographed, rubber-stamped or printed. The foregoing methods of signature have been sustained in many cases. People v. Brussel, 1932, 122 Cal.App.Supp., 785, 789, 7 P.2d 403 (rubber stamp signature); Allenberg v. Rapken & Co., Ltd., 1930, 108 Cal.App. 99, 291 P. 281 (rubber stamp signature); O'Neil v. Brode, 1919, 40 Cal.App. 371, 181 P. 91 (rubber stamp signature); Hewel v. Hogin, 1906, 3 Cal. App. 248, 254, 84 P. 1002 (lithographic signature); Ligare v. California S. R. Co., 1888, 76 Cal. 610, 18 P. 777 (printed signature); Williams v. McDonald, 1881, 58 Cal. 527 (printed signature).

Defendants contend further (a) that the findings and judgment awarding plaintiff damages arising out of the operation of the brokerage account are contrary to the law and evidence, (b) that plaintiff's conduct in revoking the power of attorney and personally taking over the account amounted to a ratification, and (c) that the court erred in failing to find on the issue raised by defendant's answer that he transferred the 500 shares of Consolidated Steel to plaintiff without consideration.

The court found that plaintiff, while absent from this country, executed a power of attorney upon defendant's representations that he would protect her interests and he was instructed not to use the power of attorney in stock market speculations; that Agnes Mullaney assigned and transferred to plaintiff and each of the defendants one-third of the 1500 shares of Consolidated Steel stock owned by her; that George Mullaney used the power of attorney, contrary to plaintiff's instructions, to open a brokerage account for her, sold her 500 shares of Consolidated Steel for $7,204.85, and then purchased 3500 shares of Exeter Oil Company stock and 1000 shares of Musical Industries, authorizing the broker to hold said shares as security for the unpaid balance of $2,201.12 remaining due on the purchase price after applying all the proceeds received from the sale of the 500 shares of Consolidated Steel; that subsequently defendant directed 500 shares of the Exeter Oil to be withdrawn from the brokerage account and deposited to the account of Marie Mullaney; that on February 4, 1939, plaintiff was advised of the brokerage account when demand was made upon her by the broker to pay an unpaid balance or he would sell the stock to satisfy the balance; that plaintiff, solely for the purpose of salvaging a portion of the property purchased with the proceeds of the Consolidated Steel, sold sufficient shares of stock to satisfy the unpaid balance; that after deducting the proceeds of said sale there remained in said account 1400 shares of Exeter Oil Company stock, of the value of $525, and the sum of $811.01 cash; that plaintiff was damaged in the sum of $5,868.84 by reason of the sale and conversion of the 500 shares of Consolidated Steel stock, after deducting from the proceeds of the sale the reasonable value of the shares of stock and cash remaining in the account.

Plaintiff's testimony was to the effect that while she trusted her brother she wrote him not to invest her money and to put it in the bank; that during 1937 and 1938 she received money from defendant upon her request; that thereafter he refused to give her money, stating that it was gone, he having lost it in the stock market; that in 1936 her mother told her that she owned Consolidated Steel stock; that in July, 1937, she and her husband were going to Santa Barbara and she asked George what stocks she owned and he listed them on a slip of paper, which was introduced in evidence and reads:

"184 Union Oil	4336.00
500 Con. Steel	7500.00
1000 E. M. I @ 6 1/4	
2000 Exeter 92 1/2–1.05"	

Plaintiff further testified that in January, 1938, she first learned of the brokerage account when she received an interest slip; that defendant told her not to worry about the account; that she revoked her power of attorney in June, 1938; that in January, 1939, she was advised by the broker that the account needed additional money to be properly margined; that she consulted her attorney and he advised her to sell only enough stock to cover the margin calls.

Defendant testified that he gave plaintiff the slip of paper above copied, that his mother gave him 1500 shares of Consolidated Steel [apparently indorsed in blank] and that he had 500 shares put into the name of each of his sisters "merely for convenience". At this point, his March 1, 1937 letter was introduced in evidence. It contained the following declaration: "* * * There was some Union Oil stock, some Consolidated Steel and some Exeter Oil stock, *but I also fixed that up last April, and it is alright, divided three ways.* * * *" (Italics added.)

[11, 12] The findings that Agnes Mullaney owned 1500 shares of Consolidated Steel stock and assigned and transferred one-third of this amount to plaintiff and that defendant directed the broker to sell the 500 shares of Consolidated Steel stock owned by plaintiff, are necessarily inconsistent with and therefore sufficient to dispose of defendant's allegation in his answer that defendant transferred these shares to plaintiff without consideration. Findings are liberally construed in support of the judgment.

[13] These findings are supported by the evidence above reviewed. George admitted that his mother endorsed and delivered to him her Consolidated Steel stock. The trial court was not bound to accept his testimony that she gave him no instructions when she did so, and that plaintiff had no interest in this stock, but might infer from the slip of paper he gave plaintiff, the letter he wrote to plaintiff, and his acts in having the certificate for 500 shares issued in plaintiff's name, that his mother had directed him to do so.

[14] The case of Griffin v. Payne, 1933, 133 Cal.App. 363, 24 P.2d 370, cited by defendant in support of his contention that plaintiff ratified his acts when she took over the account, is not applicable to the situation in the case at bar. Payne was informed the same day the stocks were purchased and had subsequent notices, but waited until after the market value of the stock had decreased before he made objections to the purchases. There the court properly held that he ratified the purchases. Not so, in the instant case. Here, defendant failed to make a full disclosure of the facts surrounding the stock transactions and when plaintiff finally learned the true situation, after having been misled by defendant, it was no longer within her power to rescind the transaction and her only recourse was to salvage what stocks were left on hand. Such action on her part cannot be said to amount to an exonerating ratification. We believe the conclusion reached in Pacific Vinegar, etc., Works v. Smith, 1907, 152 Cal. 507, 511, 512, 93 P. 85, 86, is controlling in the instant case. There the court used the following language: "But, upon a moment's reflection, it will become apparent that the reason for applying the rule in all its liberality to innocent third persons does not exist in the same broad and benignant sense to the unwarranted and perhaps unlawful act of the agent. Thus, in many instances, the transaction is one which the principal could not rescind, because of the ostensible power of his agent. The innocent third party is thus fully protected. But can it with rea-

son or justice be said that, because the principal is thus compelled to accept the consideration from the innocent third party, the agent himself must of necessity be held harmless for his violation of duty and breach of trust? If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for not less than $1 a bushel, shall sell and deliver it for 50 cents a bushel, there is no power in the principal to rescind the sale. Shall the principal by accepting the 50 cents be held to have exonerated his agent from liability for the other 50 cents per bushel? Such a doctrine certainly does not commend itself, and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and, failing so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured. But, in a case such as the one here presented, it cannot successfully be contended that the acts of the plaintiff in endeavoring to realize upon the notes of the insolvent corporation, taken and indorsed by Smith in violation of his instructions, could amount, as to him, to an exonerating ratification. * * * it was not only the right, but it was the duty, of the plaintiff to realize as much as it could upon the notes thus improperly taken by its president, not to the end that he should be relieved from responsibility for the differences, but to the very end that by using every endeavor to realize upon the notes the agent's liability by way of damage could be accurately estimated in terms of that difference."

[15-20] George was never authorized to sell or deal in stocks for plaintiff; to the contrary, he was specifically instructed not to do so, and his action in so doing constituted a violation of his duty and breach of trust for which he is liable. Pacific Vinegar, etc., Works v. Smith, supra; Corbett v. Benioff, 1932, 126 Cal. App. 772, 776, 14 P.2d 1028. In this connection, he argues that plaintiff cannot accept the benefits, i. e. the increased price of Consolidated Steel shares and decline the losses incurred in the purchase of other securities. This argument is untenable. An agent may not "do any act which a trustee is forbidden to do." Civ.Code, sec. 2322; Calmon v. Sarraille, 1904, 142 Cal. 638, 641, 76 P. 486; Smith v. Elderton, 1911, 16 Cal.App. 424, 117 P. 563. And "in all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind" (Civ.Code, sec. 2228). "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner" (Civ.Code, sec. 2229). "A trustee who uses or disposes of the trust property * * * may, at the option of the beneficiary, be required to account for all profits so made * * * and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest." Civ.Code, sec. 2237; Rest. Trusts, sec. 208, 210, 213; Gray v. Yarbrough, 1923, 61 Cal.App. 724, 730, 215 P. 914; Corbett v. Benioff, supra. In the Corbett case [126 Cal.App. 772, 14 P.2d 1029] the appellants likewise argued that "respondents must ratify the transaction as a whole or repudiate it as a whole. They cannot accept its benefits and reject its burdens" and the court responded: "The point which appellants endeavor to make is that the sale of the stock of the Los Angeles First National Bank and the purchase of the stock of General Motors was a single transaction, and that respondents have ratified the sale by claiming the proceeds thereof and repudiating the purchase. It is a sufficient answer to state that respondents have never ratified either the sale or the purchase. Both were unauthorized, and respondents are merly claiming the amount of the proceeds of the unauthorized sale as the measure of the liability of appellants for the breach of trust." Under the foregoing authorities, it seems clear that plaintiff was entitled to a judgment on this item against defendant for the sum of $5,868.84 with interest.

[21-24] It appears from plaintiff's testimony that she first knew of the brokerage account in January, 1938, and she then went to the broker regarding the account. We must accept this statement rather than defendant's testimony that he told her of it in 1937. What she learned from the broker at this time the record does not

show, but in view of her other testimony regarding the instructions she gave defendant—instructions which this account violated—she was put upon inquiry at this time and charged with notice of all that an inquiry would have disclosed. Hence we cannot deal with the case on the assumption that she remained ignorant of the facts regarding the account after January, 1938. Defendant contends that she should at that time have closed out the account, and that, even if she may hold him for damages according to the rule above stated, she cannot recover anything on account of depreciation after that time of the stocks then in the account. We incline to the view that plaintiff should have acted without unnecessary delay after she discovered or should have discovered the facts regarding this account, allowing her, of course, a reasonable time for action after discovery, actual or imputed. She could not wait and hold defendant for subsequent decreases in value of the stocks in the account. But we find no evidence in the record regarding any such decrease in value, except perhaps the broker's letter to plaintiff of January 24, 1939, calling for an additional margin of $75 because of "the drop in the last two days in market prices." At the trial the values of the stocks in this account were stipulated, without any specification of the dates to which the values were applicable, and we have no basis for an inference that these values changed at any time. Plaintiff made a prima facie case by showing the amount received for the Consolidated Steel stock and the value of the stocks and money in the account when she should reasonably have acted in regard to it; if any change thereafter and before she did act would have affected the amount of her damages, the defendant should have offered evidence regarding it.

Defendants claim that the court erred in granting plaintiff judgment because of the conversion of 184 shares of Union Oil stock and in failing to find on the issues raised by his answer that the stock was placed in plaintiff's name "without consideration and for convenience only." His contention is that plaintiff never owned this stock and that this allegation of the answer was shown to be true.

[25-29] The findings of the court on this subject are: That Agnes Mullaney in her lifetime owned 704 shares of Union Oil stock; that prior to her death she assigned 184 shares of Union Oil stock to plaintiff and on May 6, 1936, defendant caused said shares to be recorded on the books of the Union Oil Co. in plaintiff's name and a certificate to be issued in her name therefor; that later, by the use of his power of attorney from plaintiff and without plaintiff's consent or knowledge and without authority, defendant caused these shares to be transferred to himself, sold them and converted the proceeds to his own use; and that "by reason of the conversion of said shares of stock, as aforesaid" plaintiff has been damaged in the amount of the judgment. In support of this finding there is testimony from an assistant secretary of Union Oil Company, who produced the certificates for 368 shares originally belonging to Agnes Mullaney, attached to which was an assignment of 184 shares to plaintiff and 184 shares to Marie E. Mullaney, signed by Agnes Mullaney, and who testified that a new certificate in the name of plaintiff was issued for 184 shares and mailed to defendant in May, 1936, and later receipted for by him and that in May, 1937, these shares were transferred to defendant on an assignment of the certificate signed by him as plaintiff's agent, accompanied by a power of attorney from plaintiff to defendant dated July 7, 1936, empowering him to act for her in such matters. This evidence, with the inferences to be drawn from it, is sufficient to support the findings above mentioned. Defendant claims that no valid delivery of the certificate to plaintiff is shown thereby. It is true, no manual tradition to her of the stock certificates assigned by Agnes Mullaney, or of the new certificate issued to plaintiff, is shown. But it is apparent from all the evidence above recited, that defendant, even before the execution of plaintiff's power of attorney, was acting for plaintiff, in all matters relating to the disposition and handling of their mother's property, and hence the delivery to him was a sufficient delivery to pass title to plaintiff. It is true, the defendant gave testimony from which a contrary inference could be drawn, but the trial court was not bound to believe him and evidently did not do so. Its decision in this respect is binding upon us. The court did not make an express finding on the allegation of defendant's answer that this Union Oil stock "was placed in the name of plaintiff by defendant without con-

sideration merely for convenience." But, as we have already stated, findings are to be liberally construed in support of the judgment. The findings above mentioned, that Agnes Mullaney owned these shares of stock and assigned them to plaintiff and that defendant without authority transferred them to himself are so necessarily inconsistent with defendant's allegation as to amount to a negation thereof.

[30] Defendants urge that the part of the judgment awarding plaintiff 1666 shares of Laguna Land & Water Co. stock or its value of $149.94 is against the evidence. Defendant testified that his mother owned 5000 shares of this stock, which was transferred into his name and he still had all of said stock. His declarations in his letters to plaintiff impeach this testimony, and the court was entitled to believe the assertions that "everything was being divided three-ways," and to find that one-third of the stocks, or 1666 shares, or its proceeds, belonged to plaintiff.

[31] Defendants further urge that the court erred in granting plaintiff $1,000 for the alleged conversion of 5000 shares of Mt. Diablo stock. George testified that 6280 shares of Mt. Diablo stock were owned by his mother and that she turned over the stock to him; that he sold it for $3,000 after her death. The testimony is clear that this stock was never given to defendant as his sole and separate property; it was merely turned over to him, he sold it and pocketed the proceeds. The court properly found in accordance with George's declarations that the property was being divided three ways, and that one-third belonged to plaintiff.

[32] As to defendants' contention that the court erred in holding that Agnes Mullaney and the parties hereto agreed that during the lifetime of Agnes Mullaney the income from Parcel 1 should be divided in equal parts between Agnes Mullaney and the parties hereto, we direct attention to defendant's letter of October, 1936. This finding is not vital, but other evidence also supports this finding.

Judgment affirmed.

SHINN, Acting P. J., PARKER WOOD, J., and SHAW, J. pro tem., concur.

Hearing denied; GIBSON, C. J., dissenting.

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60 Cal.App.2d 318

IRWINDALE CITRUS ASS'N v. SEMLER.

Civ. 14003.

District Court of Appeal, Second District, Division 1, California.

Aug. 27, 1943.

Rehearing Denied Sept. 24, 1943.

Hearing Denied Oct. 25, 1943.

1. Contracts ⟹10(4)

Where co-operative marketing association's by-laws, made part of its marketing contract with member, required association to pack, ship, and sell its members' fruit to best advantage and for best interests of members, contract provision, reserving to association right to receive, pack and market all of such member's fruit whenever it found market which in its judgment justified such marketing, did not destroy "mutuality of obligation" of contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Obligation".

2. Contracts ⟹10(4)

Where marketing contract between co-operative marketing association and orange grower provided that grower might terminate agreement by filing written notice with association's secretary in November of any year and association's by-laws gave any member right to resign from association by filing written resignation during first 15 days of August, contract was not invalid for lack of "mutuality of obligation" as permitting grower to withdraw therefrom at his pleasure.

3. Agriculture ⟹6

A crop grower, partially performing his obligation under marketing contract with co-operative marketing association for two seasons, cannot question due execution of contract on ground that requirements for membership in association were not complied with by either party.

4. Contracts ⟹309(1)

A positive, unqualified contract to do something possible in nature of things to be done is binding, though performance thereof is difficult or rendered impracticable or even impossible by some unforeseen cause, over which promisor had no control, but against which he might have provided in contract, unless performance was prevented by promisee's culpable negligence or other wrongful act. Civ.Code, § 1597.

5. Agriculture ⚷6

In co-operative marketing association's action against member thereof for breach of marketing contract by defendant's failure to deliver his orange crop to plaintiff for marketing, plaintiff's permission to other members to sell their fruit to others than plaintiff in previous years held no defense.

6. Appeal and error ⚷891

On appeal from judgment awarding co-operative marketing association damages for appellant's failure to deliver his orange crop to association for marketing pursuant to marketing contract, appellant's application for leave to produce certified copy of minute order, showing plea of nolo contendere entered in criminal proceeding pending in federal court against fruit growers' exchange, on ground that association could not recover, if it proposed to market appellant's fruit through such exchange in violation of federal law, must be denied, in absence of showing that association was mentioned in indictment or made party defendant in such proceeding.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the Irwindale Citrus Association against George C. Semler to recover liquidated damages under a marketing agreement for defendant's failure to deliver a crop of oranges to plaintiff for marketing, in which defendant filed a counterclaim and cross-complaint for damages. Judgment for plaintiff, and defendant appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

R. B. Bidwell, of Glendora, and Tscharner & Miller, of Azusa, for respondent.

YORK, Presiding Justice.

This is an appeal by defendant Semler from a judgment in favor of plaintiff, a co-operative marketing association, in an action to recover liquidated damages alleged to be due under the terms of a marketing agreement, by reason of defendant's failure to deliver his 1939 crop of Valencia oranges to plaintiff for handling and marketing, pursuant to the terms of said agreement.

Appellant also seeks a review of the order denying his motion for a new trial, and has filed in this court an application for leave to file additional evidence.

The record herein reveals that on or about April 9, 1937, respondent association and appellant executed an agreement, under the terms of which appellant agreed "to pick, haul and deliver" to the association's packing house at Irwindale, "for the purpose of packing and marketing, all the oranges now growing upon his lands, and all that may, during the term of this agreement, be grown upon his lands, or any other lands rented by him which are situated in the district served by this association * * * at such time or times and in such quantities as directed by the association.

"And the association, in consideration thereof, agrees to receive, pack and market all of said fruit whenever a market may be found for the same which in the judgment of the association and in accordance with its rules and regulations, shall justify such marketing and shipment; and to pay the grower the amount received for said oranges, less the charges which it may have against the grower, as provided by its by-laws."

It was further provided that said agreement should remain in effect "during all times that the grower is a member of the association", and also provided that the grower might terminate the agreement by filing a written notice of his desire so to do with the secretary of the association at any time during the month of November of any year during the term. The by-laws of the association were made a part of said agreement, which covered "10 acres of Valencias located at 1100 Cypress Ave., South side, East of Lark Ellen" in the Irwindale district.

The parties to the contract operated thereunder during the years 1937 and 1938. During the year 1939 a writ of attachment issued directed against the 1939 crop of oranges on the said ten acres of appellant, in the case of Ringer v. Semler, and in connection therewith appellant released the sheriff from any liability arising by reason of the sale of said crop by him (the sheriff) to the Granada Packing House.

It also appears that while said crop was under attachment, the Board of Directors of said association refused appellant's request to release the fruit, although appellant offered the equivalent number of boxes of oranges from a grove he owned across the street, the fruit there averaging one size smaller than that on the ten acres covered by the contract.

The instant action was initiated in the Municipal Court of Los Angeles seeking a judgment for $1,250, being 25¢ per box of a 5000-box crop allegedly sold outside the association. Appellant counterclaimed and crosscomplained for damages aggregating $7,696.96, whereupon the cause was transferred for trial to the Superior Court which entered judgment for respondent in the amount of $946 and costs.

Appellant lists his contentions on this appeal as follows:

"1. The Consignment contract was void for lack of mutuality of obligation.

"2. Semler never became a member of the association.

"3. Semler did not withdraw, sell or market any fruit outside the association.

"4. The association cannot recover because there is no showing that the market justified the picking of Semler's fruit.

"5. Plaintiff is not entitled to recover a penalty because it was first to breach the contract.

"6. It would be inequitable, unfair and unjust to require Semler to pay a penalty.

"7. The association never authorized the filing of this action.

"8. The court did not give proper credit on defendant's counter-claim.

"9. The court erred in denying defendant's motion for a new trial."

[1] Appellant's main contention is that the marketing contract is void for lack of mutuality of obligation for the reason that "the grower is unconditionally bound, but the association is bound only in the event it can find a market which, in its judgment, shall justify such marketing and shipment * * *."

Said marketing agreement specifically provides that the "by-laws of the association shall be and are hereby made a part of this agreement." Sub. 4, sec. 5, Art. IV of the association's by-laws provides: "4. The Board of Directors shall cause to be made all necessary provisions for the handling, packing, and shipping of the fruit of members, and shall pack, ship, and sell the same to the best advantage and for the best interests of the members." It would therefore appear that the association was bound to pack, ship and sell to the best advantage and for the best interests of its members the fruit delivered to it by the latter. And the fact that the association reserved the right "to receive, pack and market all of said fruit whenever a market may be found for the same which in the judgment of the association and in accordance with the rules and regulations, shall justify such marketing and shipment; and to pay to the grower the amount received for said oranges, less the charges which it may have against the grower as provided by its bylaws", does not destroy the mutuality of the contract. The very nature of co-operative marketing is such that the services expected of respondent association were fairly well established by the practices of the industry, and the "existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern." Anaheim C. F. Ass'n v. Yeoman, 51 Cal.App. 759, 763, 197 P. 959, 961. See, also, Meyers v. Nolan, 18 Cal.App.2d 319, 63 P.2d 1216.

It should not be overlooked that both parties to the instant action performed under the terms of the marketing contract for the years 1937 and 1938 and that the court found: "Said contract and all provisions thereof were ratified, confirmed and acted upon by the plaintiff association and defendant Semler, during said period of time, and was and is a lawful contract binding and obligatory upon both parties thereto, was not lacking in mutuality, was performed and not breached by plaintiff, and was partially performed by defendant Semler. Said contract was acted upon and partially performed by defendant Semler until he breached same prior to the termination thereof."

[2] The cases cited by appellant of Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 11, 76 P.2d 663, 115 A.L.R. 476, and Shortell v. Evans-Ferguson Co., 98 Cal. App. 650, 277 P. 519, holding that a contract which permits one party to withdraw at his pleasure is void for lack of mutuality of obligation, are not applicable to the facts presented by the instant litigation. In the Shortell case, an agreement to purchase real estate contained a provision to the effect that the owner reserved the right to return the purchase money at any time before a contract of sale for the property was signed. In the Naify case an insurance

company cancelled an automobile liability insurance policy without the knowledge of the assured until after his automobile was involved in a collision.

In the instant case, the marketing agreement provided as follows: "That this agreement shall be and remain in full force and effect during all times that the grower is a member of the association; provided that the grower may terminate this agreement by filing a written notice of his desire so to terminate with the secretary of the association at any time during the month of November of any year during the term of this agreement." Section 4 of Art. II of the by-laws of the association provided: "* * * Any member shall have the right to resign from the association and terminate his membership by filing with the secretary * * * at any time during the first fifteen days of the month of August a written resignation (sometimes called notice of withdrawal), which resignation shall become effective as, of and on the close of business on November 30th of the year presented, without any action on the part of the association; and at said close of business on said November 30th, said membership shall automatically terminate and end and the certificate of membership shall be deemed cancelled; provided that no such resignation or withdrawal * * * shall be effective for any purpose if the member who gives or files such notice shall, at such time when the membership would otherwise have terminated, be indebted to the association * * *." The hereinbefore quoted provisions of the marketing contract and by-laws clearly demonstrate that, instead of being able to withdraw at his pleasure, a member was required to comply with certain terms and conditions before his withdrawal became effective. An examination of the questioned contract, together with the by-laws of the association which expressly form a part thereof, fails to sustain appellant's contention that the contract is invalid for lack of mutuality of obligation.

As was so aptly stated in the case of Anaheim C. F. Ass'n v. Yeoman, 51 Cal.App. 759, 763, 197 P. 959, 961: "The association was organized for the purpose of the better handling of citrus fruits through the co-operative and joint effort of its members. From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the co-operation of its members mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared."

[3] Appellant urges that he never was a member of the respondent association because the requirements for membership therein were not complied with either by him or by the association, therefore, the association is precluded "from recovering a penalty for an alleged violation of the by-laws." Having partially performed his obligations under the contract for two seasons, appellant is now in no position to question the due execution thereof.

[4] Appellant contends that the attachment excused him from the obligation to deliver his fruit to the association in 1939. "Where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he becomes unable to perform. If a thing is possible in itself to be done—possible in the nature of things to be done—a positive contract to do it is binding though the performance is rendered impracticable, or even impossible, by some unforeseen cause over which the promisor had no control, but against which he might have provided in his contract. * * * Except where prevention has been caused by the culpable negligence or other wrongful act of the promisee, it must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or, as it is sometimes said, it must be an impossibilitas rei as distinguished from an impossibilitas facti. If performance is possible, failure to perform is none the less a breach, although the obligor himself may have become wholly unable to perform. The Civil Code, § 1597, provides that 'Everything is deemed possible except that which is impossible in the nature of things.'" 6 Cal.Jur. 439, sec. 262. See, also, Klauber v. San Diego Street-Car Co., 95 Cal. 353, 358, 30 P. 555.

[5] Neither is appellant's contention that the respondent association permitted

other members to sell fruit outside thereof entitled to consideration, because, as was stated in the case of California Bean Growers', etc., v. Rindge, etc., 199 Cal. 168, 178, 248 P. 658, 662, 47 A.L.R. 904: "The allegation that one of the directors 'did not deliver his 1919 crop of beans to the association,' and that 'no action has been commenced against him' does not state a ground of defense. The order in which actions may be commenced against defaulting members is immaterial." The record discloses that of the nine sales made outside of the association before appellant became a member thereof, seven were in the year 1933; that one of these members sold outside in 1934 and paid the penalty; that in 1933 the market was glutted and because of this, the association permitted the seven members to sell outside. Of the four sales made outside of the association during the time appellant was a member thereof, three were of fruit damaged by frost which was not saleable by the association. One sale was made outside after appellant severed his membership. No penalty for this infraction has as yet been collected, but neither has the time elapsed within which such penalty may be exacted of the defaulting member.

An examination of the record herein reveals ample evidence to support the findings, and also that the trial court properly denied appellant's motion for a new trial. Consequently, it is deemed unnecessary to discuss other points raised in this appeal.

[6] Appellant has made application for leave to produce a "certified copy of a minute order made in that certain criminal proceeding now pending in the United States District Court of the Southern District of California, Central Division, entitled 'United States of America, plaintiff, v. California Fruit Growers Exchange et al., defendants, No. 15167', which said minute order consists of the record of a plea of nolo contendere entered in said proceeding on behalf of the California Fruit Growers Exchange to the charges set forth in the indictment rendered in said proceeding." This application is made on the ground that such additional evidence is material and affects the substantial rights of appellant, in that respondent "association would not be entitled to recover a penalty for failure to deliver the fruit grown by Semler on his orchard during the year 1939 in the event Irwindale Citrus Association proposed to sell or market said fruit through its agent, California Fruit Growers Exchange, in violation of Federal law."

No showing has been made that respondent association was even mentioned in the indictment in said Federal action or that it was made a party defendant therein. Moreover, neither the indictment nor the plea of nolo contendere made in said action tends in any way to prove or disprove any issue involved in the instant litigation.

For the reasons stated, the application to produce additional evidence is denied; the judgment is affirmed.

DORAN and WHITE, JJ., concur.

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60 Cal.App.2d 421

BEARD v. MELVIN.

Civ. 6941; Sac. 5589.

District Court of Appeal, Third District, California.

Aug. 31, 1943.

1. Frauds, statute of 🔑128

Oral promise by mother to leave property to son by will, which was void under statute of frauds, could not be relied on to support allegation of implied contract between mother and son. Civ. Code, § 1624, subd. 6.

2. Frauds, statute of 🔑125(1)

Where proof of a promise or contract which within the statute of frauds is essential to the maintenance of an action, there can be no recovery therein unless the statute is satisfied, whatever the form of the action.

3. Executors and administrators 🔑443(5)

Where plaintiff in an action against representative of a decedent's estate merely alleges that decedent owed plaintiff a specified sum, and that plaintiff refrained from filing and presenting a claim against the estate, the law does not imply that the heirs or devisees of the decedent are obligated to plaintiff for the amount claimed.

4. Executors and administrators ⚷443(5)

Complaint, in action by son against administrator with will annexed of mother's estate, which merely alleged that mother, after death of husband, agreed orally with son that in consideration of son's not filing claims against husband's estate mother would provide for son in mother's will in an amount not less than one-fourth of mother's estate, that son filed no claim against husband's estate and received no payment of husband's indebtedness to son, but that mother failed to fulfill agreement, did not state cause of action on "quasi contract" or "implied contract". Civ.Code, § 1621; § 1624, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Contract" and "Quasi Contract".

5. Frauds, statute of ⚷138(4)
Limitation of actions ⚷49(2)

Where continuous personal services are performed under an express agreement for compensation on termination thereof, and the agreement is unenforceable because not in writing, reasonable value of services may be recovered, and statute of limitations does not commence to run until termination of the services, which is usually on death of promisor.

6. Limitation of actions ⚷49(2)

Son's cause of action on implied contract or quasi contract with deceased mother, whereby mother agreed to leave property to son by will which was made more than 4 years before mother's death, arose, at time mother's obligation came into being, and hence action commenced after mother's death was barred by two and four year statutes of limitations. Code Civ.Proc. § 337, subd. 2; § 339, subd. 1.

7. Estoppel ⚷52

Estoppels are not favored in law.

8. Frauds, statute of ⚷144

Where complaint in action by son against administrator of mother's estate merely alleged that mother, after death of husband, agreed orally with son that, in consideration of son's not filing claims against husband's estate, mother would provide for son in mother's will in an amount not less than one-fourth of mother's estate, and that son filed no claims against husband's estate and received no payment of husband's indebtedness to son, but that mother failed to fulfill agreement, essential allegations of an "estoppel" to set up the defense of the statute of frauds were lacking. Civ.Code, § 1624, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

9. Frauds, statute of ⚷144

Generally, neither the mere omission to put a contract in writing, nor such an omission coupled with performance of the contract, is alone sufficient to create an "estoppel" to invoke the statute of frauds.

10. Frauds, statute of ⚷158(4)

Where statute of frauds is invoked as a defense, plaintiff must be able to show clearly such acts and conduct on defendant's part as amount to a representation that the defendant proposed to stand by his agreement and not avail himself of the statute to escape performance thereof, and that plaintiff in reliance on the representation proceeded to so far alter plaintiff's position as to incur an unjust and unconscionable injury and loss in case defendant is permitted to rely on the statute.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Clarence W. Beard against Herbert Carroll Melvin, as administrator with the will annexed of the estate of Alice Melvin, deceased, to recover money alleged to be due plaintiff under an implied contract with deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

George L. Popert and Busick & Busick, all of Sacramento, for appellant.

Murle C. Shreck and T. G. Negrich, both of Sacramento, for respondent.

ADAMS, Presiding Justice.

Appeal from a judgment in favor of defendant made on plaintiff's failure to amend his second amended complaint after order sustaining defendant's demurrer thereto.

Plaintiff's second amended complaint alleges that on February 14, 1940, Alice Melvin died testate, possessed of real and personal property; that her will was duly admitted to probate and that defendant Herbert Carroll Melvin became the administrator of the will annexed of said decedent; that plaintiff is a son of said Alice Melvin and was, by her said will, given a one-third interest in certain real property described in said complaint appraised at $4,000; that said Alice Melvin was the widow of Herbert G. Melvin who died on December 16, 1917, and was the sole legatee under the will of said Herbert G. Melvin; that said estate had an appraised value of $26,660; that a decree of final distribution was made of said estate; that at the time of the death of said Herbert G. Melvin he was indebted to plaintiff in the sum of $6,912.68; that thereafter plaintiff entered into an oral agreement with Alice Melvin that in consideration of plaintiff's not filing and prosecuting his claims against the estate of said Herbert G. Melvin the said Alice Melvin would make provision in her will for plaintiff, in an amount not less than one-fourth of her estate; that pursuant to said agreement, plaintiff did not file a claim against the estate of said Herbert G. Melvin and never received any payment on his said claim; that Alice Melvin failed and omitted to fulfill her agreement and did not in her will provide a legacy or bequest to plaintiff in an amount not less than one-fourth of her estate; and that by reason of her failure to perform she became indebted to plaintiff, at the time of her death, under an implied contract, for the reasonable value of the claims which plaintiff held against the estate of Herbert G. Melvin, which reasonable value plaintiff alleges to be $6,912.68. It is further alleged that plaintiff filed a claim in the estate of said Alice Melvin for the said amount, but that said claim was rejected by defendant. A copy of said claim was attached to plaintiff's complaint, and judgment was prayed for the sum of $6,912.68.

Defendant demurred generally to plaintiff's said complaint, and set up that it appeared upon the face thereof that plaintiff's claim was barred by the statute of frauds and that it was also barred by the provisions of subdivision 2 of section 337 and subdivision 1 of section 339 of the Code of Civil Procedure. Defendant's demurrer was sustained and plaintiff was allowed ten days to amend; but, after due notice, he failed to do so, and judgment for defendant was entered.

On this appeal appellant, in effect, concedes that the alleged oral contract of Alice Melvin to provide for appellant by her will is unenforceable by reason of subdivision 6 of section 1624 of the Civil Code, except as to an asserted estoppel of defendant hereinafter discussed, but he asserts that "recovery is prayed for upon the promise which the law implies on the part of Alice Melvin to pay the reasonable value of the benefits which she received, under the terms of her express oral contract to compensate appellant by will"; that "The Estate can be held upon an implied promise to pay for the benefits which she received under the original agreement"; that "Recovery is not asked upon the original promise on the part of Alice Melvin, but recovery is requested on the implied promise which the law raises against her."

In support of his contention that his complaint states a cause of action to recover upon such an implied promise, appellant relies particularly upon the language of the court in Zellner v. Wassman, 184 Cal. 80, at page 88, 193 P. 84, at page 87, where it is stated: "Where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the part of the party receiving the benefits to pay the reasonable value of whatever has been received under the contract." He also cites Demartini v. Katz, 49 Cal.App.2d 67, 120 P.2d 944, Paul v. Layne & Bowler Corporation, 9 Cal.2d 561, 71 P.2d 817, and Dondero v. Aparicio, 63 Cal.App. 373, 218 P. 608. The first two of these cases involved agreements to compensate by will for services rendered to a decedent at his request, in which the courts held that, while the oral contract could not be enforced in view of the statute of frauds, plaintiff could recover in an action at law on a quantum meruit, for the reasonable value of the services performed by plaintiff upon a contract implied by law. It was in support of its holding to that effect that the court, in the Zellner case, used the general language above quoted upon which appellant relies.

Paul v. Layne & Bowler Corporation, supra, was not a case involving an oral agreement to make a will, but was an action for damages for breach of an oral agreement to make a lease of certain property for a period of three years, plaintiff alleging that he had taken possession of the property and made certain expenditures for improvements thereon. The court held that no right of action existed for damages for the breach of the invalid oral contract, but that plaintiff's remedy was for "a return of or compensation for the benefits which the defendant has received under the plaintiff's occupancy by which the defendant has become unjustly enriched and for which it is therefore indebted to the plaintiff." [9 Cal.2d 561, 71 P.2d 820.]

In Dondero v. Aparicio, supra, plaintiffs sought to recover $1,100 alleged to be the balance due them from defendants under an oral contract for the sale by plaintiff to defendants of certain land. The court said that the action was but an ordinary action at law in assumpsit, and that therefore cases in which oral agreements for the sale of real property have, upon equitable considerations, been upheld had no application; that where a parol agreement for the sale of real property has been fully executed on the part of the seller and nothing remains to be done by the other except to pay the consideration, relief is generally afforded in law by permitting the seller to recover, not upon the contract of sale, but in assumpsit upon the promise implied by law. There the transaction had not been fully performed by plaintiffs, however, as there was no delivery of a deed and acceptance thereof, so the judgment for plaintiffs was reversed.

Appellant deduces from the foregoing decisions, and particularly from the language used in Zellner v. Wassman, above quoted, that in "all cases of oral contracts where recovery cannot be had thereon because of the requirements of the Statute of Frauds" a plaintiff can recover the reasonable value of whatever has been performed by him or has been received under the oral contract by the defaulting party; and that accordingly he is entitled to recover from the estate of Alice Melvin the amount of the claim which he had against the estate of Herbert G. Melvin because he forebore filing his said claim. While the quoted language used by the court in Zellner v. Wassman is broad in its implications, it is contended by respondent that it must be restricted in its application; and while he concedes that where personal services are performed for a decedent a recovery for the reasonable value thereof may be had on a contract implied by law, he asserts that the principle there set forth may not be extended to cover cases other than those involving personal services.

Assuming, but not deciding, that the general principle set forth in the above quoted excerpt from the opinion in Zellner v. Wassman may be extended to cover cases other than those involving services performed for a decedent under an oral contract unenforceable under the statute of frauds, or improvements to realty under contracts which cannot be enforced under the statute, if we eliminate the allegations of plaintiff's complaint regarding the oral agreement what allegations remain to show a right of appellant to recover under an implied contract? An implied contract is defined by section 1621 of the Civil Code to be one the existence and terms of which are manifested by conduct; that is, one the terms of which are not stated in words. In cases such as Zellner v. Wassman, supra, the conduct of the decedent in accepting the services rendered and in failing to make payment therefor is held sufficient to imply an obligation to pay their reasonable value. In cases such as Paul v. Layne & Bowler Corporation, supra, the conduct of the one party in receiving and retaining the benefits resulting from improvements to his real property resulting from the acts of the other party, is held to imply an obligation to pay the reasonable value thereof. Is any such conduct on the part of Alice Melvin here alleged as manifests the existence and terms of a contract to pay to appellant "the reasonable value of the claims which said plaintiff held against the estate of Herbert G. Melvin"?

[1, 2] The oral contract itself may not be relied upon to support an implied contract. It is said in 27 C.J. 315 that: "Whatever the form of the action may be, if the proof of a promise or contract within the statute is essential to maintain it, there can be no recovery unless the statute is satisfied." And in Thacher v. New York, W. & B. Ry., 153 App.Div. 186, 138 N.Y.S. 463, 466, the court said: "The whole theory of allowing a recovery upon quantum meruit where the contract is found to be void under the statute proceeds upon an elmination of the contract. There is no contract in existence to be availed of by either the plaintiff or the defendant to fix their several rights, duties, or obligations. * * * If, although the statute declared the contract to be void and incapable of enforcement, it could still be made use of to fix the respective liabilities of the parties, the statute would become a nullity."

[3, 4] The only allegations of plaintiff's amended complaint as to the conduct of the parties which can be relied upon to support an implied contract are that Herbert G. Melvin died possessed of property; that in his last will and testament he made his wife, Alice Melvin, the sole legatee and devisee thereof; that said estate had on hand for final distribution property of the net appraised valuation of $26,660; that the decree of final distribution was made and entered and has become final; that at the time of his death said Herbert G. Melvin was "indebted to plaintiff" in the sum of $6,912.68; that plaintiff did not file or prosecute his said claims against the estate of Herbert G. Melvin and has never been paid; that Alice Melvin did not provide for plaintiff in her will except to give him a one-third interest in real property appraised at $4,000; that plaintiff filed a claim against the estate of Alice Melvin, which was denied. It is not alleged that Herbert G. Melvin's will was admitted to probate nor is it alleged that his estate was distributed to Alice Melvin. Obviously, the foregoing does not allege conduct on the part of either plaintiff or Alice Melvin from which a contract of any kind can be implied. Even if it had been alleged that the estate of Herbert G. Melvin was distributed to Alice Melvin—which it is not—the fact that she succeeded to the estate of her deceased husband and accepted same could not be said to be conduct on her part from which a contract to pay plaintiff "the reasonable value of the claims" which plaintiff held against the estate of Herbert G. Melvin could be inferred. It is not alleged that plaintiff's failure to file his claim in the Estate of Herbert G. Melvin was due to a request on the part of Alice Melvin nor does it follow, from the allegations of said complaint, that Alice Melvin received any benefit from plaintiff's abstention from filing his alleged claim. The court cannot assume that said claim was valid and enforceable and that if it had been filed it would have been paid. Same may have been barred by the statute of limitations or unenforceable for other reasons. Its value for this reason is not subject to be ascertained, determined or measured. Russell v. Agar, 121 Cal. 396, 398, 53 P. 926, 66 Am.St.Rep. 35. For the same reasons no quasi contract or obligation created by law for reasons of justice arises from the facts alleged. Where, as here, plaintiff merely alleges that A owed him a specified sum and that he refrained from filing and prosecuting a claim against the estate of said A, the law does not imply that the heirs or devisees of such decedent who succeed to his estate become obligated to such claimant for the amount of his said claim. If this were true, the statute requiring the filing of claims against the estates of decedents would be superfluous. We conclude that plaintiff's complaint does not state a cause of action, upon a quasi contract or an implied contract.

However, even if we were to hold that plaintiff has stated a cause of action not dependent upon the alleged oral agreement, we would be constrained to hold that it was barred by the statute of limitations. Appellant contends that the statute did not begin to run until the death of Alice Melvin; that it began to run only when she "failed to carry out in her will her express oral agreement," thus relying upon the oral agreement. In support of this contention appellant cites Zellner v. Wassman, supra, Burr v. Floyd, 137 Cal.App. 692, 31 P.2d 402, Morrison v. Land, 169 Cal. 580, 147 P. 259, and Bacon v. Kessel, 31 Cal. App.2d 245, 87 P.2d 857. In the Zellner case the question of the statute of limitations did not arise. Burr v. Floyd, supra, was also an action to recover the value of personal services rendered to a decedent on an oral contract to compensate by will. There the court did say that "under such circumstances, the law will imply a promise to pay the reasonable value of the services rendered when the express promise to compensate by will has failed of fulfillment." [137 Cal.App. 692, 31 P.2d 404.] But it was not said in connection with whether the statute of limitations did or did not bar recovery. The word "when" as used by the court obviously did not refer to time, but meant "in a case where" the express promise to compensate by will has failed of fulfillment. In Morrison v. Land, supra, where it was sought to secure specific enforcement of a contract to compensate for services by will, plaintiff did not allege that he had filed a claim against the estate of decedent, and the language at page 585 of 169 Cal., 147 P. 259, relied upon by appellant, was used in connection with the court's discussion of the necessity for the filing of such a claim. The effect of the statute of limitations was not considered in the case.

Bacon v. Kessel, supra, did not involve a contract within the statute of frauds, but a contract by appellant, one of the beneficiaries under a will, that if respondent would not contest said will she would see that he got one-eighth share of her portion thereof. When the estate was distributed she repudiated her agreement, whereupon this action was commenced to enforce the contract. The court said that the action was one for damages for breach of an oral contract and that the statute of limitations did not bar the action which was begun within two years after the distribution of the estate. The case is not comparable to the one before us. Here appellant is suing, not on the oral contract but upon what he contends is a contract implied by law; and he cannot rely upon the oral contract to toll the statute of limitations.

[5] The question of when the statute of limitations begins to run in cases where services have been rendered to a decedent under an oral contract to compensate by will, such as Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, Demartini v. Katz, supra, and Winder v. Winder, 18 Cal.2d 123, 114 P.2d 347, has apparently been one causing considerable difference of opinion in the courts of this state. In most of these cases the services were rendered up to the time of the death of the promisor, and in such cases it has been held that the statute did not begin to run until the termination of the services, or, as it was sometimes stated, until the promise to compensate by will has failed of fulfillment. When the death of the promisor and the termination of the services coincided the effect was the same whichever was said to start the running of the statute. But in Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, the last services rendered by the plaintiff to decedent terminated some sixteen years before the latter's death, wherefore it became necessary to decide whether the termination of the services or the death of the decedent was to be the starting point. In its first opinion in the case, 77 P.2d 1064, the Supreme Court adopted the opinion of the District Court of Appeal and held that the date of the death of the promisor governed. Two justices dissented, and on rehearing, 12 Cal.2d 334, page 343, 84 P.2d 146, page 149, a different opinion was rendered, wherein, though it did not base its decision upon the ground that the action was barred by the statute of limitations, the court said, after citing cases including Zellner v. Wassman, and Burr v. Floyd, supra, that: "It may be taken as established by these cases that ordinarily a promise to pay the value of such services is implied by law at the termination thereof, and that the statute of limitations then begins to run." And in the later case of Winder v. Winder, 18 Cal.2d 123, page 127, 114 P.2d 347, page 350, it said: "It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing (§ 1624, Civ.Code; § 1973, Code Civ.Proc.), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Morrison v. Land, 169 Cal. 580, 147 P. 259; [In re] Estate of Rohrer, 160 Cal. 574, 117 P. 672, Ann.Cas.1913A, 479; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Burr v. Floyd, 137 Cal.App. 692, 696, 31 P.2d 402; Warder v. Hutchison, 69 Cal. App. 291, 231 P. 563; Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 188 P. 1034."

[6] We conclude from the foregoing that if, under the allegations of plaintiff's complaint herein, any cause of action on an implied or quasi contract arose, the obligation of Alice Melvin, if any such resulted, commenced at the time when her obligation came into being, if it ever did, and not upon her death, and that same was barred by the statute of limitations.

[7, 8] Coming now to the matter of estoppel, appellant alleged in his brief that: "Under the rule laid down in Keller v. Gerber, 49 Cal.App. 515, 522, and 193 P. 809, where a verbal contract has been so far performed by one of the parties relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, Courts of equity will decree its execution upon the grounds that the refusal to execute the same under such circumstances was a fraud." He then asserts that in the case at bar, defendant is estopped to assert the statute because plaintiff relied upon the good faith of Alice Melvin to perform her oral agreement, that she became unjustly enriched, and her failure to perform under such circumstances amounted to a fraud upon plaintiff. In this connection appellant apparently overlooks the fact that elsewhere in his brief he expressly declares that his action

is not one for specific performance of the oral contract but one "upon the promise which the law implied * * * when decedent failed to carry out in her will her express oral agreement." But regardless of this inconsistency, appellant's contention that defendant is estopped cannot be sustained. Estoppels are not favored in law (10 Cal.Jur. 613), and in plaintiff's complaint the allegations of essential elements of an estoppel are entirely lacking.

[9, 10] Furthermore, one of the very cases relied upon by appellant on this appeal holds contrary to his contention. In Zellner v. Wassman, supra, 184 Cal. at pages 86, 87, 193 P. at page 87, it was said: "As a general rule neither the mere omission to put a contract in writing nor such omission coupled with performance is alone sufficient to create an estoppel. 'A plaintiff * * * must be able to show clearly * * * such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement, and not avail himself of the statute to escape his performance, and also that the plaintiff, in reliance on this representation, proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur "an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense."' 5 Browne on Statute of Frauds, p. 585. Plaintiff's services to decedent's mother were apparently rendered upon the basis of friendship, in the absence of contract and without expectation of charge. The performance relied upon by plaintiff consisted in waiving administrator's fees and refraining from presenting a claim against the mother's estate, in addition to certain personal services, in consideration of an oral promise to leave plaintiff $5,000 by will. There was therefore no such change of conditions and relations in reliance upon the contract that a refusal of the other party to perform would amount to fraud, as was the case in Barry v. Beamer, 8 Cal.App. 200, 96 P. 373, cited by counsel for plaintiff. There was no representation on the part of decedent that he would reduce the promise to writing as was the case in Seymour v. Oelrichs, supra [156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154]. The words and conduct on the part of decedent in making the oral promise and accepting plaintiff's performance did not amount to an inducement to plaintiff to, in effect, waive a written instrument in reliance upon a representation that decedent would stand by his agreement and not avail himself of the statute of frauds. There is therefore an absence of the element of fraud which is requisite to an estoppel. It is a case in which the consequences of the failure to comply with the statute must be borne by the party who seeks to enforce the agreement, and it follows that plaintiff has no cause of action upon the contract." Also see Paul v. Layne & Bowler Corporation, supra, 9 Cal.2d at page 565, 71 P.2d 817, and Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333.

Plaintiff's complaint contains no allegation of fraud on the part of Alice Melvin, and, as hereinbefore pointed out, appellant asserts that his complaint is not for enforcement of the contract but for the value of his claim against the estate of Herbert G. Melvin.

As we are of the opinion that plaintiff's complaint does not state a cause of action and that defendant's demurrer thereto was properly sustained, the judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

60 Cal.App.2d 335

PEOPLE v. TIBBITS.

Cr. 3713.

District Court of Appeal, Second District, Division 1, California.

Aug. 28, 1943.

1. Criminal law 🔑1001

A defendant, until he has been apprehended, cannot be committed into the "custody" of the proper officer within statute providing that where probation has been terminated and judgment pronounced defendant must be committed to the custody of the proper officer and be detained until the judgment be complied with. Pen.Code, § 1215.

See Words and Phrases, Permanent Edition, for all other definitions of "Custody".

2. Criminal law ⚷1001

That defendant was absent when his probation was revoked, because he had violated the terms thereof, did not render the revocation order invalid.

3. Criminal law ⚷161

Where defendant's parole upon conviction of second-degree burglary was revoked and a bench warrant was issued for his apprehension and he was thereafter convicted of burglary and was paroled from the state prison and the second-degree burglary sentence was ordered into effect after he was apprehended, the procedure did not constitute prohibited "double jeopardy", because the constitutional guaranty does not apply to service of a sentence, but applies only to twice being put upon trial for the same offense. Pen.Code, §§ 1215, 1216; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Jeopardy".

4. Pardon ⚷4

Where defendant's probation upon conviction of second-degree burglary was revoked and he was thereafter convicted of burglary and was paroled from state prison, and the second-degree burglary sentence was ordered into effect, whatever time was to be deducted for defendant's previous incarcerations was for the Board of Prison Terms and Paroles, and not for the court.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Charles Paul Tibbits was convicted upon a plea of guilty of second-degree burglary, and the judgment was ordered into execution after a revocation of probation, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment ordered into execution after a revocation of probation.

By an information filed by the District Attorney of Los Angeles County, appellant was charged in Count I thereof with the crime of forgery, committed on or about January 2, 1932, and in Count II with the crime of burglary, connected in its commission with the charge set forth in Count I. Appellant entered a plea of "not guilty" to both counts, and when the case came on for hearing on November 16, 1933, by leave of court appellant withdrew his plea of "not guilty" and entered a plea of "guilty" to the offense charged in Count II of the information, which was stipulated to be burglary in the second degree, and orally applied for probation.

Thereafter, on December 14, 1933, appellant was sentenced to state prison for the term prescribed by law, the execution of sentence was suspended, and probation was granted for a period of two years under the following conditions: "* * * defendant shall serve six full months less eighty-five days of his probationary period at the county road camp. Defendant must make full restitution through Probation Department." Count I of the information was dismissed.

On September 27, 1934, the court issued a bench warrant for appellant and revoked and terminated his probation in the absence of appellant, the court having found that appellant had violated the terms of his probation in that he was "a deserter from the probation office and had failed to make any restitution."

In the meantime, in August of 1939, appellant was convicted of burglary at Modesto, California, was sentenced to state prison and was thereafter paroled.

On March 1, 1943, the court ordered the sentence of December 14, 1933, committing appellant to the state prison for the term prescribed by law, to be placed in full force and effect, and appellant was remanded to the sheriff.

Appellant here urges that: "The order of March 1, 1943, was null and void; the defendant having been ordered committed on September 27, 1934, and having thereafter been delivered to the warden of the state prison at San Quentin for the term prescribed by law (for the Modesto burglary) was entitled to have his time run on that commitment from the date on which he was originally committed to San Quentin, and the trial court on March 1, 1943, was without jurisdiction * * * after defendant was released from San Quentin to bring him back here again and recommit him. Such procedure in effect constitutes double punishment, and therefore is within the prohibition of the double jeopardy section of the Constitution of California, Art. I, section 13."

[1] While section 1215 of the Penal Code provides, as pointed out by appellant, that where "probation has been terminated * * * and the suspension of the sentence, or of the execution revoked, and the judgment pronounced, the defendant must forthwith be committed to the custody of the proper officer and be detained until the judgment be complied with"; there is nothing in the record to indicate that the judgment of December 14, 1933, which was suspended and ordered into effect on September 27, 1934, could have been complied with until March 1, 1943. In other words, a defendant cannot be so committed into the custody of the proper officer until he has been apprehended.

[2] Section 1216 of the Penal Code provides that: "If the judgment is for imprisonment in the state prison, the sheriff of the county must, upon receipt of a certified copy thereof, take and deliver the defendant to the warden of the state prison. He must also deliver to the warden the certified copy of the judgment, and take from the warden a receipt for the defendant." In the instant prosecution, appellant was delivered to the warden of the state prison and served his sentence therein, until paroled, in reparation for the crime he committed in Modesto, but he has not paid his debt to society for the commission of the burglary in Los Angeles County, on account of which he was granted probation and his sentence suspended. It is clear from the record that on September 27, 1934, the court in the absence of appellant revoked his probation because he had violated the terms thereof, whereupon the court issued a bench warrant for appellant's apprehension. It must be assumed that appellant was not apprehended until March 1, 1943, when the trial court in the presence of appellant ordered the sentence of December 14, 1933, to be in full force and effect. Incidentally, the fact that appellant was absent at the time his probation was revoked, does not render the order revoking probation invalid. People v. Hunter, 42 Cal.App.2d 87, 91, 108 P.2d 472.

[3] Appellant's contention that the procedure herein constitutes double jeopardy within the meaning of section 13, Article I of the Constitution of California, providing "No person shall be twice put in jeopardy for the same offense", cannot be sustained, because the constitutional guaranty relating to once in jeopardy "has no application to the service of a sentence, but applies only to twice being put upon trial for the same offense." In re Wilson, 196 Cal. 515, 524, 238 P. 359, 362.

[4] Whatever time is to be deducted for previous incarcerations of appellant in the county jail or in San Quentin is a matter to be determined by the Board of Prison Terms and Paroles, and not by the court.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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60 Cal.App.2d 303

SHOTWELL et ux. v. BLOOM et al.

Civ. 12390.

District Court of Appeal, First District,
Division 1, California.
Aug. 27, 1943.

Rehearing Denied Sept. 25, 1943.
Hearing Denied Oct. 25, 1943.

1. Landlord and tenant 🔑169(2)

Until employees knew whether lessees had been warned of defective flue in leased premises, lessees were "necessary parties" to action for loss of personal effects of employees in fire resulting from defective flue and were properly joined with owners as parties defendant, though complaint in one count predicated liability on fraud and concealment by owners. Code Civ.Proc. §§ 379–379c.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

2. Action 🔑50(6)

Cause of action against owners and lessees for loss of personal effects of lessees' employees, wherein liability was predicated on failure to warn of defective flue in leased premises was properly joined with cause of action against same parties and for the same relief on ground that owners were guilty of fraud and concealment with respect to defective flue. Code Civ. Proc. §§ 379–379c, 427, subd. 8.

3. Action ⚿50(1)

Amendments to Code of Civil Procedure broadening rules as to joinder of parties defendant enlarged old rules of joinder of causes of action so that causes may be joined when they meet the tests of amended provisions as to joinder of parties, and all such causes need not affect all parties to the action. Code Civ.Proc. §§ 379–379c, 427, subd. 8.

4. Fraud ⚿41

Complaint alleging that failure of owners having actual knowledge of defective flue to warn lessees or lessees' employees thereof amounted to a concealment of the defect stated the indispensable elements of a cause of action predicating on fraud liability for loss of employees' personal effects in a fire resulting from defective flue.

5. Landlord and tenant ⚿166(2, 10), 167(9)

Under the doctrine of "caveat emptor", landlord is not liable for injuries to personal property of tenant or his invitees resulting from defects in leased premises unless defects were hidden and not apparent to tenant but known to landlord at the time of the demise and landlord failed to warn tenant thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Caveat Emptor".

6. Landlord and tenant ⚿164(6, 7), 167(8)

Though landlord has no duty of inspecting premises to be leased with the object of locating latent defects or repairing patent defects, he is bound to inform tenant of hidden defects known to landlord which are not apparent to tenant and failure to do so renders landlord liable for injuries to tenant or his invitees arising therefrom.

7. Landlord and tenant ⚿164(1)

Except as to public or semipublic building, landlord is liable to one who enters leased premises in the right of the tenant for injuries resulting from pre-existing defects to the same extent as if the tenant had been injured.

8. Landlord and tenant ⚿167(8)

One who, upon express or implied invitation of tenant, enters or is proceeding to enter upon leased premises is an "invitee" and as such stands in the shoes of the tenant and may recover against landlord only if tenant could recover.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

9. Landlord and tenant ⚿167(8)

Landlord having warned tenant of hidden defects in leased premises is not liable for injuries suffered as a result thereof by tenant's invitee whom tenant failed to warn of defects, and tenant having failed to give such warning is alone liable.

10. Landlord and tenant ⚿169(7)

In action against owners of leased premises for loss of personal property of lessees' employees, evidence that there were loose bricks and a crack in the back of a fireplace in the house and that fire started behind the fireplace warranted inference that fire started as a result of defective fireplace.

11. Landlord and tenant ⚿169(11)

In action against owners for loss of personal property in fire that destroyed premises leased by employers for plaintiffs' use, conflicting evidence as to whether owners had actual knowledge of defects in fireplace from which fire resulted was for jury.

12. Trial ⚿140(2)

The sufficiency of defendant's attempt to explain a statement detrimental to his interests made before trial and his credibility as a witness were for the jury.

13. Landlord and tenant ⚿169(7)

In action against owners for loss of personal property in a fire that destroyed premises leased by employers for plaintiffs' use, conflicting evidence sustained implied finding that owners had actual knowledge of hidden defects in fireplace which resulted in the fire.

14. Landlord and tenant ⚿164(7), 167(8)

Landlord is not liable to tenant or tenant's invitee for injuries resulting from a defect in leased premises of which tenant or his invitee knew or by the exercise of reasonable care should have known, though landlord had actual knowledge of defect and did not warn tenant thereof.

15. Appeal and error ⚿930(4)

Where it was established that fire which destroyed personal effects of lessees' employees resulted from defects in fireplace of which owners had actual knowledge and did not warn lessees, it must be assumed in support of verdict for employees that jury found that employees by the exercise of due care would not have discovered such defects, unless the contrary appears as a matter of law.

16. Landlord and tenant ⚷169(11)

Whether loose bricks and a crack in the back of fireplace were latent defects or so patent that occupants by exercise of reasonable care should have discovered them before using fireplace the day they moved into leased premises was for jury, where day was very dark, electricity had not been turned on, back of fireplace was covered with soot, and fireplace itself was filled with rubbish.

17. Evidence ⚷474(19)

Owners of personal property destroyed in a fire were competent to testify as to its value, though they had just moved with the property from another state, their alleged lack of knowledge of value of the property in locality where it was destroyed going to the weight and not to admissibility of their testimony.

18. Evidence ⚷474(16)

Owner is a qualified witness as to the value of property owned by him regardless of whether he is generally familiar with such value.

19. New trial ⚷89

Where record disclosed that from the time of the opening statement to end of trial of action for loss of personal property of occupants of leased premises owners knew that it was plaintiffs' theory that allegations of complaint relating to a defective flue as the cause of fire referred to loose bricks and crack in the back of fireplace itself and evidence showed and jury impliedly found that owners had knowledge of such defects several years before fire, there was no such "fatal variance" or surprise as would warrant granting a new trial, and denial of motion therefor rested in the discretion of trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

20. Costs ⚷18

The purpose of statutes prohibiting recovery of costs when judgment is one that could have been rendered by an inferior court within the same county or city is to force plaintiffs to bring cases in an inferior court whenever possible and to penalize them for failure to do so. Code Civ.Proc. § 1032.

21. Costs ⚷18

Plaintiffs having commenced action in superior court and having recovered judgment for less than the maximum amount within jurisdiction of the Class A Justices' Court located in the county were not entitled to costs, though judgment also denied defendants any relief on their cross-complaint for $10,000. Code Civ.Proc. § 1032.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Lee Shotwell and wife against V. J. Bloom, Mrs. V. J. Bloom, and others to recover for loss of personal effects burned in a fire wherein named defendants filed a cross-complaint. From a verdict and judgment for plaintiffs and against named defendants, the named defendants appeal, and from an order striking their cost bill from the files, plaintiffs appeal.

Judgment and order affirmed.

George H. Harlan, of San Rafael, for defendants, appellants and respondents.

Jordan L. Martinelli and Samuel W. Gardiner, both of San Rafael, for respondents and appellants.

PETERS, Presiding Justice.

Mr. and Mrs. Shotwell brought this action against the Blooms and others to recover for the value of their personal effects which were burned up in a fire which destroyed the premises in which they were living, and which were owned by the Blooms. The Blooms cross complained asking for $10,000 damages for the loss of the house, alleging that the fire was caused by the negligence of the Shotwells. The jury rendered a verdict of $850 in favor of the Shotwells, and against the Blooms. The Blooms appeal from the judgment entered on that verdict. The Shotwells appeal from an order of the trial court striking their cost bill from the files.

The facts are as follows: In October of 1941 the Blooms, who owned a farm in Marin County, leased it to a partnership known as Roberts Dairy. On the property was a house which had, prior to 1925, been the family residence of the Blooms. Between 1925 and October of 1941 the property, including the house, had been leased to successive tenants. When the property was leased by Roberts Dairy, the Blooms knew that the dairy intended to use the house on the premises for the purpose of housing an employee of the dairy and his family. In November of 1941 the Shotwells were hired by the dairy to look after and operate the premises, the employment to commence in December of 1941. Mr. Shotwell was to receive a salary, plus use of the house in question, and food as his compensation. The Shotwells were living in Oregon in November of 1941 when their contract with the dairy was entered into. On December 1, 1941, they arrived at Roberts Dairy. They were traveling by automobile and had two trailers containing their household furniture and effects. It was a rainy day and their furniture and other effects were very damp. Mr. Turney, one of the partners of the dairy, told the Shotwells to go out to the farm and to take possession of the house. They drove out to the house and moved in their furniture during the afternoon of that day. The day was gloomy and the electricity had not been turned on. The only way to heat the house was by a kitchen stove and two fireplaces, one of which was located in the living room. The Shotwells started fires in the two fireplaces late in the afternoon, and these fires were kept lighted until they retired sometime before 10 p. m. The fires were put out before they retired. Shortly thereafter a fire occurred which resulted in the house burning down and a considerable portion of the furniture of the Shotwells being destroyed. There is no serious dispute but that the fire started in the partition behind the fireplace in the living room. At the trial it was the theory of the Shotwells that there was a crack and loose bricks in the back of the fireplace; that the Blooms knew of the existence of these defects; that these were latent defects; that the Blooms failed to notify Roberts Dairy, or them, of the existence of these latent defects, and that the fire was proximately caused by these defects.

The first amended complaint is in two counts. It names the Blooms, Roberts Dairy and its partners as joint defendants. The first count alleged a renting of the house to the Shotwells by the Blooms and the dairy jointly; that the house was in a dangerous and defective condition in that the only method of heating the house was by means of a fireplace which had a dangerous and defective flue; that defendants knew of this defect and the Shotwells did not; and that defendants failed to warn the Shotwells of this known defect. It will be noted that in this count there is no allegation of fraud or concealment.

The second count, in general, repeated the allegations of the first with the following differences: The allegations concerning the renting by the dairy and the knowledge of its partners were dropped. This count alleged that the Blooms had leased the property to the dairy, and that the Shotwells were the employees of the dairy; that the Blooms were guilty of fraud and concealment with respect to the defects in the fireplace; that this fraud was against both the Blooms and the dairy. The Blooms' demurrer to this complaint was overruled. Early in the trial, on motion of the Shotwells, the dairy and its partners were dismissed as defendants.

On this appeal the Blooms make three main contentions: (1) The demurrer to the complaint was improperly overruled; (2) the facts do not support the judgment, and (3) their motion for a new trial should have been granted.

In support of their contention that their demurrer should have been sustained, the Blooms contend that the cause of action contained in the first count is based upon neglect of the duty to repair by the Blooms and the dairy, whereas the second count is based upon the alleged fraud of the Blooms alone. They therefore contend that the causes of action alleged in the complaint did not arise out of the same tort, did not affect all the parties to the action, and that there was an improper joinder of parties and causes of action. These contentions are without merit. There was no improper joinder of either parties defendant or of causes of action.

[1] So far as the parties are concerned, the Shotwells first alleged that both sets of defendants knew of the dangerous condition, and that both sets of defendants failed to warn them of the latent defect. The second count was based on the theory that the Blooms were guilty of a fraud both on the tenant and on them as employees of the defendant in failing to warn either the tenant or them of the hidden defect. The rules on joinder of parties defendant, since the 1927 amendments to the Code of Civil Procedure, have been greatly broadened

over those theretofore existing. Section 379 now provides that any person may be joined as a defendant "who is a necessary party to a complete determination or settlement of the question involved." Until the Shotwells knew whether Roberts Dairy had been warned of the defects, the presence of that defendant was indispensable to a settlement of the controversy. Section 379a permits the joinder of all defendants "against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative." Section 379b provides that "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him," while § 379c provides that "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties." The present case falls within several of these sections. The two sets of defendants were, therefore, properly joined.

[2, 3] So far as the joinder of causes of action are concerned, Sub. 8 of § 427 of the Code of Civil Procedure permits the joinder of causes of action where they arise out of "Claims arising out of the same transaction, or transactions connected with the same subject of action." The present case falls squarely within the letter and spirit of that subdivision. Moreover, it has been held that the liberal amended statutes on joinder of parties referred to above enlarged the old rules of joinder of causes of action, so that causes now may be joined when they meet the tests of the sections on joinder of parties, and that all such causes do not have to affect all parties to the action. Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Teeter v. City of Los Angeles, 209 Cal. 685, 290 P. 11; Peters v. Bigelow, 137 Cal.App. 135, 30 P.2d 450; Kane v. Mendenhall, 5 Cal.2d 749, 56 P.2d 498; see, also, 23 Cal. L.Rev. 325; 7 Sou.Cal.L.Rev. 469.

[4] The Blooms also contend that the second cause of action, upon which the Shotwells relied at the trial, is predicated on fraud, and urge that the facts constituting the alleged fraud were not properly pleaded. It is obvious that the Shotwells did not plead nor rely upon any active fraud of the Blooms except in so far as the failure to warn of the known defects constituted a fraud upon the tenant or his invitees. The theory of the complaint was that the Blooms had actual knowledge of the defects in the fireplace; that they failed to warn their lessee, the Roberts Dairy, or the employees of the lessee; that this amounted to a concealment of the defects. The indispensable elements of the cause of action forming the basis of the complaint were properly alleged.

The main contentions of the Blooms are that the trial court did not properly instruct the jury on the law applicable to the liability of a landlord to the employees of the tenant for injuries caused by hidden defects; that even if the instructions were correct the evidence does not show that they had actual knowledge of the defects; and that the defects, if any, were patent and not latent.

[5, 6] The law applicable to the problem here presented is reasonably well settled. The general rule is that the landlord is not liable for injuries to the person or property of the tenant or his invitees caused by defects in the leased premises. This general rule of non-liability is an application of the doctrine of caveat emptor. In general, the lessee takes the premises as they are. There is no duty on the landlord to inspect with the object of locating latent defects nor to repair patent defects. Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854; Nelson v. Myers, 94 Cal. App. 66, 270 P. 719; 1 Tiffany, Landlord and Tenant, p. 556, § 86, Sub. (a); see cases collected 15 Cal.Jur. p. 704, § 114; 7 Cal.Jur.Supp. p. 440, § 114; 32 Am.Jur. p. 526, § 662.

To this general rule there is a well-settled exception. This exception, supported by cases from many states, is stated in 1 Tiffany, Landlord and Tenant, p. 562, § 86, Sub. d, as follows: "The rule above stated, that the lessor is under no obligation to the lessee as regards the condition of the premises at the time of the demise, is subject to an exception to the effect that, if there is some hidden defect in the premises, or danger thereon, which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing so to do, he is liable for injuries to the tenant arising therefrom." This is the rule announced by the Restatement of Law of Torts, Vol. 2, p. 969, § 358, and has been frequently declared in this state. Stanley v. Lander, 3 Cal.App.2d

284, 39 P.2d 225; Hassell v. Denning, 84 Cal.App. 479, 258 P. 426; Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854; Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077; Nelson v. Myers, 94 Cal.App. 66, 270 P. 719; see cases cited 15 Cal.Jur. p. 705, § 115; 7 Cal.Jur.Supp. p. 442, § 115.

[7, 8] The exception above mentioned applies not only in favor of the tenant but also in favor of those who enter in the right of the tenant, that is, in favor of members of the tenant's family (Moore v. Parker, 63 Kan. 52, 64 P. 975. 53 L.R.A. 778; Coke v. Gutkese, 80 Ky. 598, 44 Am. Rep. 499; Davis v. Smith, 26 R.I. 129, 58 A. 630, 66 L.R.A. 478, 106 Am.St.Rep. 691; Cutter v. Hamlen, 147 Mass. 471, 18 N.E. 397, 1 L.R.A. 429), his employees (Godley v. Hagerty, 20 Pa. 387, 59 Am.Dec. 731; Anderson v. Hayes, 101 Wis. 538, 77 N.W. 891, 70 Am.St.Rep. 930), sub-tenants (Guenther v. Jackson, 73 Ind.App. 162, 126 N.E. 873), or other invitee (Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 So. 852, 17 L.R.A.,N.S., 1161; Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N.W. 288). As to such invitees of the tenant (except as to the lease of public or semi-public buildings), the landlord is liable to the same extent as he would have been had the tenant been injured. Stated another way, the landlord's liability, except in the case of public and semi-public buildings where his liability is greater (see King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559), is no greater to the invitee of the tenant than it would be to the tenant himself. 1 Tiffany, Landlord and Tenant, p. 649, § 96, Subs. (a) and (b); see cases collected, Harris v. Lewistown Trust Co., 326 Pa. 145, 191 A. 34, 110 A.L.R. 749; 15 Cal.Jur. p. 742, § 155; 32 Am.Jur. p. 529, § 665, p. 538, § 671; 84 Univ. of Pa.Law Rev. 473. This is also the rule of the Restatement of the Law of Torts (Vol. 2, p. 969, § 358). In Runyon v. City of Los Angeles, 40 Cal.App. 383, 392, 180 P. 837, 841, the court stated that "one who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant" and may recover against the landlord only if the tenant could recover. See, also, Angevine v. Knox-Goodrich, 3 Cal.Unrep. 648, 31 P. 529, 18 L.R.A. 264.

[9] Under this rule the landlord (except in the case of the leasing of public or semi-public buildings) discharges his full liability if he informs his tenant of the defect. If the tenant fails to inform his invitee of such known defect the tenant and not the landlord is liable. Tiffany says of this proposition: "The lessee's knowledge is in effect imputed to the person injured, or rather, perhaps, it is the lessee's duty, not the lessor's, to inform persons, entering on the premises by the former's invitation or permission, of the dangerous condition. A different rule, requiring the lessor to give such information to every person whom the lessee may allow upon the premises, would impose on the lessor the duties of an occupant while divested of the benefits, and would in effect prevent the leasing of any premises in which there is a concealed source of danger to persons who might enter thereon." 1 Tiffany, Landlord and Tenant, § 96(b) at page 653.

The trial court fully instructed the jury in exact accordance with the rules above stated. There was no error in these instructions.

It is next contended that the evidence does not support the implied findings of the jury that the fire was caused by latent defects of which the Blooms had actual knowledge. It is admitted that the Blooms did not warn the Roberts Dairy or the Shotwells of the existence of the defects in the chimney, and the uncontradicted evidence is that neither the tenant nor the Shotwells discovered the defects, but it is contended that there is no legally sufficient evidence to show that the Blooms had knowledge of the defects, if any in fact existed.

[10] The evidence shows that there were loose bricks in the back of the fireplace and that there was a crack in the back of the fireplace extending diagonally from one corner near the floor of the fireplace upwards into the chimney. A Mrs. Rothwell, who leased and lived in the house in question during the period 1926–1934, testified that she had considerable trouble with the fireplace while she lived there; that there were loose bricks in the back of the fireplace that were constantly falling out and that there was a diagonal crack about half an inch wide across the back of the fireplace; that the crack was as deep as you could see; that as a result of these defects she discontinued the use of the fireplace during her tenancy. The son-in-law of Mrs. Rothwell, Thomas Greer, corroborated her statement as to the existence

of the loose bricks and crack. Both of the Shotwells, as well as several other witnesses, testified that after the fire the crack could be clearly seen in the back of the fireplace. Mr. Shotwell made a detailed examination of the chimney and fireplace after the fire, and described the crack and the loose bricks. He testified that the crack penetrated the back of the fireplace and that you could see light through the crack. That the fire started as a result of the crack and loose bricks is a reasonable, if not inevitable, inference from the evidence. The evidence is overwhelming that the fire started in back of the fireplace and did not start from the roof. This was testified to not only by the Shotwells and Frank Lintz, who was living with the Shotwells on the day of the fire, but also by several firemen who unsuccessfully tried to put the fire out.

[11] The only other question involved is whether the Blooms had actual knowledge of the existence of the defects in the fireplace. The Blooms categorically denied that they knew of the defects or that any one had ever informed them of the defects. Mrs. Rothwell who, as already pointed out, leased the premises from the Blooms from 1926 to 1934, testified that sometime during 1927 Mr. Bloom called at the house, and that while he was standing with her in front of the fireplace she told him that it was unsafe, and called his attention particularly to the loose bricks. Bloom replied she should be careful and not build too big a fire. Her husband unsuccessfully attempted to repair the defects, and, when Bloom failed to do so, she discontinued the use of the fireplace. Thomas Greer testified that sometime in 1927 he and a hired man by the name of Kinney were cleaning the chimney when Mr. Bloom came into the yard; that Kinney told Bloom that the fireplace was dangerous because of the crack and the loose bricks, and that Bloom said "it couldn't be very bad." Thus, there was positive evidence that as early as 1927 Bloom had actual knowledge of the defects. Although Bloom denied these conversations, such conflicts were for the jury. This testimony alone supports the implied finding that Mr. Bloom had actual knowledge of the defects.

[12, 13] It should also be mentioned that there is other evidence in the record which, while not as direct as that of Mrs. Rothwell and Greer, supports an inference that the Blooms were suspicious of the chimney and had knowledge that something was wrong. Both the Blooms testified that after the property was leased to Roberts Dairy in 1941, they visited the property and conducted a smoke test on the chimney in question, as well as on the chimney of another fireplace in the house; that they plugged the top of the chimney here involved and burned some burlap in the fireplace; that they looked in back of the fireplace but found no cracks or loose bricks, and no smoke coming out. They stated that they had no suspicions of the fireplace when they made this test, and had no special reason for making it. Mrs. Rothwell, the former tenant above mentioned, testified that Mr. Bloom called on her in June of 1942, after the fire, for the purpose of having her testify for him at the trial; that at that time she asked him about all the loose bricks in the back of the fireplace; that Bloom then stated to her that "he had warned everyone not to build too big a fire in the fireplace," and that he had had the fireplace repaired after the Rothwells left the premises. Bloom positively denied these conversations. His credibility was, of course, for the jury. Several witnesses testified that Bloom had stated to them that, had he known the Shotwells were going to move in, he would have warned them against building too big a fire. Bloom tried to explain this statement by contending that he was afraid that too big a fire would start a roof fire. The sufficiency and credibility of the explanation were, of course, for the jury. One witness testified that after the fire Bloom agreed that the fire started through the crack in the chimney. Another testified that after the fire he offered to show Bloom the crack in the chimney but that Bloom refused to accompany the witness to the chimney. From this brief summary, it is obvious that the implied finding of actual knowledge is amply supported.

[14-16] It is next argued that the defects here found to exist were patent and not latent, and should have been discovered by the Shotwells or by Roberts Dairy. It is clear that if the tenant or his invitee knows, or by the exercise of reasonable care should have known, of the defects that no liability attaches to the landlord even where the landlord has actual knowledge of the defects causing the injury. The trial judge so instructed the jury in this case. In support of the verdict we must assume that the jury found that the

Shotwells, by the exercise of due care, would not have discovered the defects. That implied finding can be upset only if, as a matter of law, it can be said that the Shotwells, in the exercise of reasonable care, should have discovered the defects. The defects here found to exist consisted of loose bricks and a crack in the back of the fireplace. The day was very dark, it was raining and the electricity had not been turned on. The back of the fireplace was covered with soot, and the fireplace itself was filled with rubbish. Certainly, it cannot be said that the Shotwells, as a matter of law, were required to make a careful inspection of the fireplace before using it. Whether they exercised due care and whether the defects were patent or latent were obviously questions for the jury. Its determination, under the facts, is conclusive.

[17, 18] The Blooms next urge that for several different reasons their motion for a new trial should have been granted. They first contend that there was no legally admissible evidence of the value of the property destroyed. The only witnesses as to the value of the destroyed furniture were the Shotwells, and it is urged that, although they were the owners of the property, they were not competent to testify as to value because they had just moved here from Oregon and, therefore, had no knowledge of the value of the property in Marin County. The contention is without merit. It goes to the weight, not to the admissibility, of the evidence. An owner is a qualified witness as to the value of property owned by him whether generally familiar with such values or not. See cases collected 10 Cal.Jur. p. 1023, § 278.

[19] It is next urged that the motion should have been granted on the ground of surprise and newly discovered evidence. This contention is predicated upon the fact that the complaint alleges that the defects causing the fire were in the fireplace "flue," while the evidence showed they were in the back of the fireplace. It is contended that this constituted a fatal variance between the pleading and proof, and that it took the Blooms by surprise at the trial, and that, had they known that the defects charged were in the back of the fireplace and not in the flue, other witnesses would have been produced who would have testified that there were no cracks in the back of the fireplace. Affidavits of these proposed witnesses were produced on the hearing of the motion. These contentions are without merit. In the first place, the Blooms were not taken by surprise late in the trial by this alleged change in theory, as contended by them. Counsel for the Shotwells in his opening statement clearly and unequivocally stated that he intended to prove that the fire started "through these openings in the fireplace itself." Mr. Bloom was called as the first witness and he was asked if he had any knowledge of cracks in the fireplace. He was also asked concerning an alleged conversation with Mrs. Shotwell and Greer concerning the crack and loose bricks in the back of the fireplace. Mrs. Rothwell was the third witness called, and Greer was the fourth. They testified in detail concerning the loose bricks and the crack in the back of the fireplace, and no objection was made to their testimony. No objection on the ground of variance was made to the other testimony in the record concerning the condition of the back of the fireplace. A reading of the record discloses that from the time of the opening statement to the end of the trial the Blooms knew that it was the theory of the Shotwells that the allegations of the complaint relating to the defective "flue" referred to loose bricks and the crack in the back of the fireplace. The evidence shows, and the jury impliedly found, that Mr. Bloom had knowledge of the condition as early as 1927. Under such circumstances there was no fatal variance, nor surprise, warranting the granting of a new trial. To say the least, the denial of the motion under these facts rested in the discretion of the trial court.

Objection is also made to several of the instructions. At the request of the Shotwells, instructions were given embodying the rules of law above set forth relating to the landlord's liability to the employees of his tenant for injuries caused by latent defects. These instructions were not only in accord with the proper rules of law already discussed, but were practically identical with several instructions given at the request of the Blooms. There was no error in any of the instructions. Other points of a minor nature are urged. They have been considered, and all found to be without merit.

From what has been said, there was no error in the judgment against the Blooms.

The Shotwells appeal from an order of the trial court striking their cost bill from the files. After the entry of judgment, the Shotwells filed a cost bill for $133. The Blooms moved to strike the cost bill on the ground that the judgment for $850 was less than $1,000, which is the jurisdiction of the Class A Justices' Court located in the county in which the action was tried. Section 1032 of the Code of Civil Procedure provides in part as follows:

"In the superior court except as otherwise expressly provided, costs are allowed of course:

"(a) To plaintiff upon a judgment in his favor: * * * in an action for the recovery of money or damages * * *.

"Provided, that the plaintiff shall not recover costs when the judgment is one which could have been rendered by a municipal or inferior court within the same county or city and county."

Based on this section, the trial court struck the cost bill from the files. The Shotwells concede, as they must, that under the above section, so far as the judgment granted them $850, no costs could be recovered because the judgment was less than $1,000. But they urge that, since the judgment also denied the Blooms any relief on their cross complaint for $10,000, the judgment actually rendered was not one "which could have been rendered" by a Class A Justices' Court. There seems to be no case directly in point although there is one case under old sections 1022 and 1024 of the Code of Civil Procedure relating to denial of costs in the Superior Court when the judgment was below $300, which seems to support the action of the trial court in the present case. Benson v. Braun, 134 Cal. 41, 66 P. 1. The case is not decisive, however, because of some differences in language between these old sections and the present § 1032 here involved.

[20, 21] The purpose of statutes such as § 1032 is clear. It is to force plaintiffs to bring their cases in the inferior courts wherever possible, and to penalize them if they do not do so. Here, without reference to the cross complaint, the Shotwells brought their action in the wrong court and were subject to the penalty. It is hard to see why this defect was cured by the filing of the cross complaint by the Blooms. The tendency of the courts has been to look only to the amount given in the judgment in determining whether, under § 1032, the successful party is entitled to costs. In other words, the courts have consistently applied the principle that costs are not recoverable if the actual recovery is less than the jurisdictional amount. Handy v. Samaha, 117 Cal.App. 286, 3 P.2d 602; Shaw v. Imperial Mut. L. & B. Ass'n, 4 Cal.App.2d 534, 41 P.2d 574. Thus, in Hollinger v. Medina, 46 Cal.App.2d 542, 116 P.2d 166, it was held in an action in the Superior Court where the jury determined that the plaintiff was damaged to the extent of $10,000, but under the comparative negligence doctrine there applicable defendant was only responsible for one-tenth of the damage or $1,000, and judgment was rendered for that amount, that costs were not recoverable.

Of course, had the plaintiff not sued for more than $1,000, and had he filed his complaint in the inferior court, and then had the defendant cross complained for $10,000, the case would have been transferred to the Superior Court. Had judgment then been rendered for plaintiff for $850, as was here done, it might be argued that plaintiff, not having invoked the Superior Court jurisdiction, would be entitled to costs. But that is not the situation here involved. Here, the plaintiff invoked the Superior Court jurisdiction. As it turned out, he received judgment for less than $1,000. No recovery at all was allowed on the cross complaint. Had the issues presented by the complaint and answer been tried alone, no costs could be recovered by plaintiff, because the inferior court could have granted a judgment for $850. The inferior court could likewise have entered a judgment denying any relief on the cross complaint. Under such circumstances, we believe the letter and spirit of the statute requires that costs be denied the Shotwells.

The appeal by the Blooms from the judgment is affirmed. The appeal by the Shotwells from the order of the trial court striking their cost bill is also affirmed.

KNIGHT and WARD, JJ., concur.

22 Cal.2d 742

MacNICOL v. EAST COALINGA OIL FIELDS CORPORATION et al.

Sac. 5475.

Supreme Court of California.
Aug. 27, 1943.

1. Boundaries 🔑20(1)

The statute providing that an owner of land bounded by a road is presumed to own to the center of the way and that a transfer of land bounded by a highway passes title to the soil of the bounding highway to the center thereof, unless a different intention appears from the grant, relates to streets and highways which have an actual or prospective existence for use of the abutting land. Civ.Code, §§ 831, 1112.

2. Boundaries 🔑20(2)

Where purpose of recorded map showing subdivision of mining tract in lots and blocks was to provide a convenient method of fixing each lot owner's right to participate in the proceeds from sale of oil produced from the tract and there was no intention to open proposed roads, there were no "lots" in the tract "bounded by a road or street" or "bounded by a highway" within statute relating to ownership to center of ways and title to conveyed lots did not extend to center line of roads depicted on map. Civ.Code, §§ 831, 1112.

See Words and Phrases, Permanent Edition, for all other definitions of "Lot Bounded by a Highway" and "Lot Bounded by a Road or Street".

3. Mines and minerals 🔑54(2)

Where deed conveying subdivision lots and drilling contract entered into in connection with conveyance were part of one transaction, they were construed together to ascertain the parties' intent on question whether grantor's fee title to proposed road on which lot was located governed its rights in oil and gas produced therefrom. Civ. Code, § 1642.

4. Mines and minerals 🔑54(2)

Where deed conveying subdivision lots and drilling contract between grantor and grantee disclosed that grantor's reserved right for 50 years to drill for oil "upon said quarter section" and the parties' respective shares in the profits were interdependent, the respective rights of participation in net profits during the period extended to any well drilled in any part of the tract, including grantor's proposed roads on which lots were located and were not limited to wells drilled on conveyed lots.

5. Mines and minerals 🔑55(5)

Where drilling contract and deed of subdivision lots reserved to grantor 20 per cent. of "net production" from wells drilled upon the subdivision, a proportionate share of the proceeds from the sale of gas and other hydro-carbon substances was excepted from the grant in addition to oil, notwithstanding that reservation referred expressly to oil drilling rights and gas was not expressly mentioned. Civ.Code, § 1069.

See Words and Phrases, Permanent Edition, for all other definitions of "Net Production".

6. Mines and minerals 🔑55(8)

Evidence was insufficient to show that oil company, which reserved exclusive right to drill for oil on certain premises for 50 years and reserved right to participate in profits, perpetually waived anything more than its drilling rights by consenting to the execution of an oil and gas lease.

7. Mines and minerals 🔑55(4)

Estate reserved by oil company of right to drill for oil on certain premises for 50 years was not an "estate in perpetuity" but an "estate for years".

See Words and Phrases, Permanent Edition, for all other definitions of "Estate for Years" and "Estate in Perpetuity".

TRAYNOR, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Lee Alex MacNicol against the East Coalinga Oil Fields Corporation and others to quiet title and for declaratory relief. From a judgment for defendants, plaintiff appeals.

Judgment modified and, as modified, affirmed.

For prior opinion, see 122 P.2d 661.

L. A. MacNicol, of Merced, in pro. per. for appellant.

C. Ray Robinson and W. Eugene Craven, both of Merced, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendant in an action to quiet title and for declaratory relief.

The case was presented to the trial court on an agreed statement of facts supplemented by documentary and oral evidence introduced during the course of the trial. There is no dispute as to the facts.

In 1919 George Schwinn and Mattie Kearns owned an irregular quarter section of land containing approximately 183 acres located in Fresno County. The land is about twelve miles from the town of Coalinga. Its surface is barren and unimproved, with no roads or streets surrounding it. The only substantial value of the land is in its oil and gas potentialities. The owners commenced preparations looking to its development for oil prospect and production. A subdivision map was filed showing the tract divided into twenty blocks of one hundred twenty lots, each lot being twenty-five feet in width. The map shows 2,160 single lots of 2,500 square feet and 240 double lots of 5,000 square feet each, an equivalent of a total of 2,640 single lots. The lots are shown on the map as fronting on eleven county roads forty feet in width, running east and west, and three roads running north and south. On the map 151.5151 acres are contained within the blocks, and 31.94 acres within the roads. No offer of dedication of the roads as public highways appears on the map, but the county board of supervisors caused to be endorsed thereon an acceptance of an assumed dedication arising from the filing of the map. No such roads were ever constructed.

The defendant, East Coalinga Oil Fields Corporation, was organized to facilitate the furtherance of the project. The corporation was first authorized to act as sales agent for the sale of the lots. Subsequently, title to the tract was conveyed to the corporation. On the theory that the interests to be sold were securities, a permit was obtained from the Commissioner of Corporations which required that seventy per cent of the purchase price of $110 for single lots and $220 for double lots be paid to the owners, and thirty per cent be paid into a fund to insure drilling operations within the tract.

The defendant entered upon the campaign for the sale of the lots. Each purchaser executed a drilling contract with the defendant which described the land to be purchased by lot and block, and provided that the 183 acre tract of land "is believed to be oil bearing and not otherwise productive, and the subdivision is made for mining purposes only. It is further understood that the grantee is an independent purchaser of a parcel of land in fee simple, having as an incident thereto a right to receive a portion of the net proceeds from the sale of any oil produced from any wells drilled upon said tract, by the East Coalinga Oil Fields Corporation, its successors or assigns." The contract also provided that upon the payment in full of the purchase price the corporation would execute a deed to the purchaser which should provide that the grantee "shall receive a proportionate share of eighty per cent (80%) of all the net profits arising from the sale of oil derived from any oil well or wells which the East Coalinga Oil Fields Corporation may drill on any part of the above quarter section, and in the proportion that the number of lots conveyed by said deed bears to the total number of lots in said quarter section subdivision, and the East Coalinga Oil Fields Corporation shall retain twenty per cent (20%) of the said net profits, as its share and proportion of the net production of said well or wells, which is hereby reserved, together with the exclusive right to drill for oil on said quarter section." It was also provided in the drilling contract that the lots containing 5,000 square feet should be computed as double lots both as to price and participation of profits. Upon payment of the purchase price each purchaser received a grant deed executed by the corporation. The deed described the real property conveyed by lot and block number with special reference to the recorded map. The deed reserved "unto said East Coalinga Oil Fields Corporation, for a period of fifty years from the date hereof, the exclusive right to drill for oil upon said described quarter section." By the deed the purchaser was also granted the right to "a proportionate share of eighty per cent (80%) of all of the net profits derived from the sale of oil from any oil well or wells which the undersigned, the Corporation, drills on any part or parts of said subdivision, of which the within described property is a portion, in the proportion that the number of lots conveyed by this deed bears to the total number of lots in said entire tract, as specified in that certain drilling contract executed by the parties hereto concerning the within particularly described property."

By such a deed, dated February 1, 1922, J. P. Cackler became the owner of lots 58 and 59 in Block 4 of the map of the subdivision. He executed the drilling contract with the corporation. The plaintiff, Lee Alex MacNicol, is his successor in interest as to those lots.

In April, 1921, the defendant commenced the drilling of an oil well in the tract. Drilling continued to a depth of about 4,780 feet, when, in May, 1923, the drilling fund became exhausted, the equipment was lost by foreclosure, and operations were abandoned. In 1938 oil was discovered in paying quantities in the general vicinity of the tract, and efforts to finance drilling operations were resumed. In July of that year numerous owners, including the plaintiff, as lessors, entered into counterpart leases constituting a community oil and gas lease with Zeb A. Terry as lessee, whereby the latter was authorized to drill for and produce oil, gas, and other hydro-carbon substances on the leased premises, and pay to the lessors as royalty "a sum equal to one-eighth of the market price of all oil produced and sold by it" from wells drilled by the lessee or its assigns on said premises. The lease also provided for payment to the lessors of one-eighth of the proceeds from the sale of gas or water produced from the leased premises after deduction of the cost of production, transport and sale. The defendant consented in writing to the execution by lot owners of the counterparts of the so-called Terry community lease. Various assignments of that lease were executed by the lessee. Subsequently, as the result of drilling operations under the Terry lease, oil was produced in paying quantities.

A controversy arose between the lessors and the defendant over the division of royalties received from operations under the Terry lease. The defendant claimed that it was entitled to twenty per cent of the royalties received by the lessors under the lease; that the leased premises were confined to the lot boundaries as shown on the map and did not extend to any part of the so-called roads; that it was the owner of all land designated on the map as roads and therefore of all oil and gas produced therefrom. The lessors contended that the defendant waived all right to a share of the royalties by the execution in writing of its consent to the community lease and that their title extended to the center of the roads depicted on the map as contiguous to their lots. Conflicting claims to proceeds from the sale of gas produced from the drilling operations under the lease also arose. The plaintiff thereupon commenced the present action.

The trial court found and concluded that there had been no dedication to public use of any land designated on the map as roads; that the plaintiff owned only the 2,500 square feet in each lot described in the deed; and that the defendant was the owner of the 31.94 acres included within the subdivision designated on the map as roads. The decree quieted the title of the plaintiff to the 2,500 square feet represented by each of the lots, subject to the exclusive right of the defendant for a period of fifty years to drill for oil, gas and other hydro-carbon substances. It decreed that the defendant was the owner in fee of the 31.94 acres contained within the boundaries of the roads depicted on the map.

The plaintiff assigns error in the foregoing conclusions. He invokes sections 831 and 1112 of the Civil Code providing respectively that "an owner of land bounded by a road or street is presumed to own to the center of the way; but the contrary may be shown," and "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." He also relies on Allan v. City and County of San Francisco, 7 Cal.2d 642, 646, 61 P.2d 1175, where it was said that a transfer of land by lot and block number carries the title of the grantee to the center of the street in front of the land conveyed.

[1, 2] It is an undisputed fact in this case, however, that the roads as depicted on the recorded map did not exist in fact. The cases relied on by the plaintiff involved streets or highways which had an actual existence, and it is obvious that the provisions of the code sections relate to streets and highways which have an actual or prospective existence for the use of the abutting land. See Elliott v. McIntosh, 41 Cal.App. 763, 183 P. 692; 4 Cal.Jur. 380. It cannot seriously be contended that the roads shown on the map had such an existence. Public rights are not involved, nor is anyone in this action seeking to establish any rights in behalf of the public. In fact it was stipulated that there was no intention to improve any part of the 31.94 acres as roads or streets for subdivision

purposes, but that the entire area, including the 31.94 acres, was intended to be used for mining purposes only, and none thereof for residential purposes. It becomes apparent from the stipulated facts and the documentary evidence that the purpose of the recorded map showing a subdivision in lots and blocks was to provide a convenient method of fixing the extent of each lot owner's right to participate in the proceeds from sale of oil produced from the tract. There was therefore never any intention to open any such roads. Consequently there never was any land or any "lots" in the tract "bounded by a road or street" or "bounded by a highway," as contemplated by said sections 831 or 1112. There is therefore no occasion to apply the rules laid down in those sections to the facts of this case. The conclusion of the trial court that each of the lots conveyed to the plaintiff's predecessor in interest was 2,500 square feet in area and that title did not extend to the center line of the roads depicted on the map, is therefore sustained by the record.

The court also decreed the parties' respective rights in oil and gas. It determined that the plaintiff was entitled to eighty per cent and that the defendant was entitled to twenty per cent of the net profits from the sale of oil produced on the 151.5151 acres contained within the blocks as shown on the map; that the defendant was entitled to the proceeds from the sale of all oil, gas and other hydro-carbon substances produced from the 31.94 acres, and to the proceeds of all gas produced from the 151.5151 acres; and that the defendant did not relinquish any of its rights to twenty per cent of the royalties payable under the community lease by its consent to the execution thereof by the owners of lots. The plaintiff also questions the correctness of those conclusions of the trial court.

[3] Apparently the trial court was of the view that the defendant's fee title in the 31.94 acres governed its rights in the oil and gas produced therefrom. Had there been nothing more involved in this case than the grants of lots to the various purchasers, there might have been some foundation for such an assumption. But here the participation rights do not flow alone from the grants of land. The deeds qualified the grants by a reservation of the drilling rights for a stated period, and by a transfer of participation benefits therein to the grantees; and co-incidentally a drilling contract was entered into by the grantor with each prospective lot owner. Those instruments—the deed and the drilling contract—were part of one transaction and must be construed together. Sec. 1642, Civ.Code.

Undoubtedly the defendant had reserved from the grant to the plaintiff the exclusive right to drill "on said quarter section," including the plaintiff's lots, for a period of fifty years. It had reserved a similar right as to all the land sold in the tract. It might not exercise its right to drill on every lot sold, and neither the purchaser nor the defendant intended that it should do so. But in order to share in the actual drilling operations in the tract and to procure capital to finance the operations, each purchaser furnished funds and pooled his interests with all the other purchasers in return for a proportion of the net profits from oil produced thereby. By the language of the instruments the scheme connoted a proportionate share to every lot owner in every well drilled anywhere in the tract under the drilling contract. Drilling was the only intended use of any of the land in the tract. At the outset the sale of lots in the tract was the only source of capital. Respective participation benefits in the net profits from the operations so financed were therefore proportioned, eighty per cent to the grantee-investors and twenty per cent to the corporation.

[4] From the language of the deed and the drilling contract it becomes obvious that the reserved right to drill for oil "upon said quarter section," and the parties' respective shares in the profits were co-relative and interdependent. They were created to exist for a period of fifty years. The respective rights of participation in net profits during that period extended to any well drilled in any part of the tract, and were not limited to wells drilled on the lots conveyed to the various purchasers. All of the land in the tract was put into the fifty year oil development "pool," and not merely the acreage contained within the lots as depicted on the recorded map. To say, as the trial court said, that the plaintiff is entitled to 2/2640ths of eighty per cent of the net profits from oil produced on the 151.5151 acres, and that the defendant is entitled to all the oil, gas and other hydro-carbon substances produced from the 31.94 acres, is to add language to the contract which the parties obviously did not include.

[5] It also appears that the trial court erred in concluding that the defendant was entitled to all the gas from the entire tract. The provisions of the grant and of the drilling contract must likewise be deemed to govern the rights of the parties with reference to participation of proceeds from the sale of gas. Those provisions must be considered in the light of the fact that gas and oil in place are inseparable and both are brought to the surface in drilling operations. It is true, as stipulated by the parties, that at the time the deed and drilling contract were executed, gas was not considered of any value and was not expressly mentioned in those instruments. Nevertheless the participation rights of the corporation under the drilling contract was twenty per cent "as its share and proportion of the net production of said well or wells." The expression "net production of said well or wells" is all inclusive. The language of reservation in each instrument referred expressly to oil drilling rights, but inasmuch as it also reserved twenty per cent of the "net production" from the wells, we must conclude that the language of reservation excepted also from the grant a proportionate share of the proceeds from the sale of gas and other hydro-carbon substances in addition to oil; and that all else passed to the grantee. Sec. 1069, Civ.Code. The proportionate shares of the parties in the sale of the proceeds from gas under the drilling contract and deed, as so read together, are therefore the same as in the case of the proceeds from oil.

[6, 7] The evidence sufficiently supports the trial court's conclusion that the corporation by its consent to the execution of the community lease, did not waive any of its rights to participate in the royalties payable under the lease to the extent of twenty per cent. The estate reserved by the defendant was not an estate in perpetuity, but was an estate created for a term of years. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237. The defendant granted to the lot owners a similar estate in the lands in the tract which were owned by it. By the express language of the drilling contract, the purchaser's right to participate in profits was considered by the parties as a covenant running with the land. The co-existent rights of the parties—plaintiff to receive and the defendant to retain a share in the proceeds from the wells drilled in the tract—were therefore inseparable from the land for the duration of the limited estates. The trial court was therefore justified in concluding that the purpose of the community lease was to effect a more satisfactory arrangement for compensating drilling operations when sufficient capital was not procurable from sale of lots; and that there was no waiver by the defendant of any right to participate in royalties or profits received therefrom.

From the foregoing it follows that the judgment should be and it is hereby modified to provide as to the participation rights of the parties (1) that the plaintiff is entitled, for a period of fifty years from February 1, 1922, to that proportion of eighty per cent of the profits or royalties received from sale of oil and gas produced from wells drilled in any part of said tract under the drilling contract or the community lease which the lots owned by the plaintiff bear to the total number of lots in the tract, namely 2/2640ths of said percentage; and (2) that defendant is entitled to retain the remaining twenty per cent of the profits or royalties from sale of oil and gas produced from wells drilled in said tract under the drilling contract or the community lease for the same period.

As so modified the judgment is affirmed, neither party to recover costs on appeal.

GIBSON, C. J., and CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

It is my opinion that when the defendant consented to the Terry lease it relinquished its right to participate in the profits from operations under that lease. The lease provides explicitly for the disposition of profits from the wells, permitting Terry to retain seven-eighths of the price for oil produced, and requiring him to pay one-eighth to the lessors. Having consented to this lease and reserved only its rights "in, on, or to any lot or lots not leased to Zeb A. Terry," defendant was bound by the terms of distribution provided in the lease. Moreover, under its contract with plaintiff, defendant had no more than the right to 20 per cent of the net profits arising "from the sale of oil derived from any well or wells which the East Coalinga Oil Fields Corporation may drill." Nowhere in this language is there a basis for the reservation of a right to profit from wells drilled by others after defendant waived its exclusive right to drill.

Nor can I agree with the majority opinion that Civil Code sections 831 and

1112 relate only to streets and highways that have "an actual or prospective existence for the use of the abutting land." It has been the established law of this state that a conveyance describing the property by reference to a recorded map that shows the property bounded by a street, passes the grantor's title up to the center of the street even though the dedication of the street was never accepted, or the street was never opened or improved (Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027), or it was abandoned before the conveyance was made. Anderson v. Citizen's Savings & T. Co., 185 Cal. 386, 393, 197 P. 113. See also Allan v. City and County of San Francisco, 7 Cal.2d 642, 649, 61 P.2d 1175; Gramer v. City of Sacramento, 2 Cal.2d 432, 438, 41 P.2d 543; Machado v. Title Guarantee & T. Co., 15 Cal.2d 180, 185, 99 P.2d 245; Tiffany, Real Property, (3rd ed. 1939) 106, 107. This court expressly withheld approval of dictum to the contrary in Elliott v. McIntosh, 41 Cal.App. 763, 769, 183 P. 692, relied upon in the majority opinion.

EDMONDS, J., concurred.

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22 Cal.2d 725

MOORE et al. v. CALIFORNIA OREGON POWER CO.

Sac. 5338.

Supreme Court of California.

Aug. 27, 1943.

Rehearing Denied Sept. 23, 1943.

1. Appeal and error 🔑934(1)

On appeal from judgment for defendants notwithstanding the verdict for plaintiffs, conflicts in evidence would be resolved in favor of plaintiffs.

2. Waters and water courses 🔑46

The use of waters of a stream in their passage through land of a riparian owner to generate electric power is within his rights.

3. Waters and water courses 🔑47

The electric energy generated by riparian owner at power plant using waters of a stream may be conveyed for use on nonriparian lands.

4. Waters and water courses 🔑46

A riparian owner has no right to erect machinery requiring for its propulsion more water than stream furnishes at its ordinary stages and operate such machinery by accumulating the water.

5. Waters and water courses 🔑47, 138

Seasonal storage of water for power purposes is not a proper "riparian use", but constitutes an "appropriation", so that, if it continues for time prescribed by statute of limitations, it will ripen into a "prescriptive right".

See Words and Phrases, Permanent Edition, for all other definitions of "Appropriation", "Prescriptive Right" and "Riparian Use".

6. Waters and water courses 🔑46

Evidence as to manner in which upper riparian owner stored and released waters of stream at one of its two power plants established that use of water at such plant was a proper "riparian use" of water.

7. Waters and water courses 🔑47

The use of waters of a stream by riparian owner upon nonriparian lands is a "nonriparian use", and in such a case the riparian owner is a "trespasser" on rights of lower riparian owner from inception of such use.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonriparian Use" and "Trespasser".

8. Waters and water courses 🔑47

Evidence that upper riparian owner, in operation of one of its two power plants, stored water during dry season, discharging it in unusual quantities, established that owner's use was a "nonriparian use" and was adverse to right of lower riparian owners.

9. Waters and water courses 🔑42

In "seasonal storage" by riparian owner, waters of a stream are stored during times when water in stream is abundant and discharged at that time of year when there is a scarcity of water, and often to advantage of lower owners.

See Words and Phrases, Permanent Edition, for all other definitions of "Seasonal Storage".

10. Waters and water courses 🔑277

Evidence established that nonriparian use of waters of stream by riparian owner in operating of one of its two power plants continued for a period of five years openly, continuously and under a claim of right, so as to give owner a right by prescription to waters to the extent of such use.

11. Waters and water courses ⚿127

An upper riparian owner may acquire a prescriptive right to waters of a stream as against a lower riparian owner by an adverse use of waters for the prescriptive period.

12. Waters and water courses ⚿143

The prescriptive rights to use of waters of a stream are "stricti juris", and should not be extended beyond the actual user.

See Words and Phrases, Permanent Edition, for all other definitions of "Stricti Juris".

13. Waters and water courses ⚿277

Where riparian owner, after completion of its dam for use in generating electricity, used water in such a manner as not to interfere with lower riparian owners' use of waters during daytime with certain exceptions for statutory period, prescriptive right acquired by owner was limited by extent of use which conferred the title and could not be extended beyond the actual user.

14. Waters and water courses ⚿129

Any person may obtain the exclusive right to water flowing in stream by grant or prescription, as against either riparian owners on the stream or the prior appropriation of water by other parties.

15. Waters and water courses ⚿144

The right to use of waters of a stream acquired by prescription is only commensurate with right enjoyed, and extent of the enjoyment measures the right.

16. Limitation of actions ⚿55(7)

Where riparian owner acquired prescriptive right to use of waters of stream for operation of power plant, but injury to lower riparian owners' rights to use of waters during daytime did not begin until some two years before lower riparian owners' action against owner operating power plants for alleged violation of their riparian rights was begun, the action was not barred by statute of limitations.

17. Waters and water courses ⚿49

Damages cannot be awarded a riparian owner for an interference with his riparian rights without proof on his part that he has actually been damaged by reason of such interference.

18. Waters and water courses ⚿144

Where riparian owner used waters of river up until 1931 so as not to interfere with use by lower riparian owner, prescriptive rights of upper riparian owner were limited by those of lower riparian owner.

19. Waters and water courses ⚿282

Where riparian owner acquired prescriptive right to use of waters of stream for operation of power plants, subject to rights of lower riparian owners to sufficient water during daytime to properly irrigate their riparian lands, evidence presented question for jury as to whether any change in facilities of owner operating power plant or in its method of operation damaging rights of lower riparian owners occurred.

20. Waters and water courses ⚿49

Evidence failed to establish that taking of water rights belonging to plaintiffs' land occurred prior to plaintiffs' acquisition of land, so as to preclude their recovery for damages for alleged violation of their riparian rights, where damages for which plaintiffs instituted action were based upon taking of their daytime riparian rights to waters of stream at time after plaintiffs had entered into possession of land, and not upon the taking of waters by defendant when its dam was completed some years prior to acquisition of any interest in lands by plaintiffs.

◆

In Bank.

Appeal from Superior Court, Siskiyou County; Arthur Coats, Judge Assigned.

Action by C. F. Moore and another against the California Oregon Power Company for damages for alleged violation of riparian rights. From a judgment for defendant, notwithstanding the verdict for plaintiffs, the plaintiffs appeal.

Judgment reversed with direction.

For prior opinion, see 122 P.2d 628.

Carter, Barrett & Carlton, Daniel S. Carlton, and Oliver J. Carter, all of Redding, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

CURTIS, Justice.

This is an appeal by plaintiffs from a judgment notwithstanding the verdict entered for defendant in an action brought by plaintiffs upon a complaint setting forth two causes of action. Upon the first cause of action the plaintiffs asked for an injunction restraining the defendant from interfering with plaintiffs' riparian rights to the waters flowing in the Klamath River. Upon the second, the plaintiffs asked for damages alleged to have been sustained by them by reason of the acts of defendant in depriving them of their riparian rights to the waters of said river. The plaintiffs abandoned their action for an injunction as the defendant had, prior to the commencement of said action, devoted the waters of the river to a public use.

Plaintiffs are the owners of lands which are admittedly riparian to Klamath River situated in the county of Siskiyou. Some years prior to the commencement of this action, the predecessors of the defendant built a dam at Copco in the bed of the river about ten miles above the lands of the plaintiffs. The dam was completed in 1917, and the waters of the river were by means of this dam impounded and used for furnishing power to operate a power plant constructed at Copco. This plant was built and operated for the generation of electric power to be sold, and which was sold, to the public in the various localities in the vicinity of said plant. The dam thus constructed in 1917 was raised in 1922 to a height of 126 feet and a second unit of the plant was placed in operation. The plant at Copco will be referred to as Copco No. 1.

The reservoir back of the dam at Copco has been kept full, and though it has a capacity of 85,000 acre feet of water, only the upper 5,000 acre feet is available for use in the operation of the plants. The dam is what is known as the highhead type, the outlet being located near the top of the dam. Normally only the upper five feet of the water in the reservoir is used. Since the completion of the dam and the generating plant at Copco, and in the year 1925, a second plant known as Copco No. 2 was installed downstream from Copco No. 1, in which the waters of the river after their release at Copco No. 1 have been utilized for the operation of Copco No. 2. The dam at Copco No. 2, however, does not detain or impound the water, but simply allows it to pass through the plant and then down the river. Since the construction of these plants they have been used continuously by the defendant for the purpose for which they were constructed. They are all located on riparian lands belonging to defendant. The plaintiffs admit that defendant has gained a prescriptive right to use the waters of the river during the nighttime and during holidays and Sundays of each week, but contend that up to the year 1931, they received ample water for all riparian purposes in a constant and regular flow during the daytime. This action was begun in 1933.

The defendant in its answer, while making certain denials of the various allegations of plaintiffs' complaint, pleads the statute of limitations and contends that it has gained by prescription the right to the entire flow of the river at its Copco plants, having used the same openly, continuously and under a claim of right for over five years prior to the commencement of this action. Practically the sole question before us is whether plaintiffs' cause of action is barred by the statute of limitations. It is conceded the five year period of limitation applies in this case.

The evidence shows without substantial conflict that following the construction of the dam at Copco, and up to the irrigating season of 1931, there was at all times except during the nighttime and on Sundays and holidays, a uniform and ample supply of water flowing in the river at the head of plaintiffs' ditch to supply all the water needed for the irrigation of plaintiffs' lands. However, there was evidence which tended to show that commencing with the irrigating season in 1931 and during that and the subsequent years, plaintiffs were not able to use the waters of the stream upon their lands. The inability of plaintiffs to so use the waters of the river during that year was due, so the plaintiffs contend, solely to the manner in which defendant retained and released water from its reservoir at its Copco No. 1 plant. The year 1931 was an exceedingly dry year and the waters of the stream were unusually low. However, the defendant released all the waters impounded by it in its reservoir during that year, and the waters so released flowed down to and along plaintiffs' lands. There is no evidence that defendant diverted any of the waters of the stream from the river bed except by means of its reservoir, and as we have seen, the waters so diverted and impounded in its reservoir were released downstream to plaintiffs' lands. This statement also applies to the release of waters from the reservoir after said year. Following the year 1931 were years of ordinary rainfall. There is no claim of any unusual water shortage in the river after 1931, but the evidence shows that while the defendant released all the waters flowing in the stream after they had been stored in its reservoir, the manner in which it released the waters caused the stream below its plants to so fluctuate that plaintiffs' diversion works were continually washed away, with the result that plaintiffs were unable to use practically any of said waters upon their lands. The plaintiffs made repeated attempts to repair and even to reconstruct their diversion works, but they were washed away the following day, or in at least a few days thereafter, by the unusually large flow of water discharged at intervals by defendant from its reservoir into the river above the intake of plaintiffs' ditch. This occurred in 1931 as well as in the years following 1931.

On one occasion occurring in 1931, the plaintiff, Charles F. Moore, testified as follows:

"I built a dam out at the head of the ditch and plowed and scraped channels at the head of the ditch and tried to pick up more water.

"Q. And did you get any from that method? A. No, sir, the next day after we completed the first ditch, the dam washed away and the ditch filled up.

"Q. That is, by this big head of water that came down? A. Yes, sir."

This condition prevailed during the irrigating season following the year 1931.

[1] It is this fluctuation of the stream caused by the manner in which the defendant has, beginning with the year 1931, discharged the water from its reservoir, that has deprived the plaintiffs of the use of necessary water for the irrigation of their riparian lands, and for which they were awarded damages by the verdict of the jury in this case. Defendant contends that it has operated its plant since 1931 in the same manner in which the plant was operated prior to that year, and that it has released the water from its reservoir for that purpose in the same manner and in the same regular quantities as in previous years. The evidence in support of that contention only creates a conflict with that of the plaintiffs, to the contrary effect. This conflict must be resolved in favor of the plaintiffs in view of the verdict of the jury. It is not seriously contested by defendant that such an injury to plaintiffs' riparian rights would entitle them to damages unless the defendant had, prior to the year 1931, gained a right by prescription to so discharge and use the waters of the river in the manner and to the extent shown above.

It might be well at this time to give further details respecting the manner in which the defendant operated its Copco No. 1 plant. The defendant only released water from these plants when there was a demand for power by its customers. According to the statement of its vice-president: "The plant would begin to pick up load as soon as the customers begin to throw switches and the industries pick up load in the morning * * * from 6 o'clock until 8 in the morning, and increased from then on until our normal peak is reached about 11 or 11:30 in the morning; sometimes a little earlier, 10:30 to 11:30. * * * During the noon hour, it usually drops and then picks up again in the afternoon, not as high a peak as in the morning, and it continues until 4 or 5 o'clock in the afternoon. Then there is another drop-off in the load in the late afternoon which is picked up in the evening, and continues until 9 or 9:30 in the evening, when it begins to drop off very rapidly until midnight, and then there is a minimum interval between midnight and 6 o'clock in the morning. * * * Saturday afternoons and Sundays and holidays are normally considered off peak; * * * the Copco No. 1 [plant] is operated with an automatic governor."

[2] The use of the waters of a stream in their passage through the land of a riparian owner to operate a power plant thereon to generate electric power is as clearly within his rights as is his right to operate a mill thereon to grind grain, or to operate any other machinery than which there is no more ancient or well-established feature of riparian rights. Mentone Irr. Co. v. Redlands, etc. Co., 155 Cal. 323, 327, 100 P. 1082, 1083, 22 L.R.A.,N.S., 382, 17 Ann.Cas. 1222; Fall River Valley Irr. Dist. v. Mt. Shasta P. Corp., 202 Cal. 56, 70, 259 P. 444, 56 A.L.R. 264; Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 215, 287 P. 93, 70 A.L.R. 210.

[3] The electric energy thus generated may be conveyed for use on nonriparian lands. Mentone Irr. Co. v. Redlands, etc., Co., supra.

[4] However a riparian owner has no right to erect machinery requiring for its propulsion more water than the stream furnishes at its ordinary stages and operate such machinery by accumulating the water. Clinton v. Myers, 46 N.Y. 511, 7 Am.Rep. 373; Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. at page 217, 287 P. 93, 70 A.L.R. 210, cited above. Nor may he gather waters of the stream into a reservoir for future use, when it may best suit his convenience, and thus deprive another riparian owner of the use of the waters and service of the stream in their natural condition. Still v. Palouse Irr. & Power Co., 64 Wash. 606, 117 P. 466, 467; Seneca Consol. Gold Mines Co. v. Great Western Power Co., supra, 209 Cal. at page 209, 287 P. 93, 70 A.L.R. 210.

[5] Under the law as announced in these decisions it has been held that the seasonal storage of water in a reservoir—that is, the storage of water during the wet season to be used during the dry season of the year—is not a proper exercise of riparian rights. In the language of the decision last cited where the defendant, a riparian owner, was making such a use of the stream, it was stated (209 Cal. at page 217, 287 P. at page 97, 70 A.L.R. 210): "It is plain, therefore, that the use of the stream by defendant was adverse and not in the exercise merely of a riparian right. The use was as much adverse and could have been as readily enjoined as if the diversion had been to another watershed for use on nonriparian lands." To the same effect is Colorado Power Co. v. Pacific G. & E. Co., 218 Cal. 559, 564, 24 P.2d 495, and many other cases decided by this court. In the Colorado Power Co. case the court emphatically stated (218 Cal. at page 564, 24 P.2d at page 497): "Seasonal storage of water for power purposes is not a proper riparian use, but constitutes an appropriation, so that, if it continued for the time prescribed by the statute of limitations, it will ripen into a prescriptive right."

There is no contention that the storage of the waters of Klamath River by the defendant at its Copco plant is a seasonal storage of said waters. As shown above by the statement of facts in this case, the waters of the river are stored by the defendant in its dam at Copco and used by defendant as needed in the operation of its plants located at that point in the river. They are released by the defendant from its reservoir only when it is operating its plant at Copco Plant No. 1. The condition produced by the operation of the plant at Copco No. 1 is probably best described by the plaintiff C. F. Moore as follows:

"Q. By the way Mr. Moore, are you familiar with the operation of the Copco No. 1 power plant? A. Yes, sir.

"Q. How many years have you been familiar with the operation of that power plant? A. Since 1921.

"Q. And just tell the jury what you have observed; that is, your own experience in going there and watching the operation of the plant? A. Well, the operator is notified by a telephone to pick-up load, or drop load. When they pick-up load, that means to turn the water loose and let it go downstream and when they drop load, they shut up and stop the water.

"Q. Have you been actually present when that operation was taking place? A. I have right in the plants.

"Q. On many occasions? A. On numerous occasions, yes, sir; not of late years, but previous years.

"Q. Now, in 1931 when the river was dry or practically dry at the head of your ditch, to which you have heretofore testified, did you make any investigation of the conditions existing between this Copco No. 1 Dam? A. I have.

"Q. What did you do? A. I visited a number of times with the operators, and saw water backed up above the dam numerous times.

"Q. How near was it to the top of the dam? A. Well, within a few feet.

"Q. Of the top of the dam at Copco No. 1? A. Yes, sir.

"Q. What did you observe with reference to water being backed up above that dam? A. Well, the lake was almost full.

"Q. For what distance could you see water in this lake above the Copco dam? A. I would say two miles and a half or three miles.

"Q. And that was during 1931? A. Yes, sir.

"Q. Were you also there in 1932? A. Yes, sir.

"Q. Was that during the irrigation season? A. It was.

"Q. And what did you observe in regard to conditions existing then with reference to the reservoir or lake being full of water? A. It was full of water.

"Q. At those times what was the condition down at your place with reference to being water in the river at the head of your ditch? A. We had no water.

"Q. Was the channel dry? A. The channel at the head of the ditch was absolutely dry. I drove around the lake when the water was nearly in the road on the north side of the lake.

"Q. And was that during the daytime, Mr. Moore? A. Yes.

"Q. Now, you say you drove around the lake when the water was nearly in the road. Is there a road around that lake. A. Yes, sir; it crosses at the head of the lake.

"Q. And the road follows close to the water did it. A. Yes, sir.

"Q. And when did you do that? A. I did that in 1931 and 1932 both.

"Q. When; during the summer time? A. Yes, sir.

"Q. And what was the condition with reference of there being water in the river at the head of your ditch at that time? A. There wasn't any.

"Q. That is, the river was dry? A. The channel that went by the head of the ditch was dry. There was some water in the east channel."

While this evidence relates particularly to the years 1931 and 1932, the condition under which the defendant released the waters from its reservoir before that date was not materially different from that prevailing during those two years. The record shows that from the time the plant No. 1 at Copco was completed in 1922, the defendant assumed the right to use the entire flow of the stream in the operation of its plant, and under this claim it actually stored and thereafter released all the waters of the stream in the operation of its plants at such times and in such manner as best suited its convenience and its needs.

[6] The manner in which the defendant stored and released the waters of the river at its Copco Plant No. 2 was admittedly a proper riparian use of said waters. Mentone Irr. Co. v. Redlands, etc., Co., supra, and other cases cited. But the storage, retention and use of the waters of the river at Copco No. 1 was radically different from that at Copco No. 2. As we have seen, the waters at Copco No. 1 were retained for an indefinite period of time, and at times when the bed of the river below its plant at Copco No. 1 was dry. Moreover, no water in any substantial quantities was released during the nighttime, nor on Sundays or holidays. As we have seen, it was released to meet the convenience and needs of the defendant in the operation of its plants. Such a use of the waters of a stream deprives the lower riparian owners of their rights to the usual, natural and ordinary flow of the stream.

[7] A riparian owner "has no right to erect machinery, requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by [accumulating the water and] discharging [it] upon those below in unusual quantities * * *." Clinton v. Myers, 46 N.Y. 511, 7 Am.Rep. 373. This case is approved in United P. B. Co. v. Iroquois P. & P. Co., 226 N.Y. 38, 45, 123 N.E. 200, and in Seneca Consol. Gold Mines Co. v. Great Western Power Co., supra, 209 Cal. at page 216, 287 P. 93, 70 A.L.R. 210. Water may never be thus gathered in a reservoir for future use when it may best suit the convenience and use of one riparian owner, and thus deprive other riparian owners of their use and service of the stream in its natural condition, unless such right is exercised by a valid prior appropriation. Still v. Palouse Irr. & Power Co., supra. That case is also approved by the Seneca case, supra, in which the court concludes (209 Cal. at page 217, 287 P. at page 97, 70 A.L.R. 210) that such a "use of the stream by defendant [an upper riparian proprietor] was adverse and not in the exercise merely of a riparian right. The use was as much adverse and could have been as readily enjoined as if the diversion had been to another watershed for use on nonriparian lands." The use of the waters of a stream by a riparian owner upon nonriparian lands is a nonriparian use. In such a case the riparian owner was held to be a trespasser on the rights of the lower riparian owner from the inception of such use. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 334, 88 P. 978, 11 L.R.A.,N.S., 1062.

[8] From the foregoing statements of the law we see no escape from the conclusion that the defendant in the storage and use of the waters of Klamath River at its Copco No. 1 plant was not within its rights as a riparian owner; that such use was a nonriparian use and was adverse to the right of riparian owners. 25 Cal.Jur. 1191, sec. 203.

[9] It has repeatedly been held that the seasonal storage of water is a nonriparian

use thereof; that it is not within the rights of the riparian owner and is adverse to the rights of the lower owner on the stream. While there is no contention that the storage of the waters at the Copco dam comes within the definition of that term, the effect of such storage as is made by the defendant at Copco No. 1 plant upon the rights of lower owners on the stream is similar in practically all respects to that sustained through seasonal storage, and differs only in immaterial respects. The storage by defendant, which is sometimes referred to as periodic storage is often more damaging to the rights of the lower owners than seasonal storage. In seasonal storage, the waters of the stream are stored during times when the water in the stream is abundant and discharged in that part of the year when there is a scarcity of water and often to the advantage of the lower owners. The storage by defendant occurs during the dry season of the year when there is a scarcity of water and when lower proprietors are in greatest need for the waters for use upon their lands. To hold that storage which results on occasions when the bed of the river is dry during the daytime and prevents lower riparian owners of any use of the waters during the nighttime and on Sundays and holidays is a proper riparian use of the stream, while seasonal storage is not, seems both illogical and unreasonable, and contrary to long established principles of law governing the respective rights of owners of water upon a stream.

[10] As the use by the defendant of the waters of the river after its completion of its Copco dam was a nonriparian use of said waters, it was adverse to the rights of the lower riparian owners. This use had its inception at the time the Copco plant was completed and the water was used in the operation by defendant of its power plant located at that point in the year 1922. Such a use of the waters of the stream, when continued for a period of five years openly, continuously and under a claim of right so to do, gave the defendant a right by prescription to the waters of the river to the extent of such use. There is no contention but that the defendant has operated its plant for the required period of time and to the extent and in the manner required by the laws of this state to give it such right.

[11] The law is so well-established in this state as to require no extended citation of authorities that an upper riparian owner may acquire a prescriptive right to the waters of a stream as against a lower riparian owner by an adverse use of said waters for the prescriptive period. Pabst v. Finmand, 190 Cal. 124, 128-130, 211 P. 11; Miller & Lux v. Enterprise C., etc., Co., 169 Cal. 415, 422, 147 P. 567; Mt. Shasta Power Corp. v. McArthur, 109 Cal.App. 171, 292 P. 549.

[12] It is equally well-established that prescriptive rights are stricti juris and should not be extended beyond the actual user. North Fork Water Co. v. Edwards, 121 Cal. 662, 666, 54 P. 69; Strong v. Baldwin, 137 Cal. 432, 440, 70 P. 288; Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 53, 258 P. 1095.

In the case of North Fork Water Co. v. Edwards, supra, the plaintiff had acquired the right to maintain a ditch over and across the lands of the defendant for the purpose of conveying water to a large number of families for domestic and other uses. The course of the ditch was along a hillside. Long after the construction of the ditch plaintiff constructed aprons for the purpose of carrying the storm waters over the ditch and onto defendants' lands upon which the defendants had planted fruit trees. Defendants in order to protect their lands from the storm waters diverted upon their lands by means of those aprons, erected dams below the aprons thus throwing the storm waters into plaintiff's ditch. The action was brought to enjoin the defendants from maintaining said dams, the plaintiff claiming it had acquired a right by prescription to maintain said ditch over and on defendants' lands, and that the right so acquired included the right to construct aprons over their ditch to protect against storm waters flowing from the high lands above. The trial court gave judgment for the defendants, and in affirming the judgment this court held (121 Cal. at page 665, 54 P. at page 70) "The necessity for these aprons is of recent origin, in no wise connected with the origin of the easement. * * * The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former. * * * Rights by prescription are *stricti juris,* and should not be extended *beyond the user* * * * they [the aprons] were in the nature of changes in the mode of enjoyment, and, while they might be made if not harmful to the servient estate, they cannot be made to its material injury." (Italics ours.)

The principle announced in that case was applied to the prescriptive right to the use of waters of a stream, in the case of Scott v. Fruit Growers' Supply Co., supra, 202 Cal. at page 53, 258 P. at page 1097, where it was stated: "Prescriptive rights are *stricti juris* and should not be extended beyond the actual user. North Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69. Since the prescriptive right is limited by the extent of the use which conferred the title, the place of use cannot be changed, where to do so would interfere with the rights of others."

[13] In the present case the defendant after the completion of its Copco dam in 1922, used the waters of the river to operate its plant in such a manner as not to interfere with plaintiffs' use of the waters of the river during the daytime, with certain exceptions. Having so used the waters of the stream for the statutory period of five years, it acquired the right to such use as against the plaintiffs. However this right to so use the waters of the stream must be "limited by the extent of the use which conferred the title" and cannot "be extended beyond the actual user" where such change results in injury to others.

[14, 15] In two decisions of the Circuit Court, we find it stated: "Any person may obtain exclusive rights to water flowing in a stream or river by grant or prescription as against either riparian owners on the stream or the prior appropriation of the water by other parties. But the right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the right." Union Mill & Mining Co. v. Dangberg, 81 F. 73, 91; Anderson v. Bassman, 140 F. 14, 26. Other decisions of this court are in line with those just cited. Northern California Power Co. v. Flood, 186 Cal. 301, 306, 199 P. 315; Pabst v. Finmand, 190 Cal. 124, 134, 211 P. 11; Bazet v. Nugget Bar Placers, Inc., 211 Cal. 607, 616, 296 P. 616; see, also, 25 Cal.Jur. 1178.

In the case of Northern California Power Co. v. Flood, supra, 186 Cal. at page 304, 199 P. at page 316, we find this significant language: "The right to the use of waters of a stream may be acquired, as against others entitled thereto, by taking and beneficially using the same adversely and continuously under a claim of right for a period of five years. But in such a case the right, with respect to the quantity of water therein, extends only to the quantity actually put to a beneficial use. * * * In order to gain a right to the water the diverter must actually use it, and the *quantity used measures the extent of his right.*" (Italics ours.)

[16] While the defendant after the completion of its Copco dam used all the waters of the river in the operation of its plants, its use of said waters was such that ample water for irrigation purposes ran down to plaintiffs' lands until the year 1931. The quantity of the water used during that period of time may have been the same as that subsequently used, and of course it was, as in all years the defendant used all the waters of the river, but the manner of its use was not the same as before 1931. This change in the manner of use resulted in as great an injury to plaintiffs' rights as if the whole quantity of water had been diverted from the stream, as, under the conditions prevailing in 1931 and thereafter, plaintiffs were unable to use any of the waters of the river for irrigation purposes. As the injury to plaintiffs' rights to the use of the waters during the daytime did not begin until the year 1931, some two years before this action was begun, plaintiffs' action therefore was not barred by the statute of limitations.

Before concluding this opinion, however, we deem it proper to answer some of the main contentions of the defendant in support of the judgment.

Defendant's first contention that its prescriptive right was perfected in 1927, five years after the completion of its Copco No. 1 plant in 1922, has virtually been answered by what we have already stated. It is true it gained certain prescriptive rights by the use to which it put the waters of the stream for the five year period just prior to 1927. But, as we have seen, these prescriptive rights did not include the right to change the conditions under which it acquired those prescriptive rights. There is substantial evidence in the record that up to that year the plaintiffs and their predecessors in interest received sufficient water from the stream and under conditions which enabled them to properly irrigate their riparian lands. This right as we have shown continued up to the year 1931, some two years prior to the commencement of this action. Defendant has not shown any prescriptive right to use the waters of the river under the conditions which the evidence shows that it has used them beginning with the year 1931.

[17] The next contention is that the use of the waters of a stream is adverse to the rights of a lower riparian owner's rights whether or not he is damaged. A number of authorities are cited in support of this contention. The cases cited are all in actions in which injunctive relief was asked and we are in thorough accord with the rulings contained therein. But our attention has not been called to any authority holding that damages may be awarded a riparian owner of lands for an interference with his riparian rights without proof on his part that he has actually been damaged by reason of such interference.

In the case of Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.2d 790, a lower riparian owner on the stream asked for an injunction against defendant restraining it from diverting the waters of the stream. The court held that the defendant had devoted the waters continuously to a public use and denied an injunction. Plaintiff then contended that as the defendant had taken his property for a public use, that is, had interfered with his riparian right, he was entitled to damages in the difference between the market value of his property with and without this property right. In mitigation of damages the defendant stipulated and agreed to provide plaintiff and make available for his land such amount of water as would be reasonably required by plaintiff for irrigation purposes and to make such stipulation a part of the decree of the court in that action. The question of damages was tried by a jury under proper instructions by the court. The jury returned a verdict in favor of the defendant. The judgment based upon the verdict was affirmed. In that case the riparian rights of the plaintiff were decidedly interfered with. In fact they were practically lost to him. Yet this court held that he had sustained no damage as he was receiving all the waters of the river required for the irrigation of his lands. In the present action the plaintiffs, or at least their predecessors in interest, could have maintained an action for damages, if brought within the required period of time after the completion of the Copco dam in 1917, sustained by them for the loss of the use of the waters of the river during nighttime and on Sundays and holidays, if the waters were needed for irrigation purposes on their riparian lands. They could not in such action have recovered damages for loss of any further injury as they were then receiving all the water during the daytime required for the irrigation of their riparian lands. It was not until the year 1931 when the defendant so operated its plant as to interfere with plaintiffs' use of the waters of the river during the daytime that plaintiffs were damaged by reason of this loss of the service of the water during the daytime. As we have before stated our attention has not been called to any case or other authority wherein it was held that a lower owner of the stream in an action for *damages only* was entitled to recover for any act of an upper user of the stream in the absence of proof that he had actually been injured by such acts of the upper user.

The next contention of the defendant is included in its discussion of the "Extent of Defendant's Prescriptive Right."

[18] Defendant takes the position that, having gained a prescriptive right to use the waters of the river for the operation of its Copco plant, this right extends to the entire flow of the stream and is not limited by any rights of lower owners. In other words, it contends that having gained the right to use and regulate the stream in the operation of its plant for a period of five years or more, during which time it permitted sufficient water to run down the stream to properly irrigate the lands of the plaintiffs, it may, after the lapse of said period of limitations, so change the extent and manner of its use of said waters as to deprive the plaintiffs of all waters used by it previous to said change. In our opinion the position of defendant is untenable. Previous to the year 1931 the defendant's use of the waters of the river did not interfere with the plaintiffs' use of the stream for the purpose of irrigating their lands during the daytime. As we have shown, rights by prescription are strictly construed against the claimant and should not be extended beyond the actual user, and they are limited by the use which conferred the title. A person claiming title by prescription gains no title to the property claimed beyond his actual use of the property. The extent of the enjoyment measures the right. (See authorities previously cited above). In the present case as shown above the defendant so used the waters of the river up to the year 1931 as not to interfere with the plaintiffs' use thereof for the irrigation of their lands during the daytime. Therefore its prescriptive right to the waters of the stream was limited by that of the plain-

tiffs as herein set forth. There is nothing in the case of Crum v. Mt. Shasta Power Corp., 220 Cal. 295, 310, 30 P.2d 30, contrary to this conclusion. In that case it was held that a public utility could not place any limitation upon its use of the waters of a stream, which had been theretofore devoted to a public use without the consent and approval of the railroad commission. The defendant in the instant action never acquired the right to the entire use of the stream until the year 1931. Before that year its rights in the stream were subject to plaintiffs' right to the use of the stream for daytime irrigation. No limitation was ever placed on defendant's original right by holding it subject to plaintiffs' right, for the reason that defendant's use of the stream was from its inception subject to certain rights of the plaintiffs until their loss in 1931. While plaintiffs could not restrain that use, their action for damages for the loss of their rights would not be barred until the expiration of at least five years thereafter. Nor do we find anything inconsistent with our conclusion in the case of Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93, 70 A.L.R. 210, heretofore cited. In that case it was held reading from one of the head notes [7] "The diversion of the whole stream during the time of the influx of tributaries below the dam of the defendant and above plaintiff's land, in such a case, would not injure plaintiff where its quota of water was not disturbed * * *."

[19] Defendant makes the further contention that there is no evidence of any change in its facilities or method of operation in 1931 and subsequent years and that any damage to plaintiffs' property was due not to any act of defendant, but to the water shortage especially in the year 1931. It may be true that there is no direct evidence showing that there was any change in defendant's facilities used in the operation of its plant in 1931 and subsequent years, from those employed in previous years. There must have been however, some radical change in its method of operation beginning with the year 1931, as there is substantial evidence to support the implied finding of the jury that, prior to that year, the irrigation rights of plaintiffs and their predecessors in interest, except during the nighttime and on Sundays and holidays, were to no material extent interfered with by the operation of defendant's plant, but that, beginning with the year 1931, and continuing during subsequent years, plaintiffs were unable to obtain practically any water from the river to irrigate their lands. We think the evidence shows that this result during the year 1931 was largely due to the extremely light rainfall during that year and the corresponding shortage of water in the river. Yet there is evidence that during the year 1931 as well as in subsequent years there were substantial fluctuations in the water as it reached plaintiffs' property which materially contributed to plaintiffs' inability to secure the necessary amount of water for use upon their lands. These questions were all given consideration in a previous part of this opinion and we think need not be further discussed.

[20] Finally, defendant contends that the taking of the water right belonging to the lands of plaintiffs occurred prior to plaintiffs' acquisition of said lands. This contention is based upon the assumption that the taking of the waters of the river by the defendant, a public utility, was when the Copco dam was completed in 1922, some years prior to the acquisition of any interest in said lands by the plaintiffs. This contention to some extent we think has been sufficiently answered by what has been said in the previous parts of this opinion. The damages for which plaintiffs instituted this action to recover were based upon the taking in 1931 of the daytime riparian right to the waters of the stream. The evidence shows that while plaintiff, C. F. Moore, entered into possession of said lands under a contract to purchase the same some years prior to 1931, the deed given in pursuance to the terms of the contract was delivered to him on June 10, 1931. This was practically at the beginning of the irrigating season of that year. Defendant does not seriously contend that plaintiffs had not acquired the property in 1931, nor that they were not the owners thereof in subsequent years. Plaintiffs were therefore the owners of the lands at the time of the "taking of the water right" which occurred during their ownership.

The judgment is reversed with direction to the trial court to enter judgment for the plaintiffs upon the verdict of the jury.

GIBSON, C. J., SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., and SPENCE, Justice pro tem., concurred.

Rehearing denied; CARTER, J., not participating.

22 Cal.2d 713

MATHER v. MATHER et al.

L. A. 17608.

Supreme Court of California.

Aug. 27, 1943.

1. Judgment 🔑326

Where trial court had made findings that defendant was entitled to but a one-half interest in a certain claim, the entry of judgment "nunc pro tunc" adjudging defendant to be the owner of the whole of the claim was erroneous and not authorized under court's statutory power to amend or change conclusions of law. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Nunc Pro Tunc".

2. Judgment 🔑273(8)

Where notice of defendant's motion for entry of final judgment nunc pro tunc was given by mail and only ten days intervened between day fixed for hearing and day notice was mailed in Los Angeles to plaintiff's counsel in San Francisco, the notice was insufficient and court was without authority to act upon the motion. Code Civ.Proc. §§ 473, 1013.

3. Judgment 🔑273(8)

A ruling directing entry of a judgment nunc pro tunc pursuant to motion became of no effect where the court, in rendering the judgment, simply dated judgment as of the day filed. Code Civ.Proc. § 473.

4. Judgment 🔑273(1)

There was no basis for a "nunc pro tunc" entry of judgment where the antedating was not for the preservation of the fruits of the litigation which would otherwise be lost to the prevailing party, or for the correction of a deficiency in recordation of a previous decision. Code Civ.Proc. § 473.

5. Judgment 🔑271

The entry of a final judgment, after findings on two counts and after decision on appeal from order sustaining demurrer to third count, to complete judgment roll in effectively disposing of all issues by a single pronouncement as to the entire case, should be rendered by the judge who tried the cause, if available.

6. Appeal and error 🔑82(1)

An order granting entry of judgment nunc pro tunc, being an intermediate ruling of the court, is not appealable.

7. Appeal and error 🔑113(2)

An appeal will not lie from order denying motion to vacate nunc pro tunc judgment on grounds existing before entry thereof and available on appeal therefrom.

8. Appeal and error 🔑113(2)

Appellants' attempt to appeal from order refusing vacation of the judgment merely constituted a repetition of appeal from the judgment.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

On rehearing.

Judgment reversed and appeals from order dismissed.

For prior opinion, see 134 P.2d 795.

Marcel E. Cerf, Robinson & Leland, and Roger A. Bramy, all of San Francisco, for plaintiff and appellant.

Gavin McNab, Schmulowitz, Aikins & Wyman, of San Francisco, for defendants and appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

PER CURIAM.

Plaintiff and certain defendants appeal from a final judgment, from an order granting a motion for entry thereof nunc pro tunc, and from an order denying a motion to set aside such judgment and the order granting entry thereof.

The facts necessary to a correct understanding of the respective positions of the parties involved may be chronologically recorded as follows:

On August 3, 1934, the plaintiff commenced this action for rescission of a certain property settlement made between himself and his former wife, the defendant Anna Inez Mather. The complaint contained three counts for the relief sought: the first two were based upon fraud and misrepresentation, and the third rested upon the alleged invalidity of the property settlement because of its having been made in the Territory of Hawaii at a time when, according to plaintiff's pleading, the laws of that jurisdiction did not permit a married woman to contract with her husband. The other defendants here appealing were joined in the action as administrators of the estate of Louis R. Greenfield, deceased, against which it was alleged plaintiff held an approved claim with an unpaid balance of $38,699, together with accrued interest. Part of the property transferred to the defendant Anna Inez Mather under the aforesaid settlement was a one-half interest in this claim. These defendant administrators filed an answer to the complaint herein to the effect that they held on account of the claim in question, and for whom it might concern, the sum of $12,549.60; and that various assignments and notices of assignment had been served upon them affecting the said fund, the defendant Anna Inez Mather, also known as Dorothy Devore Mather, being among the claimants thereto. The defendant administrators then averred in their answer that they were holding the said sum subject to the order and direction of the court, and they asked that they might be dismissed with their costs and released from all further liability toward the parties to the action and toward all claimants to the fund. This answer was in the nature of an interpleader.

Successive demurrers were effectively interposed to the third count of the complaint, and finally on December 24, 1934, after it had been thrice restated, a demurrer was sustained without leave to amend further. On January 4, 1935, and before trial of the other counts, a purported judgment was entered to the effect that the plaintiff take nothing by his third amended third cause of action. On February 7, 1935, plaintiff filed a notice of appeal from this purported judgment.

On February 18, 1935, the cause as to the first and second counts proceeded to trial, and at the termination thereof the court made findings against the plaintiff and in favor of the defendant Anna Inez Mather. Among other facts, the court found that the plaintiff assigned and transferred to the defendant Anna Inez Mather a one-half interest in his title to the approved claim against the above mentioned Greenfield estate. As its conclusions of law the court decreed that plaintiff should take nothing by reason of his complaint, that the answering defendants should have their costs, and that a temporary injunction theretofore allowed in the action should be and was dissolved. This injunction had served to restrain the estate in question and the administrators thereof from paying any further moneys to the defendant Anna Inez Mather under the assignment made by plaintiff of the one-half interest in his claim against the said estate. The findings of fact and conclusions of law were filed March 12, 1935. Judgment was then entered on March 14, 1935. However, this last document omits any reference to the previous disposition of the third count upon demurrer and on its face purports to be merely a judgment entered upon the findings and conclusions of the court at the close of the trial of the first and second counts of the complaint. Notice of appeal from this purported judgment was filed by the plaintiff on March 15, 1935.

The record discloses that the appeal from the "judgment" on the first and second counts of the complaint was dismissed by this court on September 10, 1935, "for failure to file a transcript within the required time"; and that the "purported" appeal from the "judgment" on the third count was dismissed by this court on March 17, 1936, "on the ground that the judgment was not final, and therefore not appealable." Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174. On December 7, 1939, defendants Anna Inez Mather and Lessie G. Williams (an interested party under the aforementioned property settlement) made a motion for entry of a final judgment nunc pro tunc as of March 14, 1935, which motion was granted and such a judgment was so entered on December 12, 1939. It is from this judgment that the appeal herein is taken, as well as from the order granting the motion to enter such judgment and from the order denying the motion to set said judgment aside.

A basic point to be noted in consideration of the procedural history of this litigation is the status of the two 1935 "judgments" as declared by this court in prior opinions: Mather v. Mather, supra, and Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100. Both decisions held in substance that the entry of such successive separate judgments constituted but piecemeal disposition of a single and unseverable cause, that the judgments in question were partial not final, and were nonappealable. The case of Greenfield v. Mather, supra, was an action in interpleader commenced by the estate of Greenfield to try the issue as to the respective rights of A. W. Mather, appellant herein, and his former wife, sued therein as Dorothy Devore Mather, respondent on this appeal, to the aforementioned sum of $12,549.60. In that proceeding said husband and wife joined issue by cross-complaints and answers. Under their respective pleadings the validity of the property settlement as executed in Hawaii, a point involved in the present action, became the determinative factor. Specifically illustrative of this court's viewpoint that no final judgment was ever entered in the present action, though, according to the record, the trial court had made disposition of the issues, including the matter raised upon demurrer, by responsive rulings and findings, is the discussion of the situation as presented in the interpleader proceeding. In reversing therein by decision of August 21, 1939, the judgment entered in favor of the wife's claim to the fund involved upon the theory that the matter in issue was res judicata by virtue of the entry of the judgment of March 14, 1935, in the present action, this court stated at page 233, 14 Cal.2d, at page 103 of 93 P.2d of its opinion:

"Obviously that judgment [March 14, 1935] was in no better position than the judgment of January 4th. It disposed of the first two counts of the complaint, whereas the latter judgment disposed of the third count thereof. The reasoning which this court employed in determining the character of the one judgment (Mather v. Mather, supra) is equally applicable to fix the character of the other.

"The fact that the judgment of March 14th was the second judgment to be entered did not cloak it with finality because it did not purport to embrace a final disposition of the entire cause. By express terms it was confined to only counts 1 and 2, and erroneously failed to include a recital with respect to the disposition of count 3. It did not affect count 3. The appeal from the purported judgment on that count was pending; that purported judgment, being void, was in effect no judgment. Therefore, if count 3 in fact stated a cause of action, that cause remained pending in the trial court after the entry of the judgment on counts 1 and 2."

Appellants' challenge of the propriety of the "final judgment" rests principally upon two grounds: Its change of the findings and conclusions previously rendered by another trial judge, and its entry upon insufficient notice. The record indubitably sustains appellants' claims as to both propositions, and accordingly the discussion of other points raised by the parties in connection with the appeal from the assailed judgment becomes unnecessary.

[1] By the judgment in question, entered in this action on December 12, 1939, it was adjudged that plaintiff take nothing by his complaint or any of the counts thereof; that the injunction theretofore issued should be dissolved as of February 27, 1935; that the answering defendants Anna Inez Mather and Lessie G. Williams have their costs; and that the Greenfield estate and its administrators pay to Anna Inez Mather the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court. To the extent of the latter provision, this judgment is clearly at variance with the combined rulings of the trial court upon the order sustaining the demurrer to the third count and the findings of fact made upon the first two counts. While, as heretofore indicated, the "judgment" of March 14, 1935, rendered at the conclusion of the trial on counts one and two of plaintiff's complaint, did not contain any express direction that the Greenfield estate pay the money held by it on account of the claim in question and previously deposited in court, it was explicitly found by the court at that time that Anna Inez Mather had but a one-half interest in said claim. In contrast to this plain finding, the judgment here on appeal purports to award her the *entire* amount of the claim. While "where findings are filed, *which constitutes the rendition of judgment,* it has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment, and *such change may be made by a judge other than the one who tried the cause*" (14 Cal.Jur. 938, and cases there cited; italics ours), such authorized amendment or change obviously is not involved here. The judgment, being based upon a finding that Anna Inez Mather was the owner of one-half of the claim against the Greenfield estate, is erroneous in adjudging her to be the owner of the whole of said claim. Such condition of the record precludes affirmance of the judgment as a proper termination of this litigation.

[2] Moreover, an appropriate disposition of this entire cause would require that the two purported judgments of 1935 be expunged from the record "on motion of either party after notice to the other party." Code Civ.Proc. sec. 473; Mather v. Mather, supra; Greenfield v. Mather, supra. Appellants' objection to respond-

ents' disregard of this preliminary procedural step in effecting the entry of the "final judgment" in this case is predicated upon the following facts: Appellants' respective counsel reside in and maintain offices in the city of San Francisco, while respondents' counsel reside in and have their office in the city of Los Angeles. Notice of respondents' motion for entry of the judgment was given by mail, and only ten days intervened between the date the notice was mailed to opposing counsel and the day fixed for the hearing of the motion. It is apparent that the notice was insufficient. Code Civ.Proc., sec. 1013. Consequently, the trial court was without authority to act upon respondents' motion.

In view of the foregoing discussion it becomes immaterial that the judgment here in question, intended to be presently operative according to its express terms rather than to have an anterior effect, was not entered in conformity to the trial court's direction but "nunc pro tunc as of March 14, 1935."

[3-5] However, in clarification of the apparent confusion of the parties as to the status of the record in this connection, it might be said that while, as above recited, respondents had applied for a nunc pro tunc judgment and the trial court had so ordered pursuant to their motion, such ruling became of no effect in view of the court's subsequent action in rendering a judgment dated simply "Dec. 11, 1939." Nor would there appear here to be any basis for a nunc pro tunc entry of the judgment—the only grounds for such antedating being the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party or the correction of a deficiency in the recordation of a previous decision so as to express the true intention of the court as of the earlier date and thus conform to verity. Freeman on Judgments, fifth ed., vol. 1, §§ 122–124, pp. 222-229; ibid, § 145, et seq., p. 281, et seq.; 14 Cal.Jur. §§ 40, 41, pp. 931–935; Osmont v. All Persons, 165 Cal. 587, 133 P. 480. In the present case, as indicated by the above quotation from the opinion in the related interpleader proceeding, Greenfield v. Mather, supra, the entry of a judgment properly responsive to the prior rulings of the trial court herein—the findings made at the conclusion of the trial on the first two counts and the order sustaining the demurrer to the third count of the complaint—would simply serve to complete the judgment roll in effectively disposing of all the issues in controversy by a single pronouncement of decision as to the entire case. It might further be added that, while not required, the rendition of such judgment by the judge who tried the cause—providing that he is available at the desired time to so act—would be more consistent with sound legal practice.

[6-8] The remaining points to be considered require but brief comment. The order granting entry of judgment nunc pro tunc, being an intermediate ruling of the court, is not appealable. As to the order denying the motion to vacate the judgment, under the settled law of this state an appeal will not lie from such order if the grounds upon which the moving party sought to have the judgment vacated existed before the entry of the judgment and were available on appeal therefrom. Lawson v. Guild, 215 Cal. 378, 381, 10 P.2d 459; Barry v. Learner, 113 Cal.App. 651, 653, 299 P. 82; Barker v. Ackers, 29 Cal.App.2d 162, 176, 84 P.2d 264; 2 Cal.Jur. 164. It is obvious that appellants' attempt to appeal from the order refusing vacation of the judgment merely constitutes a repetition of their appeal from the judgment.

The judgment appealed from is reversed, and the attempted appeals from the two orders hereinabove considered are dismissed.

CARTER, Justice.

I concur in the judgment of reversal but I cannot refrain from calling attention to the fact that the somewhat muddled situation in this case is due to the obviously erroneous decision of this court in the case of Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, where it was held that the judgment rendered by the Superior Court of Los Angeles County on March 14, 1935, in the case of Mather v. Mather was void. In my opinion said judgment was not void, but was a valid final judgment and not subject to collateral attack. However, the decision of this court in the case of Greenfield v. Mather, supra, is now final, and said decision, even though erroneous, is res judicata as to the invalidity of said judgment, and is binding upon the parties to this appeal. 3 Am.Jur. 700. This being so, there is no escape from the conclusion reached in the majority opinion in the case at bar.

A review of the litigation between the parties to this action reveals that prior to

1934, Mr. and Mrs. Mather entered into an agreement while in Hawaii under which property possessed by them was transferred to Mrs. Mather. Thereafter Mr. Mather commenced an action in California against Mrs. Mather for the return of the property. The action was stated in three counts or causes of action, but all demanding the same relief, to-wit: restoration of the property, money judgment and cancellation of assignment. By counts one and two, Mr. Mather sought rescission of the agreement and return of the property because of misrepresentation, conspiracy and fraud; the third count pleaded the invalidity of the agreement under the law of Hawaii. Greenfield v. Mather, 14 Cal.2d 228, 230, 93 P.2d 100. Mrs. Mather's demurrer to the third count was sustained without leave to amend, and on January 4, 1935, a judgment (hereinafter referred to as first 1935 judgment) was entered to the effect that plaintiff take nothing by the third cause of action. An appeal was timely taken from that judgment. The action was thereafter tried on the first and second causes of action resulting in a judgment on March 14, 1935 (hereinafter referred to as second 1935 judgment), to the effect "that plaintiff (Mr. Mather) take nothing by his complaint, or by first and second counts thereof." Mather v. Mather, 5 Cal.2d 617, 618, 55 P.2d 1174. Mr. Mather appealed from that judgment and the appeal was pending when the action, which was the basis of the 1938 judgment (hereinafter referred to) was commenced, but was apparently dismissed before trial. That appeal was dismissed in September, 1935, for failure to file a transcript. Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100. The remittitur was later amended to read that the appeal from the judgment on the first and second counts was dismissed. The appeal from the first 1935 judgment was dismissed on March 17, 1936, on the ground it was not a final judgment and hence was not appealable. Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174. The court stated in the cited case that: "It is at once apparent that no final judgment was entered in the action until March 14, 1935." (Italics ours.) This carries the clear implication that the judgment of March 14, 1935, was a final judgment. It was held to be dictum however, in Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100.

The Greenfield estate being confronted with conflicting demands for an interest therein by both Mr. and Mrs. Mather, commenced an action in interpleader against them. Mrs. Mather claimed the property of the estate by virtue of the agreement considered in the first and second 1935 judgments. Mr. Mather asserted the agreement was not binding because a husband and wife could not so contract in Hawaii (the issue raised in the third count in the first 1935 judgment) and asked for a cancellation to which Mrs. Mather countered by pleading the first and second 1935 judgments as res judicata on the validity of the agreement. The trial court held the second 1935 judgment to be res judicata. (Greenfield v. Mather, 14 Cal.2d 228, 230, 93 P.2d 100, 101), and gave judgment for Mrs. Mather (hereinafter referred to as 1938 judgment). On Mr. Mather's appeal this court reversed that judgment stating that: "Admittedly that action (the 1935 action) presented the identical issue raised by the pleadings herein with respect to the validity of the * * * agreement." It proceeded upon the theory that the first 1935 judgment was void and that therefore the second 1935 judgment was also void. That would leave the action resulting in the 1935 judgments still pending. Whether this court might have reached the same result by proceeding upon the theory that the first judgment was not a judgment at all on the third count and the second judgment was limited to the first and second counts which were based on fraud, and hence, the issue as to the validity of the agreement by reason of the Hawaii law (the third count) had never been adjudicated, will be discussed later herein.

After the foregoing events had transpired, and on December 7, 1939, defendant, Mrs. Mather, made a motion in the action which was the basis of the 1935 judgments, for entry of a final judgment nunc pro tunc therein as of March 14, 1935. The motion was granted, and the instant appeal by plaintiff, Mr. Mather, was taken therefrom. The majority opinion reverses that judgment on the ground that the findings which were the basis of the second 1935 judgment were changed upon a motion made without sufficient notice thereof. This leaves the 1935 action still open and with no judgment having been entered therein.

The decision of this court in Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, viewed as holding that both the 1935 judgments were void, is not correct. At most those judgments were merely irregular.

The first judgment being irregular because prematurely rendered and the second because it failed to adjudicate the third cause of action, hence, splitting plaintiff's action. Generally, a premature judgment is not void, it is merely erroneous. In re Newman, 75 Cal. 213, 16 P. 887, 7 Am.St.Rep. 146; see Haley v. Amestoy, 44 Cal. 132; McGrath v. Langford, 35 Cal.App. 215, 169 P. 424; California C. C. Co. v. Crescent City etc. Co., 30 Cal.App. 619, 621, 159 P. 209; May v. Hatcher, 130 Cal. 627, 63 P. 33; Gray v. Hall, 203 Cal. 306, 265 P. 246. And such judgment is not subject to collateral attack. Estate of Hancock, 156 Cal. 804, 106 P. 58, 134 Am.St.Rep. 177; Alderson v. Bell, 9 Cal. 315; Whitwell v. Barbier, 7 Cal. 54. The cases of De Vally v. Kendall de Vally etc. Co., Ltd., 220 Cal. 742, 32 P.2d 638; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; and Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 20 P.2d 129, cited in the Greenfield case do not hold that the judgment is void.

An attack on a judgment when it is pleaded as res judicata is a collateral attack and a judgment is res judicata even though erroneous. 15 Cal.Jur. 104. The attack on the 1935 judgments in the 1938 action was therefore collateral and not effective unless the judgment was void. But even assuming that the first 1935 judgment was a nullity, it cannot be said that the second 1935 judgment was also a nullity or that it was not final. The most that could be said of it is that it failed to dispose of all the issues; that is, the effect of the order sustaining the demurrer to the third count without leave to amend, or that it was a disposal of litigation piecemeal. A judgment may be erroneous where it fails to dispose of all of the issues, but it is final, and res judicata, and is not void or subject to collateral attack, which as we have seen was the nature of the attack in the 1938 action. Stark v. Coker, 20 Cal.2d 839, 129 P.2d 390. Splitting of actions is not jurisdictional and may be waived; if the defendant does not object, the judgment is binding upon him. 1 Cal.Jur. 370. If plaintiff has several grounds for the cancellation of an agreement and urges only one, a judgment against him is res judicata as to the others. Rest. Judgments, sec. 63. Hence, if in the 1935 action Mr. Mather had not raised the ground for cancellation of the agreement specified in his third count, the judgment would have been res judicata upon it. He is no better off by having raised it coupled with an order sustaining the demurrer to it without leave to amend. Assuming the judgment entered on that order was a nullity, still he could have asserted error in the order sustaining the demurrer on his appeal from the second 1935 judgment. 2 Cal.Jur. 823, 824.

Viewing Greenfield v. Mather, supra, as holding that there was no final judgment in the 1935 action rather than that the judgments were void, the result should be the same. As we have seen, a judgment need not necessarily dispose of all of the issues to be final. But that would leave the issue on the third cause of action in the 1935 action still pending. It cannot, however, be said that it was not passed upon inasmuch as the order was made sustaining the demurrer thereto. While it is true that ruling could have been changed by the trial court, it did not do so. The preferable view is that the two 1935 judgments were in effect one judgment which became effective when the second judgment was entered.

This case presents a regrettable situation affecting both parties to this litigation. After approximately ten years of litigation the parties appear to be no closer to a final determination of their controversy than when the action was commenced. The merits of the controversy have not yet been passed upon by an appellate court. The case now goes back to the trial court to correct mere procedural errors which obviously could have been corrected on appeal from the judgment of March 14, 1935. That judgment became final upon the dismissal of the appeal therefrom for failure to file a transcript, and should have been upheld as res judicata in the case of Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100. The clearly erroneous decision of this court in holding to the contrary in the last cited case is the cause of this travesty on justice, but as stated at the beginning of this opinion, the decision of this court in that case is now final, and is res judicata on the issues determined thereby even though erroneous. 15 Cal.Jur. 104.

BEELER v. AMERICAN TRUST CO.

Sac. 5386.

Supreme Court of California.

Aug. 27, 1943.

Rehearing Granted Sept. 23, 1943.

1. Mortgages 🔑38(2)

Though a deed purporting to convey land absolutely in fee simple may be shown by parol evidence to be a mortgage, clear and convincing evidence is required to establish such fact.

2. Appeal and error 🔑1011(1)

Whether evidence offered is sufficiently clear and convincing to warrant holding that a deed purporting to convey land absolutely in fee simple was intended to be a mortgage is a question for trial court, whose determination in such respect upon conflicting evidence is not open to review on appeal.

3. Mortgages 🔑38(1)

In grantor's action to have a deed absolute in form declared an equitable mortgage, evidence was sufficiently clear and convincing to sustain finding that deed was intended to be a mere mortgage to secure an antecedent debt.

4. Mortgages 🔑38(1)

Evidence that land conveyed to mortgagee in satisfaction of mortgage debt which had been reduced to $60,000 was actually worth $135,000 was a strong circumstance tending to show that deed was intended to operate as a mortgage and not as an absolute conveyance.

5. Mortgages 🔑38(1)

That lease and option to repurchase land purportedly conveyed to mortgagee in satisfaction of mortgage debt provided for annual rental of $3,000, which was equivalent to interest on mortgage debt at rate of five per cent per annum, whereas annual rental value of property was more than $7,500, was a strong circumstance tending to show that purported rental was in reality an interest payment and consistent with the character of transaction as a loan.

6. Mortgages 🔑38(5)

That mortgagee retained possession of notes secured by trust deed after recordation of deed by which mortgagor's grantee purportedly conveyed land to mortgagee in satisfaction of mortgage debt tended to show that deed to mortgagee was intended to operate as a mortgage and not as an absolute conveyance, though notes bore endorsement to effect that mortgagee had acquired title by deed and that notes were cancelled.

7. Mortgages 🔑38(1)

Where mortgagee retained possession of notes secured by trust deed after recordation of deed by which mortgagor's grantee purportedly conveyed land to mortgagee in satisfaction of debt, mortgagee's bookkeeping entries designed to show full payment of debt and indorsements on notes to effect that mortgagee had acquired title by deed and notes were canceled were of no effect in determining whether deed to mortgagee was intended as an absolute conveyance or as a mortgage.

8. Mortgages 🔑38(1)

That mortgagor's grantee, after purportedly conveying land to mortgagee in satisfaction of mortgage debt and while in possession under lease and option to repurchase which required him to make ordinary repairs, expended $3,000 in replacing permanent improvements destroyed by a flood following conveyance, sold trees from land with mortgagee's approval, retained proceeds without objection, and executed two leases of portions of land and assigned them to mortgagee in payment of rental and tax installments, tended to show that deed to mortgagee was intended as a mortgage and not as an absolute conveyance.

9. Mortgages 🔑32(2, 3)

In determining whether a deed absolute in form conveys fee-simple title absolutely or operates as a mortgage, the intention of the parties must govern, and, if deed is made to secure the payment of a debt, it is a "mortgage" no matter how strong the language of deed or of any instrument accompanying it may be.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

10. Mortgages 🔑37(2)

Grantor's affidavit that contemporaneously executed deed was an absolute conveyance and not intended as a mortgage did not preclude proof that deed was intended as a mortgage to secure an antecedent debt.

11. Mortgages 🔑32(3)

Every conveyance of realty made as security for the performance of an obligation is in equity a "mortgage" regardless of the form in which it is made.

12. Mortgages ⚷32(2)

In determining whether a deed was intended as an absolute conveyance or a mortgage, equity in order to prevent fraud will consider all the facts of transaction, conduct of parties thereto, their declarations against interest, and their relations to one another and to the subject matter and will carry out the true intent of the parties. Civ.Code, §§ 2924, 2925.

13. Mortgages ⚷297

Though mortgagee may become purchaser of the equity, the relations of the parties are such that transaction, by which mortgagor purportedly conveys mortgaged realty absolutely to mortgagee, will be carefully scrutinized to prevent effectuation of a device whereby debtor under the force of necessitous circumstances is deprived of his right of redemption. Civ.Code, §§ 2924, 2925, 2889.

14. Appeal and error ⚷173(6)

Where lack of consideration for agreement to reduce mortgage debt was not pleaded in action to have a deed absolute in form declared an equitable mortgage and case was tried on other issues, the question of lack of consideration could not be raised for the first time on appeal.

15. Interest ⚷50

Where equitable mortgagor in possession of mortgaged premises under lease and option to repurchase, which required him to pay taxes thereon, in good faith and with ability to perform offered in June, 1939, to pay delinquent first installment of 1937–1938 taxes and mortgagee rejected offer, mortgagee, though entitled to reimbursement to extent of payment of first installment of taxes, was not entitled to interest thereon after such offer. Civ. Code, § 1485.

16. Compromise and settlement ⚷23(3)

In action to have deed absolute in form declared an equitable mortgage, conflicting evidence sustained finding that mortgagor's assignment of a lease of part of mortgaged premises was accepted by mortgagee, not as security for, but in full payment of interest on mortgage debt and second installment of taxes on mortgaged premises and discharged mortgagor's liability therefor.

17. Appeal and error ⚷1122(2)

Where trial court, in action to have deed absolute in form declared an equitable mortgage, inadvertently failed to make a finding with respect to mortgagee's right to reimbursement for taxes paid on mortgaged premises and there was no question as to validity of mortgagee's claim for reimbursement, Supreme Court had jurisdiction to supply omitted finding and modify other findings and conclusions of law. Code Civ.Proc. § 956a.

18. Interest ⚷50

Where equitable mortgagor in good faith offered to pay mortgage debt before maturity and was ready and able to pay, mortgagee's refusal to negotiate with mortgagor, though not objecting to form of tender or questioning mortgagor's ability to perform, suspended the running of interest upon indebtedness from date of offer. Civ.Code, §§ 1496, 1501, 1504.

TRAYNOR and EDMONDS, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Tehama County; Herbert S. Gans, Judge.

Action by C. W. Beeler against American Trust Company to have a deed absolute in form declared an equitable mortgage, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Judgment modified and, as modified, affirmed.

For prior opinion, see 129 P.2d 13.

Brobeck, Phleger & Harrison and M. B. Plant, all of San Francisco, and Carr & Kennedy, of Redding, for appellant.

McGregor, McGregor & McGregor, of Santa Barbara, McGregor & McGregor and H. S. Clewett, all of Paradise, and Carter, Barrett, Finley & Carlton, Daniel S. Carlton, and Oliver J. Carter, all of Redding, for respondent.

CURTIS, Justice.

The defendant, American Trust Company, appeals from an adverse judgment holding that a deed absolute in form was in fact an equitable mortgage. The principal contention presented by the defendant bank as a basis for a reversal of the judgment is the familiar claim that the evidence is insufficient to justify the conclusion of the trial court. As a related consideration, it is particularly urged that a verified affidavit of the grantor declaring the contemporaneously executed deed to be an absolute conveyance of the property, and not intended as a mortgage, is a conclusive expression of the understanding between the parties and precludes the admissibility of parol evidence to the contrary.

The facts and circumstances surrounding the transaction out of which this controversy arose appear to be substantially as follows: Prior to July 28, 1937, Henry Weiss owned a large tract of land in Tehama County subject to a deed of trust dated March 21, 1933, running in favor of the American Trust Company to secure two promissory notes for the aggregate sum of $74,400 and bearing interest at the rate of 5½ per cent per annum. Weiss was unable to make the stipulated payments and on October 5, 1936, he was served with a notice of default announcing the bank's election to proceed with the sale of this ranch property. At the request of Weiss the foreclosure proceedings were delayed to give him an opportunity to try to find a purchaser. In June, 1937, Weiss introduced C. W. Beeler to the officers of the bank interested in this matter, and the parties thereupon discussed various propositions looking toward a discount of the debt and its reduction to a satisfactory figure incident to Beeler's purchase of the property. Finally, Mr. Hammond, an assistant vice-president of the bank, agreed to accept $55,000 in cash if that sum were paid within the next few weeks. On July 28, 1937, Weiss conveyed the ranch to Beeler, and it was expressly provided in the terms of the transfer that Beeler assumed and agreed to pay the indebtedness secured by the deed of trust. At the same time Weiss executed and delivered to Beeler a bill of sale of certain personal property on the ranch.

The financial arrangement contemplated by Beeler as the basis for his negotiations with the bank for the early discharge of the debt on the property at the discounted figure did not materialize, and as of September 1, 1937, no part of the $55,000 had been paid. Accordingly, on this last-mentioned date the bank served upon both Beeler and Weiss a second notice of default. The indebtedness on its original scale had then increased to the aggregate sum of $81,000.

Subsequent to said notice and on September 22, 1937, Beeler visited the bank for the purpose of negotiating with its officers some refinancing plan whereby he might continue to retain the ranch and have an extension of time for the payment of the debt as theretofore reduced. The bank's officers refused to carry this property transaction any longer on the records as a security arrangement, and they therefore proposed the following course of procedure: Beeler would deed the property to the bank and in return the bank would execute to Beeler a lease of the premises for the period of one year at a rental of $3,000 per annum, Beeler to pay all taxes and maintenance expense on the ranch and to have an option to purchase the land at any time during the term of the lease for the sum of $60,000. Beeler accepted this proposition and by an absolute deed dated September 27, 1937, he conveyed the property to the bank. As an accompanying instrument, Beeler executed and delivered to the bank his verified affidavit, in which he stated that said deed "is intended to be and is an absolute conveyance of the title to said premises to the grantee named therein, and was not and is not now intended as a mortgage, trust conveyance or security of any kind; that it was the intention of affiant as grantor in said deed to convey, and by said deed this affiant did convey to the grantee therein all his right, title and interest absolutely in and to said premises; that possession of said premises has been surrendered to the grantee; that in the execution and delivery of said deed affiant was not acting under any misapprehension as to the effect thereof, and acted freely and voluntarily and was not acting under coercion or duress; that the consideration for said deed was and is the full cancellation of all debts, obligations, costs and charges secured by that certain deed of trust heretofore existing on said property * * * and the reconveyance of said property under said deed of trust; * * * This affidavit is made for the protection and benefit of the grantee in said deed, its successors and assigns * * * and particularly for the benefit of the Title Insurance and Guaranty Company, which is about to insure the title to said property in reliance thereon * * *." Pursuant to the terms of this affidavit, the bank executed a reconveyance under its trust deed reciting that the indebtedness thereby secured had been fully paid. On November 5, 1937, both the deed from Beeler and the reconveyance were duly recorded.

As of May 16, 1938, neither installment of the 1937-1938 taxes on the ranch had been fully paid, and on said mentioned day the bank served upon Beeler a notice to pay the taxes or quit the premises for failure to comply with the terms of the lease. The parties were unable to settle their differences on this score and in July, 1938, the bank brought suit in unlawful detainer seeking Beeler's eviction from the property. In the ensuing trial Beeler successfully maintained his defense on the ground that the notice of breach given him was defective, and judgment was rendered accordingly in his favor.

On October 19, 1938, Beeler commenced this action against the American Trust Company to have his deed of conveyance to the defendant bank declared a mortgage to secure the antecedent debt. In his complaint plaintiff alleged that the bank agreed to reduce the outstanding indebtedness against the property in the sum of $60,000 to be paid, together with interest at the rate of 5 per cent per annum, within the period of one year as provided by the terms of the lease, and that the bank accepted the deed of conveyance as a mortgage to secure that debt. To this complaint the defendant bank filed an answer and cross-complaint, denying the material averments of the plaintiff's pleading and asserting that the parties intended the deed to be an absolute transfer of title to the property as it in form purported to be, and not a mortgage or other security arrangement. With the principal controversial issue thus defined, the action proceeded to trial, and at the conclusion thereof the court adopted findings favorable to the plaintiff. Judgment was rendered accordingly against the defendant bank, determining the plaintiff, C. W. Beeler, to be the owner in fee of the property in question subject to a mortgage lien as security for the payment of the following sums: (1) The agreed indebtedness of $60,000 together with interest at the rate of 5 per cent per annum, according to the terms expressed in the lease and option agreement; and (2) the first installment of the 1937-1938 taxes, $477.88, with interest from the date of the entry of the decree herein. It was further ordered that on receipt of these sums within the time limitation specified by the court, the defendant bank should reconvey the property to the plaintiff and execute and deliver to him a release and satisfaction of the lien thus adjudicated. From this judgment the defendant, American Trust Company, prosecutes this appeal.

[1, 2] It is without doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage. "That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence." Woods v. Jensen, 130 Cal. 200, 203, 62 P. 473; see, also, Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St.Rep. 175; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; Couts v. Winston, 153 Cal. 686, 96 P. 357; Todd v. Todd, 164 Cal. 255, 128 P. 413; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Carlson v. Robinson, 7 Cal.2d 235, 60 P.2d 426. But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. Mahoney v. Bostwick, supra; Todd v. Todd, supra; Lockhart v. J. H. McDougall Co., supra; 17 Cal.Jur. 757, sec. 59. In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Locke v. Moulton, 132 Cal. 145, 64 P. 87; Beckman v. Waters, 161 Cal. 581, 119 P. 922; 17 Cal.Jur. 758, sec. 60. As was said in this regard in Wadleigh v. Phelps, supra, 149 Cal. at page 637, 87 P. at page 98, "the appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court."

[3] A review of the record in the light of these rules does not establish that the

finding declaring the deed in question to be a mortgage is without sufficient evidentiary support.

In construing the disputed financial arrangement concededly made as the result of the understanding reached between the plaintiff and certain officers of the defendant bank at the aforementioned conference of September 22, 1937, regard must be had at the outset for the parties' course of negotiations at that meeting relative to some appropriate disposition of the indebtedness secured by the property here involved under the outstanding deed of trust. In this connection the plaintiff's testimony shows that incident to his purchase of the ranch on July 28, 1937, and his assumption of his grantor's obligation to discharge the existing debt thereon, he had been attempting for some months to work out some feasible plan with the bank for a reduction of the loan; that the financial backing on which he relied to meet the terms of the bank's $55,000 cash discount proposition of June, 1937, did not materialize within the time scheduled; that in response to the bank's notice of default and election to sell under its deed of trust, served upon him on September 1, 1937, he visited the bank on September 22, 1937, to "make some other arrangement than the present arrangement of paying the indebtedness off in 55,000 dollars cash"; that he discussed his problem of carrying the loan and continuing with the ranch, with several officers of the bank, but principally with Mr. Kennedy, the vice-president in the real estate loan department, who offered as the only alternative to immediate foreclosure a refinancing scheme whereby the bank "could write off the loan on the books" by taking a deed of the property and giving plaintiff a one-year lease with the option to purchase the ranch at any time during that period; that plaintiff did not want the transaction handled that way, but the bank's officers insisted on this form of procedure as plaintiff's only recourse; that the indebtedness was thereupon fixed at $60,000 instead of the previous discount figure of $55,000 because of the time extension commensurate with the option provision, and the rental was set at an amount equivalent to 5 per cent interest per annum on the aforesaid $60,000, or $3,000, payable semi-annually; that as security for his payment of said interest and the taxes on the property for the ensuing year, plaintiff agreed to give the bank a chattel mortgage on certain equipment on the ranch, with the understanding that such mortgage would be returned to him upon his assigning to the bank a lease which he was then negotiating with respect to a portion of the ranch property; that plaintiff had a tract of land in Paradise, California, which he wanted the bank to consider as a basis for a reduction of the indebtedness in question; that Mr. Kennedy agreed to have an appraisal of the Paradise property made some time during the course of the year and according to the valuation so established, the bank would "take it in" either "to reduce the debt" or "as *additional* security." Corroborative of the plaintiff's recital of the parties' negotiations as concerned only with the effectuation of some new security arrangement which the plaintiff could handle successfully is the testimony of a Mr. Brown, plaintiff's banker, who was present during most of the conference on September 22, 1937. This witness, when asked to give his recollection of what occurred at the meeting, testified as follows: "Well, it appeared that Mr. Beeler had acquired a piece of property on which the American Trust Company held a deed of trust. The American Trust Company had filed notice of breach and Mr. Beeler was there for the purpose of endeavoring to refinance it, get an extension or something of that sort, and all the time I was there it centered around this deed of trust."

A few days following this meeting between the parties, the bank forwarded to plaintiff for his execution a deed of conveyance, a bill of sale of certain personal property on the ranch in lieu of the chattel mortgage theretofore specified, and a lease and option agreement—all documents which the parties had discussed in their previous negotiations, and which the plaintiff admittedly signed without question. However, with these papers the bank also sent to the plaintiff for signature an affidavit certifying, according to the pertinent provisions thereof above quoted, the nature of the transaction as an absolute conveyance of title to property in complete satisfaction and cancellation of an existing indebtedness thereon. Nothing had previously been said by any of the bank officials indicating that the bank would ask for, or would require any such affidavit. The plaintiff testified that before signing this affidavit he telephoned to the bank and discussed the document with Mr. McIntyre, an assistant vice-president, who had prepared the necessary papers for the closing of the transaction, as follows: "I asked him what the meaning of the affidavit was, that there was nothing said about it before. He said, 'We have to have that to clear up the title, so it is all right and we can put it in the real estate department. The bank always takes those.' I didn't think anything about it. I said, 'If you have to have it, that is O.K. I will sign it.' So I did." At the trial upon both direct and cross-examination with respect to this matter, Mr. McIntyre admitted that he told the plaintiff at the time in question that the affidavit was needed to satisfy a requirement of the title company before it would issue a title policy upon the property free of exceptions and that the bank was acting only as "an intermediary in the matter." On its face the affidavit in part sustains this statement as to its purpose, for it expressly provides: "This affidavit is made * * * particularly for the benefit of the Title Insurance and Guaranty Company, which is about to insure the title to said property in reliance thereon."

Also bearing on this matter is the following testimony of the plaintiff as to a conversation he had with Mr. McGlynn, an officer of the title company, before the transaction was finally closed: "We discussed, I told him rather, that this land was clear and so on, that I was deeding it all to the bank to refinance the loan, the way they wanted to do it. He said, 'You have given this affidavit. That takes you out, doesn't it?' I said, 'Why, no, I have a lease and an option and it is a form of refinancing.' He asked, 'What about this revenue stamp on the deed, where you are giving them the deed to the property?' I said, 'There is no need of any revenue stamp on it at all, because it is just given to refinance the thing.' He said, 'You refuse to put the revenue stamp on?' I said, 'Certainly I do.' He said, 'I will have to take that up with the bank.' He said, 'You have your lease and option. I don't want to see them.' I said, 'Why?' He said, 'We can't write a policy of title insurance if you aren't moving off the place and giving possession and turning that place over to them, if you aren't selling it to them.' I said, 'I am not selling it to them.' He said, 'Then I will have to write to our attorneys in San Francisco and advise them to make an exception to the property.' I said, 'Well, that is the story. I am not moving off the property.' He said, 'Are they paying you any money for it?' I said, 'Absolutely not a cent. They don't have to because I am just doing it to refinance.'" Consistent with the tenor of this conversation the title company thereafter issued its policy expressly excepting "any rights of C. W. Beeler, who is in possession"—significantly without reference to his occupancy of the property as a lessee—and the bank accepted the policy in this form, although it had previously indicated it wanted the title certificate free of such exception.

[4-7] Other matters of some relevancy in considering the status of the parties as the result of their consummation of the presently disputed transaction appear from the record: While the testimony relative to the value of the property is in direct conflict, the estimate of the plaintiff and his witnesses supports the trial court's finding that the ranch was worth "in excess of $135,000." This accredited evidence indicating the extent of the inequality between the worth of the property and the consideration stated in the conveyance, to-wit, $60,000, the amount claimed by the bank to accord with its appraisal figure, is a "strong circumstance" tending to show that the deed was intended to operate as a mortgage. Husheon v. Husheon, 71 Cal. 407, 12 P. 410; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Reynolds v. Hook, 109 Cal.App. 226, 292 P. 1000; see, also, annotation in 90 A.L.R. 953-963; 17 Cal.Jur. 788, sec. 88. Moreover, the yearly rental value of the property stands uncontroverted in the record as "in excess of $7,500" and the trial court so found, yet under the terms of the plaintiff's lease with the bank the sum denominated rental for the premises was but $3,000 per year—a disparity of some significance, particularly in view of the further evidence that such sum was fixed by the bank at an amount equivalent to the interest rate of 5 per cent per annum on the indebtedness at the reduced figure of $60,000 and payable semi-annually. This, too, constitutes a "strong circumstance" tending to show that the "rent" under the lease agreement was in reality an interest payment consistent with the character of the transaction as a loan. Couts v. Winston, 153 Cal. 686, 96 P. 357; 17 Cal.Jur. 786, sec. 86. Still another matter to be here noted is the fact that after the recordation of the deed from the plaintiff, the instrument purportedly given in extinguishment of the existing indebted-

ness, the bank continued to retain in its possession the two promissory notes—one for $60,000 and the other for $14,400—evidencing the debt secured by the aforementioned trust deed made by the plaintiff's grantor and expressly assumed by the plaintiff in the terms of his purchase of the property. While it appears that following said recordation the bank made certain entries and transfers on its records designed to indicate full payment of the debt, endorsed on the back of the $60,000 note "We have acquired title by deed. Note cancelled" and "wrote off" the $14,400 note as a loss, such bookkeeping procedure of itself is no more effectual to establish the discharge of the debt than would be the act of the payee in writing the word "Paid" across the face of the note, without relinquishment thereof to the maker. There being no delivery of the notes either to Mr. Weiss, the plaintiff's grantor, or to the plaintiff himself, the mentioned notations of the bank in this regard have no force or effect here. Wittman v. Pickens, 33 Colo. 484, 81 P. 299; Hanna v. McCrory, 19 N.M. 183, 141 P. 996; First State Bank of Hilger v. Lang, 55 Mont. 146, 174 P. 597, 9 A.L.R. 1139.

[8] As to the parties' conduct subsequent to the financial arrangement in question, the following evidence is pertinent: In December, 1937, a great flood occurred in the Sacramento River, as the result of which many permanent improvements on the property here involved were damaged or destroyed. The plaintiff testified that he communicated the magnitude of his loss to certain officers of the bank, that he asked them for a loan—not a contribution—of money to defray the expense of repair and reconstruction, that they declined to give him the financial assistance he requested, and that he expended approximately the sum of $3,000 in making the necessary structural replacements on the ranch. While the terms of the lease required the plaintiff during the term thereof to make ordinary repairs on the property, his undertaking a program of improvements on the scale intimated by the mentioned outlay of expense is a factor substantiating his claim of continued occupancy of the property as owner. The plaintiff further testified that in the course of one of his conversations with the officers of the bank relative to the flood damage, he mentioned that he contemplated selling some 276 walnut trees growing on the ranch; that they agreed with him that the removal of such trees would improve the property and that he should keep the proceeds from such sale; that he consummated the sale for the sum of $1,800, which amount he retained without objection from the bank. This arrangement as detailed by the plaintiff was not contradicted by the bank, and it, too, reflects the plaintiff's exercise of the rights of an owner in relation to the ranch property. Also to be noted here is the fact that some few months after the negotiations of the parties on September 22, 1937, resulting in the financial plan now in controversy, the plaintiff made two leases of different portions of the property—one for $2,750 and the other for $4,500—the latter, in accordance with the parties' understanding on the date mentioned, being assigned by the plaintiff to the bank in payment of his aforesaid yearly rental charge of $3,000 and the second installment of the 1937-1938 taxes on the ranch. The plaintiff discussed both of these lease propositions with the officers of the bank at the meeting of September 22, 1937, and as ultimately concluded, they both were executed as leases, not as subleases of a tenant in possession of property.

[9] While much of the foregoing recital is based upon evidence introduced on behalf of the plaintiff and in some important respects is flatly contradicted by witnesses for the defendant bank—particularly in regard to the purpose of the financial arrangement made by the parties at the conference of September 22, 1937, as a cancellation of the existing indebtedness on the ranch rather than another loan transaction—it must be remembered that all questions of preponderance and conflict of evidence are for the trial court. That court had the right to accept the plaintiff's version of this controversial matter as true, and apparently did so. Thus accepted, it was plainly sufficient to justify the finding that the deed in question was intended as a mortgage to secure the antecedent debt as discounted by the bank in formulating the refinancing plan with the plaintiff. In view of this accredited evidence relative to a continuing, subsisting loan, the following language from the case of Chapman v. Hicks, 41 Cal.App. 158, 162, 163, 182 P. 336, 338, is pertinent: "The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance [citing cases]; and where a deed, absolute on its face, is given to secure a

debt, it will be held to be a mortgage even though the parties stipulate it shall be an absolute conveyance (Hodgkins v. Wright, 127 Cal. 688, 60 P. 431; * * *). The intention of the parties must govern, and it matters not what particular form the transaction may take. If the deed is made for the purpose of securing the payment of a debt, it is a mortgage, 'no matter how strong the language of the deed, or any instrument accompanying it might be.' Woods v. Jensen, 130 Cal. 200, 62 P. 473."

[10-12] Nor is a different principle applicable here because the plaintiff executed contemporaneously with his deed an affidavit declaring the transaction to be an absolute conveyance and not intended as a mortgage. While the authorities in this country are divided with reference to the question whether a deed and an accompanying memorandum of agreement, or option of resale to the grantor, may be shown by parol evidence to be a mortgage where the terms of the memorandum unambiguously negative the existence of an indebtedness (see elaborate annotation of cases on the subject in 111 A.L.R. 448), it is the settled law of this state not to hold such writing a conclusive criterion of the character of the transaction. In Vance v. Anderson, 113 Cal. 532, 538, 45 P. 816, 818, this court set forth the basic doctrine as follows: "A deed absolute on its face may be shown by parol to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is in equity a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration. [Citing cases.]" In thus regarding "all the facts and circumstances of the transaction" so as to execute the real intention of the parties, the rule prevents either of the parties to the disputed instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. "To insist on what was really a mortgage, as a sale, is in equity a fraud, *which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.*" (Italics added.) Peninsular Trading & Fishing Co. v. Pacific Steam Whaling Co., 123 Cal. 689, 694, 56 P. 604, 606.

The defendant bank's citation of the early case of People ex rel. Ford v. Irwin, 1861, 18 Cal. 117, in support of its argument that in this jurisdiction parol evidence may not be received to vary or dispute the terms of a written instrument concerning the purpose of executing a deed, is of no avail here. That case involved a deed absolute and a contract to reconvey. One Arnold owed the plaintiff, Ford, the sum of $8,600. Arnold conveyed the real property in question by grant, bargain and sale deed to Ford, who at the same time delivered to Arnold a written agreement to reconvey the property, in which it was stipulated: "This shall only be treated as a contract to convey, and not as an acknowledgment that said conveyance from Arnold and wife to myself was intended as a mortgage." The opinion does not refer to any ruling upon the admission or exclusion of parol evidence, but discusses the problem as one of the proper construction of the instruments in the light of the evidence which had been received. Thus, it was held that evidence that the actual consideration for the deed was a pre-existing indebtedness equal in amount to the sum required to be paid upon a reconveyance of the property was sufficient to impress upon the deed the character of a mortgage "unless controlled by the clause referred to in the contract" (that is, the stipulation above quoted); that the object of the clause was to "repel" any and all presumptions which the law would otherwise have indulged in relation to the deed, and that there was "no doubt that the parties could, by a provision for that purpose, exclude all extraneous circumstances" affecting the character of the transaction; that such clause in the contract did not take away or interfere in any respect with the efficacy of the contract, but simply repelled "any presumption from outside facts, giving to it an operation different from that intended by the parties."

[13] To the extent that the discussion in the Ford case would limit the court to the consideration of *only* the deed and the accompanying written instrument, without regard for other evidence in the case, in determining the *real nature* of the disputed transaction, it is inconsistent with the im-

port of the subsequently adopted code provision on the subject and cannot be approved. Section 2924 of the Civil Code from the date of its original enactment in 1872 has provided that every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage. In accord with the implication of this statutory pronouncement, it was properly recognized in Vance v. Anderson, 1896, supra, that a collateral written agreement declaring that a contemporaneously executed deed should be treated as an absolute conveyance, and not as a mortgage, was not conclusive but only one of the facts and circumstances of the transaction worthy of consideration in determining the real intention of the parties. If by a separate writing the parties expressly agree, at the same time an absolute deed is executed, that it is what it purports to be, that is, an absolute sale, that would be no more than what the deed itself says. Therefore, if they could thus avoid its real effect as a mortgage, the true nature of such a transaction could never be shown, and the policy of the law never to permit a security to be converted by any contemporaneous agreement into a sale could be constantly evaded. Civ.Code, secs. 2924, 2925; Pierce v. Robinson, 13 Cal. 116; Wehle v. Price, 202 Cal. 394, 260 P. 878; Carlson v. Robinson, 7 Cal.2d 235, 60 P.2d 426. The right of a mortgagee to become the purchaser of the equity is unquestioned, but the relations of the parties are such that the transaction will be carefully scrutinized to prevent the effectuation of some device whereby the debtor under the force of necessitous circumstances is deprived of his right of redemption. Civ. Code, sec. 2889; Russell v. Southard, 12 How. 139, 53 U.S. 139, 13 L.Ed. 927; Peugh v. Davis, 96 U.S. 332, 24 L.Ed. 775; Bradbury v. Davenport, 114 Cal. 593 [46 P. 1062, 55 Am.St.Rep. 92]; Jones on Mortgages, secs. 251, 1045.) The rule in such a case is said to be substantially the same as that prevailing when the deed of a beneficiary to his trustee is questioned. Villa v. Rodriguez, 12 Wall. 323, 79 U.S. 323, 20 L.Ed. 406; Bradbury v. Davenport, supra.

A situation presenting considerations strikingly akin to those here involved was recently before the appellate court in the second decision in Davis v. Stewart, 53 Cal.App.2d 439, 127 P.2d 1014, and adjudicated in accordance with the views hereinabove expressed. There, as here, a deed absolute on its face was claimed to be only a mortgage. As a part of the transaction in which the deed was given, the grantor and grantee entered into an elaborate written agreement, which among other things provided: "It is understood and agreed that first party shall become, upon execution and delivery of said deed the absolute owner of said property, together with all improvements thereon and that this transaction does not constitute a mortgage, subject only however to said option for said five year period." See recital in Davis v. Stewart, 31 Cal.App.2d 574, 576, 88 P.2d 734, 735. Over objection, the trial court admitted oral testimony to the effect that notwithstanding the declarations of the contemporaneous writing, the deed was in fact intended as security for the payment of a debt. Thereafter findings were made in accordance with the oral evidence, and the judgment establishing the deed as a mortgage was affirmed. The defendant bank argues that the situation in the Davis case is distinguishable because the written agreement there did not expressly provide, as does the affidavit here, that the deed "was not and is not now intended * * * as security of any kind * * *" and hence evidence extrinsic to the writing was properly received to remove the uncertainty as to whether or not the disputed instrument was given in satisfaction of the antecedent indebtedness. That is but a tenuous distinction and will not bear close scrutiny. In both cases the import of the contemporaneous writing is the same—the negation of a security arrangement incident to the subsistence of the debt—and whether one writing amplifies by detailed recitals the purported purpose of the parties to execute an absolute transfer of title to the property involved is an immaterial consideration. Certainly, in neither instance is the language of the accompanying instrument so obscure as to require extrinsic evidence for its explanation or understanding. And, in one case as in the other, the declaration of the writing would not be held controlling unless it should appear upon *complete* evidence that it was in harmony with "*all* the facts and circumstances of the transaction." Vance v. Anderson, supra.

In concluding the discussion of this phase of the present appeal, it is sufficient to state that the circumstances of the whole case, as reflected by the evidence accredited in the trial court, are entirely consistent with the view that the defendant bank, while in fact agreeing on a loan to be secured by mortgage, was desirous, for reasons of certain interdepartmental requirements connected with its routine bookkeeping procedure, of giving the transaction a different appearance by recording it as an absolute transfer of title. Such cases cited by the defendant bank as Henley v. Hotaling, 41 Cal. 22; Farmer v. Grose, 42 Cal. 169; Woods v. Jensen, 130 Cal. 200, 62 P. 473; Wehle v. Price, 202 Cal. 394, 260 P. 878; and Goodfellow v. Goodfellow, 219 Cal. 548, 27 P.2d 898 wherein an absolute deed was sustained as such in the face of the claim that it was intended by the parties as a mortgage, merely rest upon an affirmance of the trial court's judgment as based upon substantial evidence and thus do not conflict with the fundamental premise of this opinion as to an appellate court's function in reviewing the record to determine whether challenged findings lack evidentiary support.

[14] There is no force here to the contention of the defendant bank that there was no consideration for the agreement for the reduction of the indebtedness as claimed by the plaintiff to have been made between the parties at the basic conference of September 22, 1937, as aforesaid. In the first place, the record discloses that the trial court found on substantial evidence that at said meeting the parties concluded with respect to various phases of the contemplated financial arrangement a number of reciprocal agreements, of which one concerned the understanding as to the discount of the existing debt; that as the result of these integrated negotiations the deed in question was executed and the parties have acted thereunder, though in dispute as to the real purpose of the conveyance. But regardless of this observation, the record further shows that this matter of lack of consideration was not pleaded in the trial court, that the cause was tried on other issues entirely and as if such point did not enter into the case; consequently, such objection may not properly be raised for the first time on appeal. (2 Cal.Jur. 234, 235, sec. 67; Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193.

[15] Two additional questions presented by the record require some discussion. The first of these relates to the payment of taxes on the property involved. As above stated, the lease agreement expressly placed this obligation upon the plaintiff during the one-year period therein specified—October 1, 1937, to September 30, 1938. With regard to the first installment of the 1937-1938 taxes, the record discloses that the plaintiff on November 30, 1937, received from the bank a letter enclosing the bill for the taxes covering the real property and stating that the bill covering a separate assessment with respect to certain personal property on the ranch had been forwarded to the plaintiff's grantor, Mr. Weiss, who was responsible therefor; that on December 3, 1937, the plaintiff gave the tax collector his check for the amount of the real property taxes; that subsequently the tax collector notified the bank as to the receipt of the plaintiff's check, but stated that such segregable amount of the entire tax bill could not be accepted until payment of the personal property assessment was made; that the bank suggested to the plaintiff by letter that he pay the balance of the tax bill and deduct that amount from a certain sum he then owed to Mr. Weiss in connection with the purchase of the ranch; that the plaintiff did nothing further in the matter and on April 25, 1938, his check for the real property taxes was returned to him by the tax collector; that the bank on May 16, 1938, served on the plaintiff a notice to quit the premises for breach of his lease, and subsequently commenced unlawful detainer proceedings. The plaintiff testified that in June, 1938, he called at the defendant bank and offered to pay the delinquent taxes, including those on the personal property in question, if the bank would not prosecute the eviction proceedings; that he then had sufficient money in his bank account to substantiate his offer of payment; and that the officers of the defendant bank refused to accept his proposition. As previously noted, the unlawful detainer action resulted in a judgment in favor of the plaintiff herein because of the defect in the notice of breach with respect to the amount of his tax liability. In view of this evidence the trial court properly concluded that the defendant bank should be reimbursed to the extent of its payment of the first installment of the real property taxes, $477.88, but that the running of interest on such sum was stopped by virtue of the plaintiff's offer of payment made in good faith and with ability to perform. Civ.Code, sec. 1485.

[16] As to the second installment of the 1937-1938 taxes, there arises the ques-

tion of the effect of the plaintiff's assignment of a certain lease to the bank in discharge of this obligation. The plaintiff testified that at the aforesaid conference of September 22, 1937, he agreed to assign to the bank "to pay the interest [rent] and the taxes" a lease he was then negotiating with respect to a portion of the ranch; that such assignment was accordingly made "to pay up all of the three thousand dollars and the second half of the taxes in full"; that following the bank's acceptance of the assignment he was given a "receipt for all the payments, the interest payments" that he owed it. While certain witnesses for the defendant bank stated at the trial that the assignment was taken only as security for the amount of the rental charge and the specified tax installment, the instrument itself purports to be absolute on its face and apparently the court so construed it in accordance with the plaintiff's positive testimony in the matter. Accordingly, the trial court's finding to the effect that the assignment was in full payment of the aforesaid second installment of taxes, as well as for the rental charge of $3,000 under the terms of the lease agreement, is binding on this appeal, and the defendant bank's claim that the plaintiff is indebted to it in the amount of said tax installment cannot be sustained.

[17] However, the record further establishes, and the plaintiff so concedes, that pending the trial of this action the defendant bank paid the first installment of the 1938-1939 taxes amounting to $430 on the real property here involved. Apparently the trial court inadvertently failed to make any finding as to this matter. Since there is no question as to the validity of the bank's claim for reimbursement for this expenditure, we are authorized under section 956a of the Code of Civil Procedure to supply the missing finding. We, therefore, find "That the defendant in the year 1939, paid the first installment of said real property taxes for said year amounting to the sum of $430, and under the said agreement of September 1937, and the said lease, it was the duty of the said plaintiff to pay said first installment, and said defendant should be reimbursed for its payment thereof; that there is now due and owing from plaintiff to defendant, American Trust Company, the said sum of $430, but without interest thereon because of its refusal of the offer of payment by said plaintiff above stated, and further because of its refusal of the offer of payment hereinafter in these findings referred to."

The defendant having paid the sum of $430 on account of the taxes due for the year 1938-1939, as well as the sum of $477.88 on account of the taxes for the previous year, is entitled to be reimbursed in the sum of $907.88, the aggregate of these two amounts.

For the purpose of making the findings harmonize, it is further necessary to modify Finding XXXIV by striking out subdivision 2 thereof, and inserting in its place, the following: "2. The sum of $907.88, being the amount of taxes on said real property for the years of 1937-1938, and 1938-1939, paid by the said defendant American Trust Company, together with legal interest upon said amount from the date of entry of the decree in this action."

The conclusions of law are also modified so as to meet these changes in the findings of fact.

The second and final point presented for determination relates to the proper allowance of interest to be made to the defendant bank with reference to the adjudicated mortgage indebtedness of $60,000. It is claimed by the plaintiff and found by the trial court that a tender of this amount was made to the defendant bank some few months before due under the parties' agreement and that because of such tender and refusal thereof, the bank is not entitled to interest from that date. Civ.Code, sec. 1504. The defendant bank contends that the tender, if in fact made, was insufficient to stop the running of interest.

The finding of the trial court upon the matter of tender is substantially as follows: That on June 20, 1938, at the defendant bank the plaintiff offered to pay his indebtedness in good faith, and was ready, willing and able to do so; that prior to that date plaintiff had entered into an arrangement with one MacArthur whereby the latter had agreed to advance to plaintiff the amount of money necessary to pay the indebtedness; that said MacArthur was financially able to make the requisite advancement, and was ready and willing to do so; that this offer was made to Mr. Kennedy, vice-president of the bank; that said Kennedy refused that offer without specifying any objection to its form, and refused to deal with the plaintiff in the matter in any way, but demanded that the plaintiff vacate the property within thirty days; that by virtue of its said officer's actions the defendant bank waived objection to the mode of the offer and waived tender or other offer; that such offer of performance suspended the running of interest upon the indebtedness.

This finding is in strict accord with the plaintiff's evidence on the subject. In regard to his interview with Mr. Kennedy on the day mentioned, the plaintiff testified as follows: "Well, I went into the bank. He [Kennedy] was sitting at his desk. * * * He apparently—well, he was sore because I came in. He told me before he didn't want to deal with me. I said, 'I will come in. I have a man by the name of Roderick McArthur that will give me enough money that I can liquidate this indebtedness and I want to talk to you about it and see what we can do to get it closed up.' He said, 'I don't want to talk to you. You get out of this bank. We have had nothing but trouble with you and all these leases and everything and I don't want to talk to you at all. We want you to get off of that ranch and if you are not off in thirty days we will put you off.' I tried too talk further. I tried to say something, and he walked off and said, 'I don't want to talk to you. You get out of here.'" Mr. MacArthur corroborated the plaintiff's statement with respect to their prior arrangement for the necessary advance of money, and added that he was financially able to discharge the indebtedness at the time he so agreed to assist the plaintiff. While Mr. Kennedy on behalf of the bank gave an entirely different account of the conversation had with the plaintiff on the day in question, the trial court in its findings expressly denied credence to the substance of his testimony. Since, as aforestated, the credibility of witnesses is a matter wholly within the province of the trial court, its discretion as here exercised will not be disturbed on appeal.

[18] The evidence accredited by the trial court supports not only its finding as to the fact of the offer of payment, but also its sufficiency to prevent the running of interest on the plaintiff's obligation. Thus, it appears that Mr. Kennedy as representative of the defendant bank declined absolutely to negotiate with the plaintiff in the matter and, without making any objection as to the form of the tender or questioning the plaintiff's ability to perform his offer, he simply refused to consider the proposition that the plaintiff had the right to protect his interest in the property involved. Upon this basis the trial court was warranted in concluding that any further action by the plaintiff in this respect would have met with like rebuff by the bank, and that a valid offer having once been made and refused, the indebtedness ceased to bear interest as of that date. Civ.Code secs. 1496, 1501, 1504; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1.

In accordance with the views above expressed, the judgment is modified by striking therefrom the figures, $477.88, and inserting in their place the figures, $907.88, and as so modified, the judgment is affirmed. Neither party to recover costs on appeal.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concurred.

CARTER, J., did not participate.

TRAYNOR, Justice (dissenting).

The evidence in this case is insufficient, in my opinion, to uphold plaintiff's contention and the trial court's finding that defendant, with a deed of trust on real property worth over $135,000 securing an indebtedness of $81,232.90, entered into an agreement to reduce the indebtedness to $60,000 and accept an inarticulated mortgage in place of its deed of trust. It was incumbent upon plaintiff to support his contention by evidence "clear, satisfactory and convincing; explicit, unequivocal and indisputable." Wehle v. Price, 202 Cal. 394, 397, 260 P. 878, 879; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898; Woods v. Jensen, 130 Cal. 200, 203, 62 P. 473. One searches the record in vain for such evidence. The only agreement about which there was any evidence is the one set forth in the writings, which according to plaintiff's own testimony, the parties had previously made orally. Plaintiff testified that he was told that defendant would not reduce the indebtedness and continue to carry a loan and that when defendant took the deed the indebtedness would be "wiped out." Plaintiff's affidavit was likewise unequivocal, providing that the consideration of the deed was to be "the full cancellation of all debts, obligations, costs and charges secured by that certain deed of trust. * * *."

Plaintiff concedes that the evidence plainly indicates that he understood the Weiss indebtedness was to be satisfied, but contends that his assumption agreement with Weiss created "an independent contract obligation" that was to continue. The only liability that he agreed to assume, however, was the indebtedness represented by Weiss's promissory notes and secured by the deed of trust. There was but one indebtedness, and while plaintiff became primarily liable and Weiss secondarily liable therefor under the assumption agreement, its satisfaction would necessarily end both liabilities. Plaintiff does not contend that Weiss was to be released from liability for an indebtedness that was to continue; his own testimony was that the indebtedness was to be satisfied. It is clear that he understood the transaction in this light, for he alleged in his answer to a suit brought by Weiss that he "did fulfill and carry out the terms of his agreement regarding the payment of said obligation against said property, and did procure the same to be released and satisfied in full." What the trial court found, moreover, was not that the deed was taken as security for some independent obligation arising from the assumption agreement, but that it was executed pursuant to an agreement that the "trust deed indebtedness and interest" i. e., the Weiss indebtedness, should be reduced and the deed taken as security for the reduced indebtedness. The contention that the Weiss indebtedness was to be satisfied and the deed taken as security for some independent obligation of plaintiff does not support the finding but impeaches it.

Plaintiff's contention rests upon inferences that he seeks to elicit from evidence relative to the circumstances under which the deed was delivered and to the subsequent conduct of the parties. This evidence does not warrant plaintiff's inferences. It is described in the majority opinion as "entirely consistent with the view that defendant bank, while in fact agreeing on a loan to be secured by mortgage, was desirous, for reasons of certain interdepartmental requirements connected with its routine bookkeeping procedure, of giving the transaction a different appearance by recording it as an absolute transfer of title." It is not enough for the evidence merely to be consistent with plaintiff's contention, however, for it is wholly consistent with the agreement set forth in the writings. The burden was on plaintiff to prove that it was highly probable that the deed was not what it purported to be. He did not sustain this burden by evidence that at best is simply consistent with the deed's being something else, but which is just as consistent with its being what it purports to be. Goodfellow v. Goodfellow, supra; Wehle v. Price, supra; Woods v. Jensen, supra.

Plaintiff infers from the fact that the $3,000 rental specified in the lease was equivalent to 5 per cent of the option price of $60,000, that the rental was actually interest, and the option price actually an indebtedness. Such a rental is bound to be a percentage of the option price and is apt to fall within the normal range of interest returns on investments equivalent to that price. It would be as arbitrary, however, to transmute a rental into an interest charge because it produced the same return as to transmute a dividend from stock into interest from a bond. There is nothing in the mathematical relation between the two figures that gives any clue to what they represent; the substance of the relationship is not found in the sums. It is to the terms of a transaction that one must look, and not to the sums involved, since transactions may differ widely in nature, however alike may be the sums they involve.

Plaintiff contends that Mr. Kennedy, the bank's representative, agreed to have an appraisal made of a tract of land that plaintiff owned in Paradise, California, to guide the bank in taking it in either "to reduce the debt" or "as additional security," and infers that if the security was "additional" the deed in question was a mortgage. By plaintiff's own testimony, however, the conversations regarding the Paradise property were concerned with the possibility of defendant's taking it as part of the option price. In the negotiations of September 22 he asked if defendant would take the Paradise property to reduce the indebtedness. Kennedy replied that the bank could not do so, but that if plaintiff gave the bank the deed and took back a lease and option, the latter would examine the property to determine whether it would be acceptable as part payment of the option price or as additional security for a part thereof. This suggestion obviously contemplated the possibility that the parties might later enter into an arrangement enabling plaintiff to exercise his option by paying only part of the price in cash. Following Elberg's visit to the property Kennedy told the plaintiff that the bank could not take it outright, but might take it as additional security. It cannot reasonably be inferred even from plaintiff's own testimony that defendant regarded the indebtedness as subsisting and contemplated the Paradise property as additional security for that indebtedness rather than for the option price. Plaintiff relies upon the testimony of his banker, Mr. Brown, for support for his contention. Brown merely testified, however, that he was present during the first part of the conversation of September 22nd, but left before its conclusion; that respondent asked for another extension of time; that Kennedy replied that back-interest would have to be paid up "before any discussion of that sort"; that there was some discussion as to whether the deed of trust covered all of the property to which plaintiff had title, and that "just as I left they had sent for the certificate or for the deed of trust." There is nothing in this testimony to suggest that defendant agreed to reduce the indebtedness and accept the deed as security for the lower amount.

The exception in the title policy of "any rights of C. W. Beeler who is in possession" is invoked to uphold the contention that the deed was simply a mortgage. It was defendant's lease and option, however, that necessitated this exception. Before the transaction was closed, defendant was advised by Mr. McGlyn, an officer of the Tehama County Title Company, that plaintiff's affidavit put an end to his interest in the property. Plaintiff replied that he had an option. McGlyn later advised the Title Insurance and Guarantee Company by telephone that defendant had a lease and option and would remain in possession of the property, and that company thereupon obtained defendant's confirmation of these facts and its consent to the exception in the title policy.

There is no support for plaintiff's contention in the discussion regarding the sixty-dollar internal revenue stamp. The stamp was already on the deed and the title company had been instructed to bill defendant for its cost so there is no reason why McGlyn should have asked plaintiff whether he refused to put the stamp on. In any event whatever views plaintiff may have expressed to McGlyn about the deed's being merely a means of refinancing, there is no claim that he communicated his views to defendant. See Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13.

Plaintiff relies heavily upon the finding of the trial court that when the deed in question was executed, the property had a market value of more than $135,000, and a rental value of more than $7,500, figures that substantially exceeded the option price and the rental fixed in the lease. Such an excess in conjunction with other circumstances is often indicative of a security transaction, for the greater the valuation in relation to the indebtedness, the more unlikely the owner is to sell the property to cancel the indebtedness. In this case, however, the parties themselves, whose valuations alone are pertinent (Tetenman v. Epstein, 66 Cal.App. 745, 226 P. 966), did not attach so high a value to the property. Even if they had, it is inconceivable that the bank would voluntarily have reduced an indebtedness so amply secured, and relinquished, to its own disadvantage, a deed of trust for such a mortgage. See Robinson v. Barnard, 5 Cal.App.2d 396, 400, 42 P.2d 711.

The inference that the bank intended to keep the indebtedness alive when it neglected to surrender the cancelled notes is not reasonable, for the bank not only marked the large note cancelled and entered payment on its books, and wrote off the smaller note as a loss, but insisted upon and received plaintiff's affidavit that the deed was executed in full satisfaction of the indebtedness, and recorded the reconveyance reciting full satisfaction of the indebtedness. Once these steps were taken the bank was powerless to enforce payment of the notes.

There is nothing in the evidence of conduct subsequent to the transaction to establish that the deed was taken as security rather than in satisfaction of the indebtedness, or that plaintiff had anything more than a lease and an option. Plaintiff's repair of the fences and removal of the walnut trees following the flood of the Sacramento River in 1937 do not signify that the bank regarded him as the owner of the property. He was bound by the terms of his lease to repair the fences, and he removed the walnut trees only after obtaining defendant's consent. Even if the improvements were more extensive than the lease required they do not signify ownership, for they would redound to the advantage of the plaintiff if he exercised the option. The evidence of the leases by the plaintiff likewise fails to establish him as the owner of the property, for his lease from the bank permitted him to make subleases, and it was a matter of indifference to the bank whether the instruments executed by the plaintiff and his lessees took the form of leases rather than subleases.

Even if one assumes that the deed was given as security there is no basis for the holding that the amount of the indebtedness secured was $60,000 and not $81,232.90, the amount due when the deed was executed. The supposed agreement to release defendant from a liability of over $21,000 was clearly without consideration and is unenforceable. Scheeline v. Moshier, 172 Cal. 565, 158 P. 222; see 6 Cal.Jur. 179. If the deed was given merely as security it represented less than defendant already had. The deed of trust contained the usual power of sale and other provisions for defendant's protection and was not subject to the 1933 amendments restricting the right to judgment for a deficiency. Cal.Civ. Code, sec. 2924½; Cal.Code Civ.Proc. sec. 580a. Regarded as security, the deed was less advantageous to defendant, less burdensome to plaintiff. It conferred no power of sale and would have to be foreclosed by court proceedings, thereby leaving plaintiff with a right to redeem. It contained no provisions for defendant's protection and was subject to the 1933 amendments. As security, therefore, the deed, far from being of advantage to the defendant was of advantage to plaintiff. Since the alleged agreement was oral, and it appeared upon the face of the complaint that there was no consideration, a special plea by defendant of lack of consideration was unnecessary. Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 P. 583; see 2 Cal.Jur. 257.

EDMONDS, J., concurred.

Rehearing granted; CARTER, J., not participating.

22 Cal.2d 642

PEOPLE v. DAIL et al.

Cr. 4360.

Supreme Court of California.

Aug. 3, 1943.

1. Criminal law ⇨1144(13)

On appeal from judgment of conviction, reviewing court must view evidence in light most favorable to the state.

2. Conspiracy ⇨47

Evidence *held* sufficient to support convictions of conspiracy to commit assaults and extortion by use of force and fear in connection with activities of a labor union.

3. Criminal law ⇨1186(4)

In a close case, where evidence is sharply conflicting, substantial and serious errors which were vital to defendant and may have resulted in miscarriage of justice must be regarded as prejudicial and grounds for reversal of conviction. Const. art. 6, § 4½.

4. Assault and battery ⇨96(1)
Conspiracy ⇨48
Threats ⇨8

In prosecution for conspiracy to commit assaults and extortion and commission of such offenses in connection with labor union's activities, instructions on picketing and conspiracy were erroneous as advising jury that all concerted activities by combination of workmen are illegal.

5. Constitutional law ⇨90

The right to picket peacefully and truthfully is guaranteed by Constitution as incident of "freedom of speech".

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech".

6. Criminal law ⇨1172(1)

In prosecution for conspiracy to commit and commission of assaults and extortion in connection with labor union's activities, erroneous instructions, advising jury that all concerted activities by combination of workmen are illegal, were not without prejudice to defendants as unrelated to facts developed at trial and hence without influence on jury, in view of evidence of strikes and picketing in connection with union's efforts to obtain new members.

7. Criminal law ⇨780(3)

An instruction to jury that fact that accomplice witness for state had entered plea of guilty to one count of indictment should not discredit his testimony was erroneous. Code Civ.Proc. § 2051.

8. Witnesses ⇨345(1)

A plea of guilty of felony is equivalent to proof of "conviction" thereof within statute authorizing impeachment of witness by showing his prior conviction of felony. Code Civ.Proc. § 2051.

See Words and Phrases, Permanent Edition, for all other definitions of "Conviction".

9. Criminal law 🔑780(3)

An instruction that credibility of accomplice witness for state must be judged by same standard as that of other witnesses was erroneous as contrary to statutory provision that accomplice's testimony should be viewed with distrust. Code Civ.Proc. § 2061, subd. 4.

10. Criminal law 🔑823(12)

Error in instruction that accomplice witness' credibility must be judged by same standard as that of other witnesses was not cured by giving of instruction stating statutory rule that accomplice's testimony should be viewed with distrust, as second instruction created serious conflict. Code Civ. Proc. § 2061, subd. 4.

11. Criminal law 🔑508(9)

The fact that witness for state was defendant's accomplice in commission of crime charged goes to such witness' credibility and weight of his testimony.

12. Criminal law 🔑732
Trial 🔑183

The statute authorizing trial court to instruct jury that accomplice's testimony should be viewed with distrust is not unconstitutional as authorizing charge to jury on matters of fact, especially in view of validity of statute requiring corroboration of accomplices' testimony. Code Civ.Proc. § 2061, subd. 4; Pen.Code, § 1111; Const. art. 6, § 19.

13. Criminal law 🔑780(3)

In case involving accomplice's testimony, defendant is entitled to cautionary instruction to view such testimony with distrust, particularly as statute directs giving of such instruction. Code Civ.Proc. § 2061, subd. 4.

14. Criminal law 🔑660

An erroneous instruction on law, given jury by trial court while commenting on evidence, is subject to challenge on same grounds as if included among formal instructions, and it cannot be deemed justifiable comment on evidence and witness' credibility.

15. Criminal law 🔑656(1)

While trial court is not required to comment on all evidence, its comment thereon should be temperately and fairly made.

16. Criminal law 🔑656(1)

Trial courts should be cautious in exercise of their power to comment on evidence, with view to protecting defendant's rights.

17. Criminal law 🔑656(5)

A trial court's comments that accomplices' testimony for state was given in calm and dispassionate manner, that their answers were well considered, and that there was no evidence of animosity toward defendant on face of accomplices' testimony or in their demeanor on witness stand, *held* improper as accentuating and emphasizing error in instructions that fact that one of such witnesses entered plea of guilty to one count of indictment should not discredit his testimony and that accomplices' credibility must be judged by same standard as that of other witnesses. Code Civ.Proc. §§ 2051, 2061, subd. 4.

18. Criminal law 🔑762(3)

In prosecution for conspiracy to commit assaults and extortion in connection with labor union's activities, trial court's statement to jury that one defendant's admission on witness stand of his control of union's affairs and consequent responsibility for such activities warranted his conviction, if other defendants' activities amounted to criminal offenses, was erroneous as incorrect statement of fact.

19. Conspiracy 🔑48

In prosecution for conspiracy to commit assaults and extortion in connection with labor union's activities, trial court's statement to jury that it was warranted in finding one defendant, who admitted his control of union's affairs, guilty of criminal offenses committed by other defendants, was improper as amounting to erroneous instruction to find such defendant guilty if jury found any of other defendants guilty on any of several charges in indictment, even if jury failed to find conspiracy between him and any other defendants to commit assaults.

20. Criminal law 🔑762(3)

The trial court, under guise of comments on evidence, may not properly control jury's verdicts by direction either directly or impliedly.

21. Criminal law 🔑1186(4)

In considering effect of constitutional provision barring reversal of conviction for errors not resulting in miscarriage of justice, Supreme Court is not substituted for jury and cannot determine as original inquiry question of defendant's guilt or innocence. Const. art. 6, § 4½.

22. Criminal law 🔑**1186(4)**

Whether error resulted in miscarriage of justice, as required to warrant reversal of conviction, presents law question on record before Supreme Court, which must declare, as matter of law, whether error affected substantial rights of parties complaining thereof and cannot determine evidentiary value of testimony or where preponderance of evidence lies. Const. art. 6, § 4½.

23. Criminal law 🔑**1070**

All proceedings in criminal cause permanently abated as to a defendant who died pending his appeal from conviction, so as to require dismissal of such appeal.

EDMONDS, J., dissenting in part; CURTIS and SHENK, JJ., dissenting.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Harry W. Dail and Dexter L. Lewis were convicted of conspiracy to commit assaults and extortion in connection with a labor union's activities, and one Belanger and one Copelan were convicted of simple assault in connection with such activities, and they appeal.

Appeal of defendant Dail dismissed and judgments reversed as to the other appellants.

Prior opinion, Cal.App., 111 P.2d 723.

Paul Blackwood, Frank Sturgis, Frank Desimone, and Otto Christensen, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Eugene M. Elson and Frank Richards, Deputies Atty. Gen., and Buron Fitts, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for respondent.

GIBSON, Chief Justice.

In an indictment containing seven counts, the defendants were charged with offenses connected with the activities of a labor union in and about the city of Los Angeles.

Count one charged conspiracy to commit assaults by means of force likely to produce great bodily injury and to commit extortion by obtaining property of persons with their consent induced by the wrongful use of force and fear. Five other counts charged certain defendants with having assaulted persons by means of force likely to produce great bodily injury, and the remaining count charged defendants with the crime of extortion.

Defendant Burris became a witness for the State and all charges against him were dismissed. At the commencement of the trial, defendant McKnight changed his plea of not guilty to guilty to count one. The other charges against him were dismissed and he became a witness for the State. Defendants Dail and Lewis were acquitted on all counts except the first, charging conspiracy. Defendants Belanger and Copelan were acquitted on all counts except two and three, under which they were convicted of simple assault, a misdemeanor. The remaining defendants were acquitted on all counts. Dail, Lewis, Copelan and Belanger appealed from the judgments and orders denying a new trial. Dail has since died and his appeal must therefore be dismissed.

Appellants contend that the verdicts and judgments are without support in the evidence and are based on accomplice testimony which was impeached. They also contend that the court committed prejudicial error in giving and refusing instructions and in commenting on the evidence at the conclusion of the trial.

During the period involved here, rival unions representing the American Federation of Labor and the Congress of Industrial Organizations were engaged in a struggle to organize truck drivers on the Pacific Coast and bring them within their respective unions. The campaign for membership was hotly contested by the opposing groups and in many instances places of business employing members of a rival union were picketed. At this time Lewis was acting president of Local 208 of the Teamsters' Union (an affiliate of the A. F. of L.) in Los Angeles. Dail was a national officer of the union, assigned to advise and assist local unions in Southern California. As part of a program to strengthen the union and increase its membership, Local 208 employed men to work as "checkers" and "organizers" whose duties were to collect dues and obtain new members. They received their instructions from Lewis and reported back to him.

The charges in this case are related to the organizational activities of Local 208 and were based on assaults alleged to have been authorized by Lewis and committed by the defendant checkers and organizers, among whom were Belanger, Copelan, McKnight and Burris. As before stated, although five charges of assault by means of force likely to produce great bodily injury were listed in the indictment, the jury found only two instances (counts two and three) of the commission of simple assault by Copelan and Belanger. The evidence relating to those two counts will be discussed later.

In support of the conspiracy charge upon which Lewis was convicted the prosecution called as witnesses the defendants McKnight and Burris and two other men, Williams and Johnson, all of whom were designated as accomplices by the trial court in its instructions. McKnight, against whom a criminal charge (not connected with union activities) was then pending in the superior court, testified that Lewis told him his duties were to try to get nonunion men to join the union and if they "got tough" to use his own judgment. He testified further that he aided in "dumping" or "beating up" several persons, and that on one occasion Lewis criticized him for not having taken part in a fight between another checker and a truck driver who had been asked to join the union. He also testified that he had seen certain other defendants, including Belanger and Copelan, engaged in fighting nonunion truck drivers and members of the C.I.O. In his testimony Lewis denied that he ever advocated or authorized the use of force and stated that he instructed the checkers and organizers working for Local 208 not to use violence at any time. He testified that the only altercation of which he had personal knowledge was the Calkins-Copelan incident (hereafter referred to) and that the only reports he received of fights were in connection with occasions when "the C.I.O. had attacked some of these defendants." Other witnesses corroborated the testimony of Lewis that he had warned members of the union against the use of violence.

McKnight, who was dismissed from the union on charges preferred by Lewis, admitted on cross-examination that he had been "mad at him since." Shortly after the indictment, McKnight was questioned, and answered as follows:

"Q. So you didn't talk to * * * Lewis * * * at all about any of these fights at any time? A. No.

"Q. In other words, all of your fights resulted from some particular occasion at the particular time? A. That is right. * * *

"Q. You weren't out looking for a fight? A. That is right. * * *

"Q. You were not under orders to go out and beat anybody up? A. No."

It was also brought out on cross-examination of McKnight that he left Los Angeles at approximately the time the other defendants were arrested. He was apprehended in Kansas City and admitted that while he was there he had sent a telegram to a Los Angeles newspaper in which he stated, "* * * Would you be interested in a story that would convict Harry Dail and Dexter L. Lewis and others, and if so what price for same? Must be reimbursed for same because I will be a fugitive from justice tomorrow morning at 9:30." McKnight further admitted sending a postal card to Lewis in which he said, "I am afraid you are going to be sorry for not accepting those telephone charges. * * * You have made a rat out of me. I will make just as good a rat as I did a union man."

The accomplice Burris testified for the prosecution that on several occasions he had received orders from Lewis to "go out and beat people up"; that in November, 1937, he made a trip to Delano in an automobile with the acquitted defendants King and O'Brien; that later that night they followed the automobile of a man who had spoken at a meeting in Delano and when they passed the other car he, Burris, threw a five-pound rock through its windshield. King and O'Brien denied that any such incident ever took place. Burris was also dismissed from the union on charges preferred by Lewis and shortly thereafter wrote letters to union members and officials which revealed a feeling of bitterness and animosity towards Lewis. There was also testimony that Burris had stated he had "engineered the break between the Teamsters Union in Wilmington and Local 208" and that it "was his ambition to become head of Local 208. * * *"

The two accomplices, Williams and Johnson, testified they had received instructions from Lewis that "there were men that had to be 'dumped' * * * men who went through picket lines, C.I.O.'s and nonunion men," and that they had participated in altercations and had struck persons while working as organizers for the Teamsters' Union. Lewis testified that these men were never employed by Local 208, and denied that he ever gave them instructions. It appears they had done some work for other locals and that they were frequently around Local 208.

In addition to the testimony of accomplices the prosecution introduced documentary evidence consisting of teletype messages and memoranda exchanged between Lewis and Dail with reference to the business of the union and labor conditions generally in the Los Angeles area. These messages and memoranda contained no reference to acts of violence and were apparently introduced in evidence for the purpose of showing the relationship between Dail and Lewis and Local 208. There was also introduced in evidence an expense item filed by one of the employees covering meals for members of a "goon squad." It appears that a check was issued by Lewis covering this item. In this connection Lewis stated, and his testimony was corroborated by other witnesses, that all expense items were first submitted to the treasurer for approval and the checks were then made out by a clerk and were presented to Lewis for signature without any accompanying memoranda, and that the original expense slips and office vouchers were not attached to the checks until they were canceled and returned to the office.

The evidence on which Copelan and Belanger were convicted of simple assault is also conflicting. As to count two, the evidence shows that the prosecuting witness Calkins, a member of Local 208, had been in arrears in his dues for several months prior to October 29, 1937, and that contrary to union regulations he had been driving a truck for a company operating as a union shop. Complaint also had been made that he had attempted to compel truck drivers to patronize a cafe owned by his wife. On the day of the assault alleged in count two, Copelan, Belanger and Lewis were at the Evans Freight Lines in Los Angeles where Calkins was employed. Calkins testified that while he was talking to Lewis he was struck by Copelan, and that in the scuffle that followed Belanger joined Copelan in attacking him. Other prosecution witnesses testified to having seen Copelan and Belanger fighting or scuffling with Calkins. Copelan claimed he and Calkins had an argument about the latter being in arrears in his dues and that Calkins threatened to strike him, whereupon they exchanged blows. Belanger claimed he did not enter the affray until Calkins picked up a dating stamp and raised it above his head and that he then struck Calkins to cause him to let go of the stamp. Other defense witnesses corroborated the testimony of Copelan and Belanger. Lewis testified he had left the loading dock prior to the affray, and that when it was called to his attention he ordered Belanger to stop the fight.

As to count three, the evidence shows that on November 3, 1937, the prosecuting witness Norman Smith was seated in a truck near the loading platform of the Arrowhead Freight Lines, where he was employed. Belanger asked Smith to let him see his union card. Smith said he had none because he owned his own truck, and he invited Belanger to check the registration certificate on the steering wheel. According to Smith, Belanger then opened the door of the truck and hit him, and he put his feet in Belanger's stomach and pushed him away and alighted from the truck. Smith says he was then attacked by Belanger and two or three men. Belanger testified that as he opened the truck door to look at the registration card on the steering wheel Smith kicked him in the stomach and knocked him down. According to Belanger, Smith then got out of the truck and was about to strike him again and he hit Smith in the eye. The accomplice Burris and another prosecution witness testified that Copelan struck Smith after the latter had been hit by Belanger. Copelan, on the other hand, denied taking any part in the affray, claiming he was upstairs in an office when it took place. Several witnesses testified that shortly after the fight Smith attempted to have Belanger arrested, claiming the latter had "hit him in the eye," but made no statement about having been struck by Copelan or anyone else.

[1-3] As has been shown, the evidence relating to all three counts is conflicting. The evidence as to the first count was based largely upon the testimony of accomplices who were impeached. The reviewing court is bound, however, to view the evidence in the light most favorable to the respondent, and applying this well established principle to the record in this case, we must hold that the evidence is sufficient to support the verdict. It is also true, however, that in a close case where the evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal. People v. Silver, 16 Cal.2d 714, 723, 108 P.2d 4.

[4-6] We turn now to a consideration of the appellants' contentions that the trial court committed prejudicial error in giving instructions and in commenting on the evidence. Some of the instructions claimed to be erroneous are as follows:

(1) "* * * an agreement by persons to picket a place of business and to use in picketing large numbers of pickets for the purpose of intimidating or threatening the employers or employees in such place of business, * * * constitutes unlawful picketing, and the same is true of a boycott carried on by such means";

(2) "* * * intimidation includes persuasion by or on behalf of a combination of persons resulting in coercion of the will by mere force of numbers";

(3) "* * * even a simple request to do or not to do a thing made by one or more of a body of persons under circumstances calculated to convey a threatening intimidation, with a design to hinder or obstruct workmen, is unlawful intimidation, and is not less obnoxious than the use of physical force for the same purpose";

(4) "* * * any action having in it the element of intimidation or coercion, or abuse, physical or verbal, or of invasion of rights of privacy, when not performed under sanctions of law or those lawfully empowered to enforce the law, is unlawful; * * *"

(5) "* * * every act of speech, of gesture, or of conduct which any fair-minded man may reasonably judge to be intended to convey insult, threat, or annoyance to another, or to work * * * abuse upon him, is unlawful, and any group of men pursuing by agreement such unlawful conduct when engaged in the pursuing of an act lawful in itself fall within the definition of a conspiracy by performing a lawful act in an unlawful manner."

These instructions erroneously advised the jury that all concerted activities by combinations of workmen are illegal. The rule stated therein is plainly erroneous and contrary to that announced by this court in Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403, and McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373. The right to picket peacefully and truthfully is guaranteed by the Constitution as an incident of freedom of speech. Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; A. F. of L. v. Swing, 312 U.S. 321, 325, 61 S.Ct. 568, 85 L.Ed. 855; Hotel, etc., Employees' Local v. Wisconsin Rel. Board, 315 U.S. 437, 62 S.Ct. 706, 86 L.Ed. 946. It cannot be said that the instructions were unrelated to the facts developed at the trial and therefore without influence upon the jury, as urged by respondent. Count one of the indictment (under which Lewis was convicted) charged a conspiracy "to commit assaults * * * and * * * to obtain property of other persons * * * with consent of said other persons which was induced by the wrongful use of force and fear," while counts two and three (under which Copelan and Belanger were convicted) charged assaults "connected in [their] commission with Count I." Labor controversy, jurisdictional disputes and organizational activities of rival unions were the background and framework of the charges upon which the appellants were convicted.

The record contains many references to strikes and picketing in connection with the efforts of Local 208 to obtain new members and unionize truck drivers. The efforts were directly related to the offenses charged and the erroneous instructions may have misled the jury to conclude that appellants were guilty because they had engaged in activities wrongfully characterized therein as unlawful.

[7, 8] It is further urged by appellants that the court in commenting on the evidence erroneously instructed the jury on matters of law as follows: (1) that the fact that the accomplice witness McKnight pleaded guilty to one count of the indictment should not discredit his testimony; (2) that the credibility of the accomplice witnesses was to be judged by the same standard as that of other witnesses. After commenting upon the testimony of the accomplice witnesses McKnight and Burris, the court instructed the jury as follows: "And in this connection, ladies and gentlemen, the credibility of all of these witnesses is to be judged by you by the same standard as that of any other witness. The fact that the witness McKnight has entered a plea of guilty to one count of the indictment or that all charges against the witness Burris have been dismissed by the Court on motion of the District Attorney, standing alone, should not discredit these witnesses or their testimony, unless, in addition thereto, there is something about their testimony or their manner of testifying or their in-

terest in the case, or their bias or prejudice against one or any or all of the defendants which casts suspicion upon it in your minds. In the Court's opinion the testimony of the witnesses McKnight and Burris was given in a calm and dispassionate manner; their answers were well considered, and on the face of their testimony and in their demeanor upon the witness stand, there was no evidence of animosity."

It was clearly error for the court to instruct the jury that the fact that the witness McKnight had entered a plea of guilty to one count of the indictment (a felony) should not discredit his testimony. A witness may be impeached by showing a prior conviction of felony Code Civ.Proc. § 2051. For impeachment purposes, a plea of guilty is equivalent to proof of conviction. People v. Jacobs, 73 Cal.App. 334, 351, 238 P. 770; 27 Cal.Jur. 142. The trial court in effect advised the jury that as a matter of law McKnight's plea of guilty, which was entered in the presence of the jury, was not to be regarded as tending to impeach him, and this was an incorrect statement of the law.

[9, 10] A further claim of error is that the court instructed the jury that the credibility of accomplice witnesses is to be judged by the same standard as that of other witnesses. This instruction was in direct opposition to the statutory provision that the testimony of an accomplice should be viewed with distrust. (Code Civ. Proc. sec. 2061, subd. 4). The giving of a formal instruction which stated the statutory rule did not cure the error, but instead created a serious conflict, which would normally have the effect of misleading the jury. It must be remembered that the strongest witnesses for the prosecution were the accomplices, and without their testimony the conviction could hardly have been possible. This being so, it was of the utmost importance that the jury be correctly advised as to the standards by which such testimony was to be weighed. Instead, the jury was misdirected by a clear and specific statement which in effect nullified the previous formal instruction, and no attempt was made to relate the two or explain the inconsistency. The result must inevitably have been a confusion in the jurors' minds on a matter vital to the judgment. Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. See for example: Wells v. Lloyd, 21 Cal.2d 452, 457, 132 P.2d 471; Jolley v. Clemens, 28 Cal.App.2d 55, 73, 82 P.2d 51; Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675; 8 Cal.Jur. 633.

[11] The error was further emphasized here by reason of the fact that the erroneous instruction was given by the court in connection with its comments made on the testimony of the accomplices. The fact that a person is an accomplice in the commission of a crime goes to his credibility as a witness and to the weight of his testimony. In discussing the effect and weight of such testimony state and federal courts have on numerous occasions emphasized its questionable character. People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L.R.A.,N.S., 704; People v. Braun, 31 Cal.App.2d 593, 603, 88 P.2d 728; People v. Ross, 46 Cal.App.2d 385, 397, 116 P.2d 81; Arnold v. United States, 10 Cir., 94 F.2d 499; Craig v. United States, 9 Cir., 81 F.2d 816, 827; Shields v. United States, 3 Cir., 17 F.2d 66, 68. In Crawford v. United States, 212 U.S. 183, 204, 29 S.Ct. 260, 268, 53 L.Ed. 465, the Supreme Court of the United States said with reference to the testimony of an accomplice witness that "the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses." In 20 Am.Jur. 1087 it is said: "The facts that the testimony of accomplices is not of the most satisfactory character and that it is attended with serious infirmities are matters recognized by the decisions and are too obvious and well understood to call for exposition. Such considerations go to the credibility of the evidence, and the law requires that such testimony be closely scrutinized and accepted with caution. Indeed, it has long been the custom, both in England and in the United States, for the court not only to caution the jury as to the danger of acting upon the unsupported testimony of an accomplice, but to advise them not to convict in the absence of some corroborating evidence." In People v. Coffey, 161 Cal. 433, at page 438, 119 P. 901, at page 903, 39 L.R.A.,N.S., 704, the court said that at common law it was recognized that "evidence of an accomplice, coming from a tainted source, the witness being, first, an infamous man, from his own confession of guilt, and, second, a man usually testifying in the hope of favor or the ex-

pectation of immunity, was not entitled to the same consideration as the evidence of a clean man, free from infamy. Hence it soon became the practice of the common-law judges, in the wide latitude allowed to them in the instruction of their juries, to advise the latter that the testimony of an accomplice, for the reasons indicated, was to be viewed with care, caution, and suspicion (see Code Civ.Proc., § 2061), that the accomplice stood before them as a witness entitled to little credit and that the surest way of establishing his credit in their eyes was for them to note whether his testimony was corroborated in any material matter by independent evidence, and that if it were so corroborated they might put faith in all that the accomplice had said. * * *" Section 2061, subdivision 4, was, in its present form, a part of the Code of Civil Procedure when it was enacted in 1872, and it was apparently an attempt to codify the common law.

[12] The prosecution in support of the contention that the court here correctly stated that the credibility of accomplice witnesses was to be judged by the same standard as that of any other witness relies upon Hirshfeld v. Dana, 193 Cal. 142, 160, 223 P. 451. It was there held that subdivision 4 of section 2061 of the Code of Civil Procedure, authorizing the trial court to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust * * *" is unconstitutional, because it charges the jury on matters of fact, contrary to the provisions of article VI, section 19, of the state Constitution (as it then read). See, also, People v. Northcott, 209 Cal. 639, 653, 289 P. 634, 70 A.L.R. 806. Several decisions of this court rendered prior to the Hirshfeld case indicate that the court was not then in accord on the question whether subdivision 4 of section 2061 was unconstitutional. See People v. Ruiz, 144 Cal. 251, 77 P. 907; People v. Moran, 144 Cal. 48, 63, 77 P. 777; People v. Buckley, 143 Cal. 375, 77 P. 169; see, also, People v. Silva, 121 Cal. 668, 670, 54 P. 146. Chief Justice Beatty expressed the minority view in People v. Ruiz, supra, 144 Cal. at page 255, 77 P. at page 909, as follows: "The Legislature has the undoubted power to declare what shall not be competent evidence. In the exercise of this power, it might have excluded absolutely the evidence of an accomplice, or the evidence of verbal admissions of a party. Having the power to exclude altogether, it has the power to admit subject to conditions or qualifications; and clause 4 merely states the qualification subject to which this kind of testimony is admissible—the condition upon which it is allowed to go to the jury at all."

The requirement of section 1111 of the Penal Code that accomplice testimony must be corroborated is a convincing indication of the legislative intent and policy that such evidence is to be regarded as untrustworthy and not to be believed unless fortified by other evidence tending to connect a defendant with the commission of the offense charged. The power of the Legislature so to provide is not questioned and if it may thus stigmatize accomplice testimony and completely deny it credence unless corroborated, no valid reason exists why the Legislature may not declare, as it has done in subdivision 4 of section 2061, that the jury is to be instructed to view such accomplice testimony with distrust. The difference is merely one of degree. To require such an instruction on proper occasions is not to charge the jury upon matters of fact. It merely serves to state the legislative condition upon which the jury is permitted to hear that class of evidence.

[13] The somewhat analogous situation in People v. Lucas, 16 Cal.2d 178, 182, 105 P.2d 102, 103, 130 A.L.R. 1485, presented the question whether the defendant was entitled to a cautionary instruction in a sex case to the effect that "such a charge is easily made and difficult to disprove for which reason the testimony of the prosecuting witness should be examined with caution." This court there said, "the objection * * * to such an instruction, that it contains 'statements of fact, not of law,' would appear to have spent much of its force in view of the recent amendment to section 19 of article VI of the Constitution authorizing a trial court to comment on the facts. * * *" See, also, People v. Stangler, 18 Cal.2d 688, 694, 117 P.2d 321; People v. Roberts, 50 Cal.App.2d 558, 569, 123 P.2d 628. If in a case of that type a defendant is entitled to a cautionary instruction, by analogy he is entitled to a cautionary instruction in a case involving the testimony of an accomplice, particularly when, as here, the statute directs that such an instruction be given.

It has been suggested that the 1934 amendment to section 19 of article VI of the Constitution referred to in the Lucas case cannot validate or revive section 2061, subdivision 4, supra, if it were void when enacted. This does not, however, state the problem before us. We are not required to revive a statute previously declared unconstitutional for lack of constitutional authority. The real question is whether the statute was in fact void, as held in the Hirshfeld case. In our considered opinion the Hirshfeld case was based upon a misconception, and to the extent that it purported to make improper the ordinary cautionary instructions on doubtful evidence it must be overruled. The statute was never void, under our present view, and needs no "revival." The subject of the statute—a rule of procedure—involves no problems of retroactive effect which occasionally arise when a decision declaring unconstitutionality is overruled. (See e.g., Rottschaefer on Constitutional Law (1939) 37; (1937) 37 Col.L.Rev. 1017.) The result of our present decision is that such instructions are necessary in a proper case and the failure so to instruct may be reversible error. See, also, People v. Weitzman, 362 Ill. 11, 198 N.E. 711, 716.

[14] For these reasons, therefore, it was error for the trial court under the guise of comment to instruct the jury, contrary to the statute, that the credibility of accomplice witnesses "is to be judged * * * by the *same standard* as that of any other witness." An erroneous instruction on the law given to the jury by the trial court while "commenting" on the evidence is subject to challenge on the same grounds as when included among the formal instructions. As said in People v. Costello, 21 Cal.2d 760, 765, 135 P.2d 164, an erroneous instruction upon the law cannot be deemed a justifiable comment on the evidence and credibility of a witness.

[15-17] The errors in the instructions concerning the credibility of accomplice witnesses were accentuated by the comments of the trial judge concerning the testimony of accomplices McKnight and Burris. The court told the jury that in its opinion their testimony was given "in a calm and dispassionate manner"; that their answers were "well considered"; and that "on the face of their testimony and in their demeanor upon the witness stand, there was no evidence of animosity." The court made no reference to the facts that after charges were preferred by Lewis both of these witnesses were dismissed from the union, that McKnight stated under oath that he had been "mad at him since," and that there was presented in evidence a letter written by Burris containing inflammatory accusations and embittered statements against Lewis. By such one-sided comment the court drew the attention of the jury to an asserted lack of animosity toward the defendants observable in the accomplices while testifying, without mentioning the undisputed evidence that such animosity did exist. The court also in commenting upon the conflicting statements made by the accomplice McKnight, stated to the jury that "* * * the witness McKnight admits he told an entirely different story * * * in the statement he gave shortly after the indictment was returned than the story he told you from the witness stand. * * * One circumstance you are entitled to take into consideration is the fact that he testified that at the time of his (first) statement * * * he was preparing a defense to the charges, and he had no intention of pleading guilty to any of the charges, as he subsequently did." This may have served to cast doubt on the credibility of McKnight's previous statements favorable to defendants and to invest with veracity unfavorable statements made while testifying. The trial court made slight, if any, comment on the defense evidence, but it indicated that the accomplice testimony was entitled to full credence in spite of the statutory requirement that it be viewed with distrust, and despite the fact that it was thoroughly impeached. While a trial court is not necessarily required to comment on all of the evidence, nevertheless its comment should be "temperately and fairly made. * * * Trial courts should * * * be cautious in their exercise of this power (of comment) with a view to protecting the rights of defendants." People v. DeMoss, 4 Cal.2d 469, 477, 50 P.2d 1031, 1034. In the present case, however, the quoted comments standing alone would not require a reversal, but when considered in connection with the accompanying erroneous instructions relative to the credibility of accomplice witnesses they serve to accentuate and emphasize the error in those instructions.

[18-20] The trial court also stated to the jury that "The defendants Lewis and Pitts (an aquitted defendant) have admitted to you from the witness stand their activities and control of the affairs of the organization and their consequent responsibility therefor. It is therefore not necessary for you to determine that responsibility since it stands admitted, and should you find that the acts or activities of any of

the other defendants constituted or amounted to criminal offenses, you would be warranted in finding the defendants Lewis and Pitts equally guilty of such offense or offenses." Lewis admitted only that by virtue of his position he had control of the affairs of the organization but not that he was responsible for the unauthorized conduct of its members. As before stated, Lewis testified that he had never advocated the use of violence and had admonished the men against its use and his testimony in this regard was corroborated by others. The admission of control of the organization and responsibility for its affairs does not, of course, constitute an admission that a conspiracy existed or that violence was advocated. It was therefore an incorrect statement of fact for the court to tell the jury that Lewis had admitted "responsibility therefor." Furthermore, the latter part of the quoted statement amounted to an erroneous instruction to the jury on the law to find Lewis guilty if it found *any* of the other defendants guilty on *any* of the several charges contained in the indictment. Under this improper instruction the jury was told it could find Lewis guilty on any of the several charges even though it should fail to find the existence of a conspiracy between him and any of the other defendants to commit assaults. Such erroneous instruction served to deprive Lewis of the right to have the jury consider his individual criminal responsibility. The trial court, under the guise of comment, may not properly control the verdicts by a direction either directly or *impliedly* made. People v. DeMoss, supra, 4 Cal.2d at page 477, 50 P.2d 1031; People v. Ottey, supra, 5 Cal.2d 714, 729, 56 P.2d 193. People v. Eudy, 12 Cal.2d 41, 47, 82 P.2d 359, 362, is cited by the prosecution to the effect that a trial court may express its opinion as to the guilt or innocence of a defendant. The qualification is there added, however, "provided the province of the jury is not invaded." The court here incorrectly stated the facts, erroneously declared the law and improperly invaded the province of the jury.

[21, 22] It thus appears that the court misdirected the jury on matters of vital importance to the defendants. We have heretofore pointed out that the evidence is in substantial conflict, and that any serious error could under these circumstances have a prejudicial effect. The record in this case consists of approximately 6,545 pages. Much of the evidence is immaterial since it relates to three of the counts charging assaults by means of force likely to produce great bodily injury of which defendants were acquitted. Although we have made a careful examination of the entire cause we have set forth in this opinion only so much of the evidence as appears necessary to show that it was sufficient to support the judgment, but was in substantial conflict. In considering the effect of article VI, section 4½ of the Constitution, "We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence." People v. O'Bryan, 165 Cal. 55, 66, 130 P. 1042, 1046; see, also, People v. Roe, 189 Cal. 548, 561, 209 P. 560. As stated in Tupman v. Haberkern, 208 Cal. 256, 263, 280 P. 970, 973, "Whether the error found to be present 'has resulted in a miscarriage of justice' presents a question of law on the record before the court, and the purpose of the section [4½] was to require the court to declare as matter of law whether the error has affected the substantial rights of the party complaining against it, and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies."

The conclusion is inescapable that the errors in this case resulted in a miscarriage of justice within the meaning of article VI, section 4½ of the California Constitution.

[23] All proceedings in this cause have permanently abated as to Dail by reason of his death pending appeal and the superior court is directed to enter its order to that effect. People v. St. Maurice, 166 Cal. 201, 202, 135 P. 952; People v. Alexander, 101 Cal.App. 394, 396, 281 P. 697. The judgments and orders denying new trials are, and each is, reversed as to appellants Lewis, Copelan and Belanger.

CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, Justice (concurring and dissenting).

It is conceded by all members of this court that the evidence before the jury was sufficient to support a verdict of guilty against the four appealing defendants. But, as I read the record, the character of the evidence supporting the convictions differs as to Dail and Lewis, who were found guilty of conspiracy, and as to Copelan and

Belanger, who were found guilty of assault.

The evidence upon which the former were convicted was primarily the testimony of accomplices, whose veracity, because of evidence tending to impeach them, is open to serious question. I am satisfied that, without the testimony of these accomplices, the record discloses insufficient evidence to support the convictions of Lewis and Dail. Under these circumstances, the correctness of the instruction regarding the weight to be given accomplice testimony becomes a question of decisive materiality.

The trial court instructed the jury that the credibility of an accomplice is to be judged by the same standard as that of other witnesses. I agree with the conclusion of the Chief Justice that this instruction is squarely contrary to subdivision 4 of section 2061 of the Code of Civil Procedure requiring the court, on all proper occasions, to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust." I also read the statute as a codification of the common-law rule, and disagree with the reasoning of Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, holding the subdivision unconstitutional. But even if the Hirshfeld case were controlling, it affords no justification for a direction by the court to the jury, as a matter of law, that the credibility of an accomplice is to be judged by the same standards as that of any other witness. The instruction was therefore prejudicially erroneous.

In the same category, so far as the conspiracy count is concerned, I place the instruction that the testimony of the accomplice McKnight was not discredited by his plea of guilty to a count in the indictment charging him with the commission of a felony. In addition, it may not be denied that the effect of these errors was aggravated by the disproportionate attention given by the trial judge, in commenting upon the evidence, to the factors strengthening the credibility of the accomplices as compared with his total disregard of the impeaching circumstances accompanying their testimony. I also agree that the trial court unjustifiably assumed a fact not supported by the evidence in telling the jury that the defendant Lewis had admitted in his testimony his responsibility for the criminal acts of any of the other defendants.

But the evidence upon which Copelan and Belanger were convicted of simple assault is of a totally different character. That they actually committed the acts complained of may not seriously be questioned. Unlike the evidence upon which the jury found Lewis and Dail guilty, witnesses other than accomplices testified to having seen acts of violence committed by Copelan and Belanger as charged in counts two and three of the indictment. And, as indicated by the opinion of the Chief Justice, although much of the evidence related to other, as well as these alleged acts, the jury obviously did not believe most of it for all defendants were acquitted upon the other three counts charging an assault. After the jury so carefully selected what it believed from what it disbelieved, and when its determination is amply supported by the direct testimony of witnesses other than accomplices, the erroneous instructions and comment as to the accomplice testimony did not, in my opinion, result in a miscarriage of justice so far as these two defendants are concerned. The instructions, which, in cumulative effect, erroneously advised the jury that all concerted activities by combinations of workers are illegal, could by no means have misled the jury in finding Copelan and Belanger guilty, for the error consisted in their condemnation of peaceful picketing. The nature of the charges upon which these two were convicted is obviously unconnected and incompatible with lawful picketing.

For these reasons I am convinced that the judgments and the orders denying new trials should be reversed as to Lewis and the case against him remanded for a new trial, but that, as to Copelan and Belanger, the judgment and order should be affirmed.

CURTIS, Justice.

I dissent. A group of eleven defendants were accused in count one of an indictment with conspiracy to commit assaults upon other persons by means of force likely to produce great bodily injury and to obtain property from other persons, with their consent, induced by the wrongful use of force and fear. In five other counts the defendants were charged with assaulting certain named persons by means of force likely to produce great bodily injury. The remaining count accused them of the crime of extortion.

The defendants Harry Dail and Dexter Lewis were convicted on count one and acquitted on all other counts. These two defendants were sentenced to the state penitentiary for the term prescribed by law, but the sentences were suspended and probation granted for a period of ten years. As a condition of the probation eighteen months of service in the county jail was imposed. The defendants David Belanger and Dewey Copelan were convicted on counts two and three of simple assault, a misdemeanor, a lesser but included offense, and acquitted on all other counts. They were sentenced to the county jail for a term of six months on both counts, sentences to run consecutively, and probation was denied. The indictment was dismissed as to defendant Walter Hart Burris. Defendant Paul McKnight pleaded guilty to count one and the remaining counts were dismissed as to him, except count two, the disposition of which does not appear in the record. The remaining five defendants were acquitted on all counts. Defendants Dail, Lewis, Belanger and Copelan all appealed from the orders denying new trials and from the judgments. As stated in the majority opinion, Dail died after taking his appeal. The remaining defendants appealing will be hereafter referred to as the appellants.

Dail was an international representative of the International Teamsters Union, an affiliate of the American Federation of Labor. In 1935 he was ordered to make a general survey of the various road truck operations covering the State of California. In May, 1936, he was permanently assigned to the Los Angeles area. His duties were to organize, assist in organization, and to negotiate wage scales where such services were requested by the local unions. When Dail came to Los Angeles, Local Union 208 was under international receivership, a situation provided for by the International Brotherhood constitution. A receiver may be appointed at any time by the international when the general executive council of that body determines that the local officers are not acting in the best interests of the membership. When appointed, a receiver has complete control of the local. At his own request Dail was appointed receiver for Local 208, although by his own admission there was no section in the constitution which covered his reason for requesting receivership. Appellant Lewis became an organizer for Local 208 in November, 1936. As such organizer his duty was to contact truck drivers who were not union members and try to persuade them to join the union. In July, 1937, Lewis was made acting president of Local 208 and was later elected to that office. Appellants Belanger and Copelan were organizers and checkers for Local 208. As such their duties were to try to get new members, to check members to determine whether their dues were paid, and to collect dues. Defendant Schultz was secretary-treasurer of Local 208. The other defendants, including McKnight and Burris, were organizers, checkers and business agents.

The appellants make numerous assignments of error, the first being that the evidence is insufficient to support the verdict. In view of the lengthy briefs running into thousands of pages, and the hundreds thereof devoted to arguments on the evidence, it should here be stated, as it has been many times before, that the appellants are not on trial before this court. They have already been tried by a fact-finding body in a trial extending over a period of three months. During that trial over 50 witnesses testified for the prosecution, over a hundred testified for the defense, and much documentary evidence was introduced. It was inevitable that there would be a great deal of conflicting evidence. It is well settled that on appeal all conflicts must be resolved against the appellant. This fundamental principle has at times been overlooked in the briefs before us in this case.

Appellant Lewis contends that there is no evidence of a general conspiracy nor is there any evidence showing his participation in any alleged conspiracy to commit assaults upon other persons by means of force likely to produce great bodily injury or to obtain property from other persons, with their consent, induced by the wrongful use of force and fear. The existence of a criminal conspiracy, like any other question of fact, is for the jury to determine. After a careful review of the record I am of the opinion that the jury might reasonably have inferred from the evidence presented that Dail and Lewis did conspire to commit the acts alleged.

It is contended that there is no direct evidence of a conspiracy or participation therein by Dail and Lewis. However, there need be no direct evidence to establish a conspiracy, and a common design or conspiracy may be deduced from attending circumstances, viz., the nature of the acts done, the relation of the parties and the interest of the alleged conspirators. Johnstone v. Morris, 210 Cal. 580, 292 P. 970; Beeman v. Richardson, 185 Cal. 280, 196 P. 774; Revert v. Hesse, 184 Cal. 295, 193 P. 943; People v. Donnolly, 143 Cal. 394, 77 P. 177;

People v. King, 30 Cal.App.2d 185, 85 P.2d 928; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718; People v. Collier, 111 Cal.App. 215, 295 P. 898; People v. Schmidt, 33 Cal.App. 426, 165 P. 555; People v. Seefeldt, 310 Ill. 441, 141 N.E. 829; Underhill's Criminal Evidence, sec. 771.

The avowed purpose of Dail and Lewis was to organize the trucking industry in Southern California. It was their duty to persuade non-union truck drivers to join the union and to persuade employers to enter into closed shop contracts with the union. A combination to do these things, within legal limits, would not of course be a criminal conspiracy. But if they conspired to commit assaults on non-union truckers to force them into the union or to commit assaults for the non-payment of dues, then such action would be a criminal conspiracy as charged in the indictment. It would add nothing to this opinion to refer specifically to the numerous acts of assault. The record is replete with actual physical altercations between union organizers and non-union drivers, delinquent members, members of other unions, and drivers who owned their own trucks. Threats of personal injury and threats to and actual destruction of property run throughout the entire record. A denial of the occurrence of these physical encounters is merely an evidentiary argument contrary to the implied findings of the jury. The claim that if any organizers struck or kicked other persons, it was done only in self-defense is also an argument on the evidence, and the jury was justified in concluding otherwise. Whether the incidents were isolated and independent or all an integral part of a general conspiracy was a question of fact for the jury to determine. People v. Kauffman, 152 Cal. 331, 92 P. 861.

Appellant Lewis admitted that he was in charge of the activities of the organizers for Local 208. Of course, he denied that he ever gave any orders to his organizers to commit assaults on non-union members or delinquent members, but there is ample evidence to the contrary. All of the accomplice witnesses testified that such orders were given. Attorneys' fees were authorized to be paid by Lewis for those who had been arrested for participation in assaults. Doctor and hospital bills were paid on Lewis' authorization for those who had been injured while engaged in physical altercations. Lewis signed checks in payment for expenses, including vouchers for "Meals for goon squad, 35 cents" and "Meals for beef trust, $1.13." A Mr. McCue, at the time general foreman for the Southern California Freight Lines, testified that Lewis told him that "he [Lewis] had gotten my job and that I was through, and I couldn't show up around the place anymore, otherwise he would send a goon squad and cause me some trouble." From the evidence referred to and the other evidence presented, the jury could reasonably have concluded that Lewis not only had knowledge of the activities of his organizers, but that he actually ordered the assaults to be committed. As the majority opinion conceded that the evidence is sufficient to support the verdict, a further review of the evidence will not be necessary, although the major parts of appellants' lengthy briefs are devoted to the discussion of the evidence and in an attack upon the verdict of the jury as lacking in evidentiary support.

Appellants rely on section 1110 of the Labor Code, St.1937, p. 213, in attacking certain instructions given by the trial court in regard to strikes, picketing, and boycotts. It is urged by appellants that because of the provisions of section 1110, no act may constitute a crime if done in the interests of labor. This section declares that no agreement between two or more persons to do or not to do an act in furtherance of a trade dispute between employers and employees is criminal, if the same act committed by one person would not be punishable as a crime. The novel proposition of appellants apparently is that merely because their activities were connected with labor disputes, they are entirely free from prosecution for criminal acts. Such proposition is untenable. The appellant Lewis was neither charged with nor convicted of a conspiracy to do any act in furtherance of a labor dispute. He was convicted of conspiracy to commit assaults and extortion. Assaults and extortions are just as much crimes when committed by those engaged in labor activities as when committed by any other persons. There has been a great advance in the recognition of the rights of labor since the time when a mere combination of employees to procure higher wages and shorter hours was considered a criminal conspiracy, but neither statutory law nor court decision completely absolves a man from prosecution for a criminal act simply because he is allegedly engaged in labor activities. Both this court and the United States Supreme Court have recently reiterated the warning that physical violence, threats of violence and physical intimidation in labor disputes will not be tolerated. See C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200. If in the alleged interest of labor, a conspiracy to commit the acts of assault and extortion is entered into, the conspirators may be prosecuted and their positions in and control of the unions involved may be taken into consideration along with other evidence in determining the existence of the conspiracy. Labor leaders are not "endowed with rights which the ordinary citizen individually does not have," as urged by the appellants.

In its instructions to the jury the trial court erroneously stated that certain acts constituted unlawful picketing and amounted to intimidation which was beyond the limits of peaceful persuasion. The criticism of these instructions in the main is that the court's definitions in some cases included acts which might be done under the constitutional guarantees by those acting in behalf of the unions during a labor dispute, if their intimidation of workers was accomplished without the use of violence. These instructions were in part directly contrary to the law in this regard as it has been recently stated in Shafer v. Registered Pharmacists Union Local 1172, 16 Cal.2d 379, 106 P.2d 403 and McKay v. Retail Automobile Salesmen's Local Union No. 1067, supra.

But in view of the evidence presented against the appellants in this case, these instructions were not prejudicially erroneous. The appellants were convicted of a conspiracy to commit assaults and to obtain property by means of force. All of the acts which the witnesses testified were committed in connection with the strike involved bodily injury or the threat of bodily injury. The jury was not called upon to decide whether certain acts charged against the appellants were within the limits of peaceful picketing; all of them lay far beyond the limits of what may lawfully be done in furtherance of the demands of a union in a labor dispute. The only issue to be determined by the jury's verdict, insofar at least as the count on which appellants were convicted is concerned, was whether or not appellants had conspired to commit these illegal acts. Under the circumstances the error complained of resulted in no miscarriage of justice justifying a reversal of the judgments. Sec. 4½, art. VI, Cal. Const.

Appellants further complain of an instruction given by the court that "Business is property within the meaning of that term as used in the Penal Code and the threat of an interruption of the business which will necessarily be attendant with loss to the business, is a threat of an injury to property." Even the most ardent supporter of labor would not controvert the truth of this statement. Indeed, that is the chief purpose of the strike and boycott, and it is difficult to understand appellants' objection to it. They seem to argue that under such an instruction the jury would only have to decide that appellants conspired to call a strike or enforce a boycott in order to adjudge them guilty of conspiracy to commit extortion. This does not follow from the instruction given. The instruction did not state that every threat of interruption of business was an unlawful injury. Furthermore, as previously stated, the court had already instructed the jury that employees might strike or threaten to strike for lawful purposes. What constituted an unlawful injury was sufficiently defined in other instructions. When the trial court gave the challenged instruction, it undoubtedly had in mind incidents such as the Red Line Transfer Company affair, in which appellant Lewis threatened to pull off all the truckers to force the company to pay unearned money to a discharged employee, and there is no doubt, in view of the other relevant instructions, that the jury accepted the challenged instruction in this light.

Appellants next attack the following instruction: "You are instructed that one is responsible for what wrong flows directly from his corrupt intentions. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and uncautiously and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." Inasmuch as Belanger and Copelan were actual participants in the assaults of which they were convicted, the instruction obviously was without application to them. The case of People v. Munn, 65 Cal. 211, 3 P. 650, is cited in opposition to the challenged instruction. That case presented a factually distinguishable situation in that the instruction there involved had to do solely with the responsibility of the defendant for his own acts and did not undertake, as here, to instruct the jury with respect to the responsibility of one for the acts of another when the former sets in motion the acts of the latter. Moreover, as distinguished from the instruction in the Munn case, supra, the instruction here challenged did not make appellants answerable for every "possible" consequence, but held them accountable only for such result as was "contemplated" and for what wrong flowed "directly" from their conduct. The instruction must be read as a whole and interpreted in the light of the offenses charged and the facts as disclosed by the evidence. Appellant Lewis was prosecuted on the theory that he, as principal, ordered the acts of assault to be perpetrated. If he ordered the organizers to "persuade" non-union men to join the union and if necessary to use forceful persuasion, it is immaterial what particular method of physical force was used, i.e., whether the organizers used fists, feet, or baseball bats. If the "physical power" was set in motion by him or if he awoke an indiscriminate power in the form of orders to the organizers, he would be responsible as charged for the direct results thereof. If, on the other hand, the organizers took it upon themselves to commit murder as an independent act, the principals would not be liable for such under the instruction given.

Appellants assert that the trial court committed error in charging the jury that it might find defendants guilty of conspiracy if either conspiracy to commit assault or to extort were shown beyond a reasonable doubt. The attack on this instruction is utterly without merit, but is referred to as being illustrative of the type of argument that makes up a large portion of appellants' voluminous briefs. By section 182 of the Penal Code, conspiracy is a crime in itself. The gravamen of the offense is the agreeing or conspiring together to commit a crime. The allegations of one count may allege the object of the conspiracy to be the commission of any number of separate and distinct crimes. People v. Gilbert, 26 Cal.App.2d 1, 78 P.2d 770; People v. Welch, 89 Cal.App. 18, 264 P. 324. Because conspiracy to commit different offenses is charged in one count, it does not follow that the prosecution must prove conspiracy to commit all of the offenses alleged. Proof of conspiracy to commit any one of the offenses alleged would be sufficient, and this is precisely what the court instructed the jury.

It is urged that error was committed by the trial court in the giving of one of its instructions in regard to the sufficiency of corroboration of the testimony of an accomplice. The method of attack used by appellants is to isolate each sentence of the instruction and then attempt to point out error in the independent sentence. Instructions should be given a reasonable, not a close and technical interpretation. (8 Cal.Jur. 631). In testing the propriety of an instruction, the charge as a whole should be considered and not isolated excerpts. People v. Besold, 154 Cal. 363, 97 P. 871. The particular instruction under attack, when considered as a whole, is a proper recitation of the law applicable to the necessity of corroboration. It is not in conflict with section 1111 of the Penal Code, and all of the statements made are supported by the case of People v. Todd, 9 Cal.App.2d 237, 49 P.2d 611 and the authorities cited therein.

Many other instructions are attacked by appellants. In fact, few other than those offered by appellants escape attack. Appellants also complain of the court's refusal to give certain instructions requested by them. Nothing can be gained by treating each of the remaining specifications of error separately. I am convinced that no prejudicial error has been committed by the giving or the refusal to give the instructions referred to by appellants. As in every group of instructions, some error may possibly exist but the practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions to the jury. People v. Schmah, 62 Cal.App. 192, 216 P. 624.

In addition to the formal instructions, the trial court exercised the privilege given it under article VI, section 19, of the Constitution of this state, to comment on the evidence and the credibility of witnesses. Appellants attack the whole of the comment and claim it was made up of statements of erroneous rules of law and was not judicial comment, but had the effect of an argument for the prosecution. The scope of trial court comment and the limitations thereon, under the above-cited constitutional provision, have been fully discussed in the recent cases of People v. Patubo, 9 Cal.

2d 537, 71 P.2d 270, 113 A.L.R. 1303; People v. Gosden, 6 Cal.2d 14, 56 P.2d 211; People v. Ottey, 5 Cal.2d 714, 56 P.2d 193; People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031. Further comment and citations on the subject are found in Notes 95 A.L.R. 785 and 113 A.L.R. 1308. With such full discussion already a part of the reports of this state, it is unnecessary that there be any further general comment here. In making its comment in the instant case, the court did not overstep the bounds of fair comment, nor did it assume the role of an advocate. As shown by the case of People v. Patubo, supra, a trial court may so abuse its privilege as to necessitate a reversal, but here I find no such "severe castigation and bitter denunciation" of the defendants as was present in that case. In the instant case there is no language comparable to that in the Patubo case [9 Cal.2d 537, 71 P.2d 272, 113 A.L.R. 1303], wherein the court stated: "If ever a man by his appearance and his manner of giving testimony has shown himself to be a willful, deliberate and outright perjurer as to material facts in a case, the defendant in this case has been it." At the outset and throughout the body of its comment the court here was careful to advise the jurors that they were the triers of the facts; that the opinion of the court was not binding upon them; and that if they arrived at conclusions different than those expressed by the court, it was not only their privilege, but their duty to disregard the conclusions of the court.

Appellants complain bitterly of a statement made by the trial court in the course of its comment that it was the jury's duty to disregard the fact that the defendants were officers or members of a labor union. Far from being error, this comment was entirely proper and was made necessary by the attitude of the appellants themselves. Throughout the trial and in the briefs before this court appellants have attempted to make the issue one of capital versus labor. Such is not the issue. Appellants were charged with the commission of certain offenses. If the evidence showed they were guilty of those offenses, then it was proper that the jury bring in a verdict of conviction regardless of their association with a labor union. Prior to the excerpt complained of, the trial court pointed out that appellants were not being prosecuted because they were members of a labor union. It then referred to the crimes charged and followed with the statement that the jury should disregard appellants' affiliation with the union in deciding the truth or falsity of the charges contained in the indictment. In so doing no error was committed.

Appellants assert that the trial court's comment on the credibility of the testimony of the accomplice witnesses McKnight and Burris constituted an erroneous statement of law. The particular paragraph of comment attacked reads as follows: "And in this connection, ladies and gentlemen, the credibility of all of these witnesses is to be judged by you by the same standard as that of any other witness. The fact that the witness McKnight has entered a plea of guilty to one count of the indictment or that all charges against the witness Burris have been dismissed by the court on motion of the district attorney, standing alone, should not discredit these witnesses or their testimony, unless, in addition thereto, there is something about their testimony or their manner of testifying or their interest in the case, or their bias or prejudice against one or any or all of the defendants which casts suspicion upon it in your minds." Considering this comment in connection with the formal instructions given, the evidence adduced at the trial, and the code sections governing accomplice testimony and testimony of witnesses generally, I am of the opinion that no error of law was committed.

In its formal instructions the court had fully advised the jury as to the necessity of corroborative evidence pointing to guilt independent of the testimony of accomplices. By these instructions the requirement of section 1111 of the Penal Code was met and the evidence shows that there was sufficient corroborative evidence. There being sufficient corroboration, it was then for the jury to determine the credibility of the accomplice witnesses and the same standard was to be used as would be applied to any other witness. The presumption that a witness speaks the truth, provided for in section 1847 of the Code of Civil Procedure, is as applicable to an accomplice witness as to any other. In the case of an accomplice witness this presumption might of course be more easily repelled because of his position, but that fact standing alone should not discredit the testimony as a matter of law, as urged by appellants. There is no valid statutory requirement that the court instruct the jury that it should view the testimony of an accomplice with distrust. Subdivision 4 of section 2061 of the Code of Civil Procedure so provides, but that subdivision was declared unconstitutional in the case of Hirshfeld v. Dana, 193 Cal. 142, 233 P. 451. It is true that the reenactment of that subdivision might be held valid since the 1934 amendment to section 19 of article VI, of the Constitution of this state, permitting the court to comment on the facts and the credibility of witnesses, but such amendment cannot validate the section which was void when enacted. See Banaz v. Smith, 133 Cal. 102, 65 P. 309; Newberry v. United States, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913. In any case appellants can have no complaint because the court in its formal instructions did inform the jury that "Under such conditions, the law attaches the qualification to the testimony of such witness that it must be corroborated as herein set forth and should be viewed with distrust, all independent of the question of guilt or innocence of the defendants."

"The defendants Lewis and Pitts have admitted to you from the witness stand their activities in the management and control of the affairs of the organization and their consequent responsibility therefor. It is therefore not necessary for you to determine that responsibility, since it stands admitted, and should you find that the acts or activities of any of the other defendants constituted or amounted to criminal offenses, you would be warranted in finding the defendants Lewis and Pitts equally guilty of such offense or offenses."

Appellants argue that the above quoted comment amounted to a directed verdict against them. I cannot agree with this contention. By this comment the court was doing no more than exercising its right to comment on the evidence. As to Lewis and Pitts, the jury was told that it *would be warranted* in finding them guilty of the acts charged. Both before and after this comment the court was careful to point out that all issues of fact were to be ultimately determined by the jury. The fact that Pitts was acquitted of all charges is evidence that the jury did not consider this comment as a directed verdict. If it had been so considered, Lewis would have been convicted of assault along with Belanger and Copelan.

The majority opinion specifies numerous other portions of the comment as error, but I do not deem it necessary to give them detailed consideration. What was said in conclusion in the case of People v. Ottey, supra, is equally applicable here. It was there stated at page 730 of 5 Cal.2d, at page 201 of 56 P.2d: "Although the court's comments might be said to show some lack of care in the preparation thereof, nevertheless viewing the comments as a whole in the light of the evidence and the inferences rationally to be drawn therefrom, we cannot escape the conclusion that the jury did so function as the sole and exclusive judges of the facts, the weight to be accorded the testimony, and the credibility of the witnesses, and that the verdict returned by them was their verdict exclusively. [Citing authority.] In such a case further discussion of the subject-matter or the views of the courts in other jurisdictions as applied to special classes of comments indulged under the law and the facts there involved would serve no useful purpose."

There remain to be considered appellants' numerous specifications of error of the trial court's rulings on the evidence. It is first urged that the court erred in permitting, over appellants' objections, the proceedings by which the accomplice and co-indictee McKnight changed his plea of not guilty to one of guilty on count one, to be conducted in the presence of the jury. The jury was instructed that the plea of guilty was not evidence against the other defendants, and they were specifically instructed to disregard it entirely. The authorities cited by appellants to the effect that prior confessions or pleas of guilty in subsequent trials of alleged co-conspirators or accomplices are inadmissible, are therefore not applicable. The only question is as to the alleged misconduct of the trial court in permitting the plea to be made in the presence of the jury. McKnight was one of the eleven defendants charged and all were being tried together. A day or two after the trial was under way appellants' attorney pointed out that McKnight was going to plead guilty and asked that the jury be withdrawn. In answer to this request the trial court properly pointed out that it would be a useless act because at some time throughout the trial the fact that McKnight had pleaded guilty would inevitably be disclosed to the jury. The denial of the request was simply a proper exercise of the court's discretion in conducting the trial. A similar ruling was under review in the case of Grunberg v. United States, 1 Cir., 145 F. 81, 76 C.C.A. 51. In that case the plea of guilty of one defendant was taken in the presence of the jury panel over the objection of the other defendants. The reviewing court stated at page 86 of 145 F.: "We can, however, hardly regard this as prejudicial, because it is impossible to escape the belief that the fact that Burman had pleaded would come out in the course of the trial, and, also, that it would become a matter of common knowledge about the courtroom, which the entire panel would inevitably be affected by. * * * The true answer to the whole is that this was one of the ordinary incidents of a trial which is within the discretion of the court, and which we cannot revise." See, also, Commonwealth v. Biddle, 200 Pa. 640, 50 A. 262.

It is contended by appellants that the court erred in receiving in evidence over objection as hearsay, People's Exhibits 31, 97 and 100, consisting of letters written by the accomplice witness Burris, and that such error was prejudicial because the letters consisted of remarks made against Lewis that were "derogatory in nature and liberally sprinkled with epithets and vituperation." These exhibits were introduced on redirect examination after attempted impeachment by inference on cross-examination that Burris' motive in testifying as he did on direct examination was to curry favor with the prosecution, and that such testimony on direct examination was fabricated with this motive in mind. These exhibits tended to rebut the inferred impeachment in that they showed that Burris was of the same mind prior to his visits to the district attorney's office. When a witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist. People v. Kynette, 15 Cal.2d 731, 753, 104 P.2d 794; Barkly v. Copeland, 74 Cal. 1, 15 P. 307, 5 Am.St.Rep. 413; Davis v. Tanner, 88 Cal.App. 67, 262 P. 1106; Clark v. Dalziel, 3 Cal.App. 121, 84 P. 429. On cross-examination appellants had introduced their Exhibit Z, which referred to People's Exhibit 97. The latter then could be introduced as the balance of the whole on the same subject permitted by section 1854 of the Code of Civil Procedure. In regard to Exhibits 31 and 100, the jury was instructed that they were not to be taken as proof of the matters stated therein, but only for the purpose of considering whether Burris fabricated evidence after getting in touch with the district attorney's office. Even assuming that the receipt in evidence of the exhibits was erroneous, appellants have no reason to complain because although they did contain statements "derogatory in nature and liberally sprinkled with epithets and vituperation," practically the identical statements were contained in Exhibit Z introduced by appellants prior to the introduction of the questioned exhibits.

Appellants next assert that error was committed in restricting the cross-examination of the accomplice witness McKnight and in permitting the cross-examination of defense witnesses beyond the scope of direct examination. To consider each point raised under these assertions would be to extend unnecessarily this dissent beyond all reasonable lengths. I am well aware of the necessity of affording the defendants' counsel the fullest scope of cross-examination of an accomplice witness (See People v. Pantages, 212 Cal. 237, 297 P. 890; People v. Williams, 18 Cal. 187; People v. Schmitz, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A.,N.S., 717), but I am equally aware of the necessity of permitting a liberal discretion on the part of the trial court in conducting the trial generally and in controlling the examination of witnesses. As pointed out earlier in this dissent, the defendants are not on trial before this court. An appellate court should not, and as a practical matter cannot, re-try every case on appeal. Many of the specifications of error made by appellants in regard to the cross-examination of McKnight are without merit. For example, he was asked on cross-examination if two men had not approached him at his home and asked him if he would give a statement which would help convict the defendants, and he replied that he had been so approached. Questions along this line were objected to as hearsay and not connected in any way with the case. The men referred to were not identified in any way nor were they shown to be connected with the district attorney's office. The objection was properly sustained. See People v. Achal, 125 Cal.App. 652, 14 P.2d 773. McKnight's contact with the district attorney's office was fully brought out in other portions of the testimony. The defense witness C. G. Anthony, vice-president of Pacific Freight Lines, was questioned on direct examination concerning the conduct of a picket line in front of the freight line offices. On cross-examination this witness testified that he saw men with wounds, these men being employees who had not gone out on strike; that one of his men had received a severe beating; that during the strike a rifle bullet had been fired into one of the company's gasoline tankers on the Ridge Route; and that a truck was turned over and windshields were broken.

The questions calling for the above testimony were all objected to as going beyond the scope of direct examination and as being hearsay. The overruling of such objections was obviously not error. All that was testified to took place during the time the picket line was on, and Anthony was testifying as to facts within his own knowledge. The defendants were being tried on charges of assaults, extortion and conspiracy to commit those offenses. Lewis testified that he was in charge of this strike and picket line. There can be no question that the testimony was relevant.

No further reference need be made to specific testimony or the introduction or asserted suppression of evidence generally. Some error may have been committed by the trial court, but in view of the discretion that must be placed in the hands of the trial court in controlling the examination of witnesses and the introduction of evidence, particularly in cases in which the crime of conspiracy is charged, I am convinced that no prejudicial error has resulted.

The appeal of appellant Dail should be dismissed, and the judgments and orders denying new trials as to the other appellants should be affirmed.

SHENK, J., concurred.

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60 Cal.App.2d 358

PEOPLE v. SLATER.

Cr. 2259.

District Court of Appeal, First District,
Division 1, California.
Aug. 30, 1943.

1. Homicide 🔑340(1), 341

In prosecution for murder, instructions given with respect to self-defense and court's refusal to give other instructions on that subject, disclosed no reversible error. Pen.Code, § 197, subd. 3.

2. Criminal law 🔑762(5)

Instructions given in prosecution for murder were not subject to criticism that they were couched in such language as conveyed to jury the impression that court was of personal opinion that accused was guilty and had presented an inadequate defense.

3. Homicide 🔑340(2), 341

Accused having admitted on cross-examination that she did not shoot decedent in self-defense, could not complain of instructions given and refusal to give other instructions relative to self-defense. Pen. Code, § 197, subd. 3.

4. Criminal law 🔑808½

Court's refusal to charge in terms of statute that homicide is justifiable when committed against one who manifestly intends and endeavors in a violent manner to enter habitation of another for the purpose of offering violence to any person therein on which accused's defense was based was error where there was evidence supporting accused's theory of shooting. Pen.Code, § 197, subd. 2.

5. Criminal law 🔑770(2)

Accused is entitled to have an instruction given on his theory of the case if there is any substantial testimony upon which to base such theory.

6. Criminal law 🔑808½

One accused of murder for shooting a neighbor while allegedly attempting to frighten him away from outside stairway to accused's apartment was entitled to instruction in terms of statute that homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual and ordinary caution and without any unlawful intent. Pen.Code, § 195.

7. Criminal law 🔑785(7)

In prosecution for murder, an instruction relating to expert testimony and in accord with statutory provisions was not erroneous. Pen.Code, § 1127b.

8. Criminal law 🔑776(2)

In prosecution for murder, instructions given in usual form on the subject of character witnesses were not erroneous.

9. Criminal law 🔑829(1)

In prosecution for murder, court did not err in refusing to give requested instructions which, although they might properly have been given, were sufficiently covered by instructions given.

10. Homicide ⚷254, 347

Evidence of circumstances under which woman 68 years of age and suffering from chronic heart ailment shot occupant of first floor apartment during heated verbal altercation which began when deceased climbed back stairs and pounded on accused's door shouting for her to come out, though sufficient to establish that homicide was unlawful, did not warrant conviction of second-degree murder, and required District Court of Appeal to reduce degree of crime to manslaughter. Pen.Code, § 1181, subd. 6.

11. Homicide ⚷347

"Doubt" in mind of reviewing tribunal as to sufficiency of evidence concerning homicide to justify verdict as to degree of crime, if sufficient to require reduction of degree, should be not merely fanciful or imaginary, but should be reasonable, real and substantial. Pen.Code, § 1181, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Doubt".

12. Homicide ⚷39

Where mortal blow is struck upon a sudden quarrel or in heat of passion upon adequate provocation, actual intent to kill, though it may exist, is disregarded, since it is not the malicious "intent" which is an essential element in the crime of murder.

See Words and Phrases, Permanent Edition, for all other definitions of "Intent".

WARD, J., dissenting.

Appeal fom Superior Court, San Francisco County; Lile T. Jacks, Judge.

Mary Slater was convicted of murder of the second degree, and from the judgment of conviction and order denying her motion for a new trial, she appeals.

Judgment modified and cause remanded with directions.

Sol A. Abrams, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant, Mary Slater, was accused by information of having murdered Lucien Doyen, and she was found guilty by a jury of murder of the second degree. Motions for arrest of judgment and a new trial were denied; likewise a motion that the judgment be modified by reducing the degree of crime to manslaughter. Thereupon appellant was sentenced to imprisonment for the term prescribed by law in the California Institution for Women. From the judgment of conviction and the order denying her motion for new trial she has appealed. The several grounds urged for reversal are that the verdict is contrary to law and the evidence, and that at the most the evidence establishes no greater degree of crime than manslaughter; that the trial court committed prejudicial error in giving and refusing to give certain instructions and in ruling on the admissibility of evidence; and that the assistant district attorney was guilty of prejudicial misconduct during the course of the trial.

At the time of trial appellant was past 68 years of age, and lived with her nephew, Clifford Slater, in an upper flat at 1569 Grove Street in San Francisco. Doyen was 38 years old and lived in the lower flat with his wife, their infant child and Mrs. Doyen's two daughters by a former marriage, aged respectively 12 and 16 years. Shortly after 1 o'clock on the afternoon of July 15, 1942, during an altercation between Doyen and appellant, appellant fired a shot from a pistol, from a bedroom window in the upper flat. Doyen was standing on an open back stairway leading from the upper flat down past the door of the lower flat to the basement, and the bullet struck him in the chest, killing him almost instantly. Appellant's defense at the trial was in substance that on account of the previous altercations and quarrels that had taken place betwen them, and because of Doyen's threatening and abusive attitude toward her, and having been previously informed that Doyen was of a violent and quarrelsome disposition and was regarded by people with whom he worked as being mentally queer, she feared on this day that he was about to break into her apartment to do her violence; that she used the pistol to frighten him away, never intending to injure him; and that she did not know that she had shot him until after the police arrived. Her version of the shooting will be hereinafter set forth in greater detail.

The following are some of the essential facts as they appear from the record relating to the background of the case: Appellant had been married, but some 17 years ago had taken back her maiden name, Slater. Her nephew was 40 years old, and had been making his home with his aunt for the past 20 years. He was employed as a storekeeper at the Southern Pacific Hospital, and had been working there for 16 years. For about 16 years appellant had been suffering from a heart ailment, and off and on during that time had been under the medical care of Dr. Humber, for many years a member of the medical staff of the Southern Pacific Hospital and for 12 years the superintendent thereof; and because of such ailment she was doubtless made nervous and irritable. For more than 15 years she had been a member of the West Side Christian Church, and several members of the church testified as to her good reputation for truth, honesty and integrity, and for peace and quiet; and no rebuttal witnesses were produced by the people on that issue.

Doyen also was employed at the Southern Pacific Hospital, as a waiter. He had been working there as such for about 12 years, and the testimony relating to his character was conflicting. Some four or five employees of the hospital testified that his reputation generally was bad—that he was belligerent, disagreeable, and hard to get along with, and that at times he was violent and had engaged in altercations and fights with other employees. However, the business superintendent of the hospital, the chief roentgenologist, a former interne, and a neighbor testified as to his good reputation.

Appellant and her nephew moved into the upper flat in December, 1941, and shortly afterwards appellant's nephew learned for the first time that Doyen was the tenant of the lower flat. Later on several quarrels and altercations took place between appellant and Doyen principally over the use of the back yard, the excessive and unnecessary noises and disturbances each claimed the other was making in and about the premises to annoy the other, and about the Doyen's dog, it being claimed by appellant that it was vicious and ran after her, and was permitted to destroy the garden she had started in her portion of the back yard; and the evidence shows that during these quarrels and altercations they called each other names and indulged in hurling opprobrious epithets. Prior to April, 1942, appellant complained to the landlord, saying that if he did not do something about evicting the Doyens she would do something desperate; and in April, 1942, she gave notice she was going to move. Mrs. Doyen testified that all of the trouble was brought about by appellant's unreasonable and abusive attitude toward them and by her repeated acts in deliberately and intentionally making noises in the upper flat to disturb them, such as by pounding on the floor. At any rate appellant selected another place to live, paid a deposit on it, and packed most of their belongings to move; but on May 23, 1942, she was stricken with a heart attack and went to the hospital, where she remained for 18 days, returning to the Grove Street flat on June 9, 1942. Meanwhile the place on which she had paid the deposit was rented to another tenant, so that she was compelled to live in the upper flat until she could find some other place; and she made no effort to unpack her belongings.

The stairway on which Doyen was standing at the time he was shot was built in an open light well located on the side of the house about midway between the front and the back of the house. It ran from a small enclosed back porch adjoining appellant's kitchen down past the kitchen door of the lower flat and then on to the basement, and connected with a passageway running from the front of the house to the back yard. The kitchen of the upper flat adjoined the back porch. The door at the top of the stairway leading into the back porch was an old screen door, the panels of which were filled in with some thin material such as cardboard or plywood. The stairway was not straight. It had two spiral turns, one about half way down from the upper to the lower floor, and the other below the level of the floor of the lower flat; and the window of the bedroom from which the shot was fired opened into the lightwell opposite the porch door leading into appellant's kitchen; and any one looking out the bedroom window could see a person standing on the stairs anywhere from the top landing down to the landing opposite the door of the kitchen of the lower flat.

Doyen was born in France, and his wife in Basil, on the German border of Switzerland. She was the only eye-witness to the shooting and to the altercation that preceded it, and according to her testimony the circumstances were as follows: Shortly before it occurred she and her husband, assisted by her oldest daughter, carried the baby buggy, which was quite heavy, and the baby, which was four months old, down the back stairs into the yard, and Mrs Doyen then went back into the house to prepare the milk for the baby. The windows of the lower flat were left open and the back door was ajar, so that the draft through the house kept slamming the door. While Mrs. Doyen was preparing the milk she heard a disturbance in the upper flat that sounded "like the ceiling was coming down," the turning over of furniture, and knocking on the floor. Her husband was outside sweeping the back stairs, and he said he would go up and knock on appellant's door and tell her to stop the noise. Taking the broom with him he ascended the stairs and knocked on appellant's door with the broom handle, calling to her to come out so that he could talk to her. He then went back down the stairs and stood at the landing opposite the kitchen door of the lower flat. Almost immediately appellant opened the window of the bedroom and Mrs. Doyen saw that she had a pistol in her hand. Continuing, Mrs Doyen testified that appellant began calling them "dirty Germans, and foreigners, and dirty son of bitches"; that her husband replied, "The same goes for you." "Why don't you have some children so it would keep you busy"; that appellant then said, "I am going to kill you," and that her husband replied, "Just try it," whereupon appellant fired the shot and then closed the window; that her husband fell on the stairs, and placing his hand on his chest said, "She shot me." Mrs. Doyen screamed that her husband had been shot, and a neighbor hearing the shot and Mrs. Doyen scream phoned for the police. Shortly afterwards two police officers named Fitzgerald and Miller arrived in a radio car and another officer named Donahue came on a motorcycle. Officer Miller went to the rear of the house and up the back stairs and Officer Fitzgerald who was not in uniform went to the front door and rang the bell. It was a glass door, but curtained on the inside. There was no immediate response, but shortly appellant opened the door and came out with the pistol in her hand. Officer Fitzgerald told her he was a policeman, and took the pistol from her. She was then placed in the radio car. Meanwhile Officer Miller had gone up the back stairway and knocked on the back door, and receiving no response he pulled the screen door open by using force, and assisted by another officer succeeded in kicking in the kitchen door. Upon entering they found that appellant had left the house by way of the front door. Within a short time Police Captain McDaniel arrived and was followed by the assistant district attorney and Police Inspectors Corassa and Ahern. Appellant was brought back upstairs and questioned about the shooting, but before they had proceeded far the officers sent for a shorthand reporter and a police photographer, and thereafter the interrogation continued. After it had finished appellant was taken downstairs to the lower flat where Mrs. Doyen was interviewed in appellant's presence. Appellant was then taken in the police car to the morgue for the purpose, so the police stated, of identifying the deceased; following which she was placed in jail.

Much of the evidence introduced by the prosecution in support of its case in chief consisted of the declarations the prosecution claimed appellant had made at the scene of the shooting before the arrival of the shorthand reporter. The evident purpose of this testimony was to show that appellant knew before the arrival of the police that she had shot Doyen, that she had done so intentionally, that she was not excited and showed no remorse for having shot him, and at that time made no claim that she feared Doyen was going to break into her flat and do her violence.

Appellant denied having made the declarations so attributed to her, and her version of what happened on the afternoon of the shooting differed widely from the one given by Mrs. Doyen. In substance it was as follows: On the previous day she had suffered a heart attack and phoned to Dr. Humber, but he was out of town, and she was told that he would get in touch with her the next day. The next day she was still ill and remained home waiting to hear from the doctor. While she was dressing to go out she heard excessive noises from the flat below, consisting of pounding on the walls, slamming doors, and running and jumping through the house. It kept growing worse, so she turned on the radio and ran the vacuum cleaner over the kitchen floor to off-set the noise. Soon she she heard some one shout, "You coward. Why don't you come out? Come on out, you coward. If you haven't enough noise, I will give you some more." She then heard some one running up and down her back stairs and a "terrific" banging on her back door as though some one was trying to kick it in. Believing it was Doyen she became terrified, because she thought he was going to break in and do her bodily harm. She was in the back of the house at the time, and she rushed to the bedroom, and looking out the window saw Doyen on the back stairs running up and down "like a mad man" kicking and pounding on her back door. She thought first she would leave the house by the way of the front stairs and through the front door, but she realized that by attempting to do so she would have to pass the Doyen's front door. She then began to realize that her back door was fragile; that neither of the two kitchen doors had any locks; that one of them could be easily unlatched and the other had an insecure bolt. She then remembered that she had a .25 caliber automatic pistol under her bed which she had purchased at the Emporium some four years previously for home protection while living at another place. She went back and got the pistol and returned to the bedroom. Looking out she could see Doyen running up and down the stairs, pounding on her door, and when he observed her at the window he began calling her vile names and raised his clenched fist in a menacing manner. He called her such names as "You dirty old maid," "you dirty old prostitute," "you cannot have children," "There is nobody wants you," "you dirty old whore," "you dirty old bitch," "damn crazy Seven Day Adventist—religious fool," and kept shouting at her, "You haven't got enough, then I will give you some more." Being frightened and bewildered she opened the window a short space and held it up with her left hand (the window cord being broken) and she exhibited the pistol so that Doyen could see it, saying, "You see this. Do you see this? You stay away from my door," and she kept repeating this to him. Doyen defied her, shouting, "You go to hell, you dirty old bitch, and you crummy old woman," at the same time coming up the stairs toward her, fisted hand upraised in a menacing way, two steps at a time, like a crazy man, and shouting at her, "I will get you out, you damn coward. I will get you out of there." She was then shaking with fear and was afraid she would drop the pistol down the stairway, and during the excitement the pistol was discharged.

Continuing, she testified that she did not intend to point the pistol at Doyen; that she was thinking that if necessary she would fire a shot at the wall opposite to frighten him away; that during the excitement she must have discharged the pistol, but that she did not know she had shot him; that after the pistol was discharged she saw him turn as if to go down stairs, so she closed the window and locked it. She then went back to finish dressing, but soon she heard more kicking and pounding on her back door. She did not know that the police had been summoned, and believing that it was Doyen trying to break in she took the pistol in her hand and went down stairs, and when she opened the door she found the police; and she claimed that it was only after some questioning that she learned that the bullet had struck and killed Doyen.

Appellant was subjected to a severe and exhaustive cross-examination extending over several sessions of the court, during which it was sought to show that the testimony she had given at the trial was inconsistent with statements made by her to the officers at the flat following the shooting; and for such purpose much use was made by the prosecutor of the transcript of the interrogation and proceedings had at that time, which transcript was offered and received in evidence as part of the prosecution's case in chief. It appears therefrom, as well as from the testimony given by appellant at the trial, that almost at the beginning of the interview in the flat she stated that she ought to have an attorney, that she did not think she "ought to talk," and that she so protested several times during the interrogation. In fact Inspector Corassa admitted, on cross-examination, that "She said several times she wanted to see an attorney." Finally she went to the telephone and summoned her nephew, and he was present during part of the interview. At the completion of the interrogation the shorthand reporter was directed to read his notes aloud in appellant's presence, and she was then asked if she would sign the transcript after the notes were transcribed. She said she would if it was correct; however the transcript was not afterwards presented to her. It further appears from said transcript and her testimony at the trial that during the interrogation the prosecuting officers asked appellant to assume the posture at the window in which she claimed she was crouched at the time of the shooting, so that photographs could be taken of her in that position; and she declined to do so. An officer then assumed various positions at the window, and she was asked to designate the one she was in when the shot was fired; and she declined to do this also, protesting that she thought she ought to see an attorney.

There was considerable rebuttal testimony given by the police officers respecting these matters, and by Mrs. Doyen in contradiction of appellant's version of the circumstances of the shooting, and of her denials about indulging in offensive epithets. In fact the trial consumed a full month, the transcript of the testimony covering more than 1200 pages; and as will be seen from the foregoing the evidence is sharply conflicting on essential points. Obviously the jury accepted the version of the shooting as given by Mrs. Doyen; and in our opinion it is legally sufficient to establish that the killing was unlawful. Therefore no useful purpose could be subserved by narrating the evidence in greater detail.

[1-3] The first assignment of error relating to the instructions involves a group based on subdivision 3 of section 197 of the Penal Code, which provides that homicide is justifiable "When committed in the lawful defense of such person." After examining the instructions given and refused on that subject and considering the points made and authorities cited by appellant respecting this group, we are satisfied that no such error appears as would justify a reversal on any of the points so urged. In support of her contention that the instructions included in this group were erroneous she repeatedly cites the recent case of People v. Zuckerman, 56 Cal.App.2d 366, 132 P.2d 545. However, a comparison of the instructions here given with those there given demonstrates that the instructions here are not open to the objections relied upon and sustained in People v. Zuckerman. Appellant also complains that the instructions here were couched in such language as conveyed to the jury the impression that the court was of the personal opinion that appellant was guilty and had presented an inadequate defense. A fair analysis of all of the instructions shows, however, that such criticism is not warranted. Moreover and in any event it would seem clear that appellant is not in a position to complain of this group of instructions because at the trial she testified definitely that she made no claim that she shot Doyen in defense of her person. Her testimony in this regard, given on cross-examination, was as follows:

"Q. Did you deliberately fire the shot at Mr. Doyen to kill him in self defense? A. I did not.

"Q. You did not? A. No sir, I tried to scare him."

[4, 5] The next assignment of error is directed against a group of instructions based on subdivision 2 of said section 197, which provides that a homicide is justifiable "When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, *or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.*" (Italics added.) As will be noted, the defense provided for in the portion of the section above italicized is different and distinct from the one provided for in the first portion of the section; and here appellant's defense was based on the italicized portion thereof. In furtherance of such defense the appellant offered an instruction in which the entire section was quoted, but the court refused to give it. Instead it gave one from which the portion of the section upon which appellant particularly relied in justification for the shooting was omitted. It read as follows: "Homicide is justifiable when committed in the defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony, or when committed in the lawful defense of such person when there is reasonable ground to apprehend the design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished." We are of the opinion that the refusal to give the instruction as proposed by appellant was error. In answer to this assignment respondent says: "This [instruction as given] is a fair statement covering the evidence as produced by the appellant. There is no evidence presented by appellant or anyone else that the deceased manifestly intended to enter appellant's flat. Appellant said that the deceased several times called to her to come out and banged on the door, but not that he was coming in, or attempted to force the door." But

clearly the testimony given by appellant which has been hereinabove set forth, if believed, would be legally sufficient to support the inference that Doyen's actions were such as would lead a reasonable person to believe that he did intend in a violent, riotous or tumultuous manner, to enter the habitation of appellant for the purpose of offering violence to her; and under well-settled rules a defendant is entitled to have an instruction given on his theory of the case, if there is any substantial testimony upon which to base such theory. In addition to the testimony above narrated she stated:

> "I was just paralyzed and I was frightened, because, like I said, I realized my doors were not solid or locked. I was not in any kind of a condition for anything like that.
>
> "Q. What did he do? A. He kept defying me.
>
> "Q. What was he doing? A. He was shaking his fist at me, and he told me—
>
> "Q. (Intg) What did he do, if anything? A. Well, he kept shaking his fist at me and kept repeating nasty names.
>
> "Q. Where was he at that point? A. He was on my part of the stairway.
>
> "Q. Was he moving or standing still? A. He was coming up to me. He started up again, and I kept thinking that maybe I ought to fire the gun in the air so as to scare him. And I thought about shooting into the stairway. And I kept hanging on to the gun. I was afraid I would drop it down the stairway."

She further testified that on one occasion, when her nephew was on his vacation in the east and she was alone in the flat, she heard a noise at one of her windows; that she looked and saw the lace curtains blowing, and upon going to the window she saw Doyen standing there; that he was looking from one window to the other, and that when he observed her, he turned and went down stairs. The record also shows that prior to the shooting her nephew had told her about the trouble and fights Doyen had with other people at the hospital; that he had used a knife in a quarrel with one man and thrown a plate at another; that he, the nephew, had been told to keep away from Doyen, and that at the hospital Doyen was called "crazy Lou."

It is our opinion that in view of the foregoing testimony appellant was entitled to an instruction embodying that portion of section 197 above italicized, and that the refusal to give the same was error because she was thereby deprived of the right to have the jury give proper consideration to the defense upon which she mainly relied.

[6] We are of the opinion also that under the facts related by appellant she was entitled to have an instruction given embodying the first subdivision of section 195 of the Penal Code. The entire section reads: "Homicide is excusable in the following cases: 1. When committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner." The court gave an instruction embodying the second subdivision only, but as contended by appellant, by omitting all reference to the first subdivision the jury may have inferred that it was only in such cases as were covered by the provisions of subdivision 2, that is, when a deadly weapon is not used, that a homicide was excusable; whereas it was her claim that the homicide here was committed by accident and misfortune in lawfully defending her home by lawful means and without any unlawful intent, and therefore excusable.

[7-9] The objections to the other instructions are without merit. The one relating to expert testimony is in accord with the provisions of section 1127b of the Penal Code; and those given upon the subject of character witnesses appear to be in the usual form. Nor aside from the two instructions already discussed was there any error in refusing the other instructions proposed by appellant. Some of them might well have been given, but the subject matter thereof seems to be sufficiently covered by those given. Furthermore, we find no reversible error in the rulings on the admissibility of evidence, or in the conduct of the assistant district attorney.

[10, 11] It is our final conclusion, however, that notwithstanding the errors above pointed out, the record presents a situation calling for the application of subdivision 6

of section 1181 of the Penal Code, which authorizes a court to modify a judgment of conviction by reducing the degree of crime, without reversing the judgment. People v. Kelley, 208 Cal. 387, 281 P. 609; People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; People v. Castro, 37 Cal.App.2d 311, 99 P.2d 374. The first two of the cases just cited were tried by juries. The Kelley case was a death penalty case, and the Supreme Court reduced the degree of crime to manslaughter, the court saying that it could not bring itself to believe that there was a wilful, deliberate and premeditated killing. The court then went on to hold, however, that the evidence established a case of manslaughter; and it exercised the power conferred upon it by section 1181 by reducing the degree of the crime despite the errors occurring during the trial. In this regard the court said [208 Cal. 387, 281 P. 611]: "The errors alleged to have occurred during the trial have not escaped our attention. Were we compelled, as formerly, to either affirm the judgment or reverse the case, we would be driven to the latter course because of prejudicial errors committed." The Howard case was also a death penalty case, and the degree of crime was reduced to second degree murder. There no prejudicial error was found, but the court said [211 Cal. 322, 295 P. 336]: "We are of the view that the record now before us establishes murder of the second degree. *We entertain a doubt* as to its showing murder of the first degree" (italics added); and accordingly the degree of crime was reduced to second-degree murder. In each of the other two cases above cited the defendant was tried by the court without a jury, and found guilty of first-degree murder with the penalty fixed at life imprisonment. In the La Fleur case the degree of crime was reduced to second-degree murder, the court saying [42 Cal.App.2d 50, 108 P.2d 103]: "The evidence adduced at the trial of the instant cause was absolutely sufficient to justify a verdict of second degree murder, *but it was hardly sufficient* to support a verdict of murder of the first degree, when reviewed in the light of all the surrounding circumstances shown by the record * * *." In the Castro case the degree of crime was reduced from first-degree murder to manslaughter, and in so doing the court said [37 Cal.App.2d 311, 99 P.2d 375]: "The attending circumstances neither indicate an abandoned and malignant heart on the part of appellant, nor portray a wilful, deliberate or premeditated killing, but reveal a crime committed 'upon a sudden quarrel or heat of passion', i. e., voluntary manslaughter." In People v. Wells, 10 Cal.2d 610, 76 P.2d 493, 503, the Kelley and Howard cases are cited, and in commenting on some of the language used therein the court said that "it should be made clear that the 'doubt,' if any, like that universally required of the jury on the trial of a criminal action, should be not merely fanciful or imaginary, but should be reasonable, real, and substantial."

[12] In the present case, as stated, the evidence is legally sufficient to establish an unlawful killing; but after viewing the case in the light of all the surrounding circumstances as they are shown by the evidence, and especially taking into consideration the fact that the fatal shooting occurred during a heated verbal altercation which started after the deceased went up the back stairs and pounded on appellant's door with a broom handle and shouted to her to come out; also appellant's age and the fact that she was suffering from a chronic heart ailment and the effects thereof, we are not satisfied that the evidence establishes any greater degree of crime than manslaughter. As stated in 13 Cal.Jur. 609, "When a mortal blow is struck upon a sudden quarrel or in the heat of passion, upon adequate provocation, the actual intent is disregarded. In such case, although the intent to kill may exist, it is not that malicious intent which is an essenial element in the crime of murder." And applying that doctrine to the present situation, we are not prepared to hold as a matter of law that this is not such a case.

The judgment of the trial court of second-degree murder is, therefore, modified, and the cause remanded to the trial court with directions to enter judgment against appellant finding her guilty of manslaughter, and to thereupon pronounce judgment upon her as prescribed by law.

PETERS, P. J., concurs.

WARD, Justice.

I dissent.

The provision "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed", Penal Code, § 1181, Sub. 6; Stats. 1927, p. 1037, was enacted, as noted in People v. Kelley, 208 Cal. 387, at page 392, 281 P. 609, to prevent a recurrence of the action taken in People v. Nagy, 199 Cal. 235, 248 P. 906, wherein the evidence proved arson in the second degree rather than the first, which necessitated a reversal and retrial. The first case presented to the Supreme Court involving the amendment (Penal Code, § 1181, Sub. 6) in which a modification was ordered was People v. Kelley, supra. In that case at page 392 of 208 Cal., at page 611 of 281 P., the court, realizing the serious effect of applying "judicial commutation" (concurring opinion by Mr. Justice Shenk in People v. French, 12 Cal. 2d 720, at page 776, 87 P.2d 1014, at page 1042), said: "We have approached the consideration of this new duty with a great deal of hesitation, not only because the duty is one not to be assumed lightly, but also because the amendment to the Code section marks a complete departure in our criminal jurisprudence, and one which on first impression seems a startling innovation in our procedure. * * * we are convinced that, but for the miserable circumstances under which the crime was committed, and which no doubt outraged the moral sense of the people of the community in which it was committed, including the jurors, a verdict of murder would not, in all probability, have been rendered."

The majority opinion seeks to use the latter part of the quotation as authority to reduce the judgment of conviction to "a lesser crime included therein." Sec. 1181. If it was the intention of the court in the Kelley case to adopt the rule that a judgment in a criminal case should be reduced if it appeared to a reviewing court that the degree of the crime "in all probability" was fixed as a result of the "miserable circumstances" surrounding the commission of the offense then the court was trifling and toying not only with the constitutional rights of the People of the State of California but also of the defendant in that case. The court had no such intention as the decision is certain and plain in its holding that malice and premeditation in the commission of the offense were lacking and that there was no prejudicial error appearing in the record. At page 393 of 208 Cal., at page 611 of 281 P. the court said: "No express malice was shown, for there was not manifested a deliberate, or any, intention to unlawfully take the life of a fellow creature. * * * Appellant was properly found guilty, on competent evidence, of a most serious offense, and the errors complained of did not, in our judgment, prejudicially contribute toward bringing about the finding that he killed Mrs. Mellus. No miscarriage of justice, therefore, resulted, except that, as a matter of law, the jury improperly fixed the degree of the crime and imposed the penalty therefor."

In the present case if prejudicial error appears defendant is entitled to a reversal of the judgment. If there is error but not prejudicial this court is prohibited from entering an order of reversal. In People v. Cowan, 38 Cal.App.2d 231, at page 246, 101 P.2d 125, at page 134, the court held: "There are errors of law in the record. In accordance with the mandate of section 4 1/2 of article VI of the Constitution, we have studied the entire reporter's transcript and are left with the firm opinion of the guilt of the defendants and that no injustice has been done to them except in fixing the degree of their crimes. Therefore, under section 4 1/2 of article VI of the Constitution, we cannot reverse the judgment."

The majority opinion holds that certain instructions might well have been given but throughout the opinion there is not one statement that there was prejudicial error in the trial of appellant and the majority opinion expressly states, "We find no reversible error in the rulings on the admissibility of evidence, or in the conduct of the assistant district attorney."

The modification of the judgment by reduction of the offense is based upon People v. Kelley, supra (previously referred to); People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; People v. La Fleur, 42 Cal. App.2d 50, 108 P.2d 99, and People v. Castro, 37 Cal.App.2d 311, 99 P.2d 374, and the statement that "in the light of all the surrounding circumstances" the evidence establishes only manslaughter.

In the Howard case [211 Cal. 322, 295 P. 336] the court entertained a doubt also "shared by the prosecution" as to proof of murder in the first degree. It must be assumed that in that case the court concluded that murder in the first degree had not been proven to a moral certainty and beyond a reasonable doubt. Certainly it was not intended to hold that a possible or imaginary doubt by a reviewing court would justify a modification. In People v. Wells, 10 Cal.2d 610, at page 627, 76 P.2d 493, at page 503, in discussing the word "doubt" as used in the Howard case, the court said, "it should be made clear that the 'doubt,' if any, like that universally required of the jury on the trial of a criminal action, should be not merely fanciful or imaginary, but should be reasonable, real, and substantial." In the Howard case at page 329 of 211 Cal., at page 336 of 295 P., 71 A.L.R. 1385, the court said, "there is a dearth of evidence tending to show the conditions as they existed at the time of the homicide, and from which it might reasonably be held that the murder was, in fact, willful, premeditated, and intentional. In this regard, the state failed to satisfy the burden of proof." In the present case there is a mass of evidence showing preparation and intent. In the La Fleur case after reviewing the record the court simply held the evidence was sufficient to support a verdict of second-degree murder but insufficient to justify a verdict in the first degree. In the Castro case the judgment was reduced to manslaughter.

Whether the evidence "falls short of the modicum required for a conviction of murder of the first degree" (People v. Castro, supra, 37 Cal.App.2d at page 315, 99 P.2d at page 375) in proof of premeditation, etc., is a question that should be approached by a reviewing court "with a great deal of hesitation." People v. Kelley, supra, 208 Cal. at page 392, 281 P. at page 611. In People v. French, supra, 12 Cal.2d at page 775, 87 P.2d at page 1042, the test is set forth as follows: "The court has no power where the defendant is convicted of murder of the first degree, in cases where the jury has exercised the discretion imposed in it, to substitute its discretion for that of the jury as to the extent of punishment to be imposed. In cases where the evidence shows that the homicide was committed with deliberation, premeditation and malice aforethought, the crime is murder of the first degree, with absolute power in the jury to determine the penalty. That there is evidence to sustain the jury's finding cannot be questioned. That being so this court is powerless to interfere with the exercise of the jury's discretion." See People v. Greig, 14 Cal.2d 548, 95 P.2d 936.

In a murder case if there is evidence to justify the finding of the jury that the accused knew what he was doing when he took the life of his fellow man the determination of the degree is a question of fact for the jury and not for a reviewing court. People v. Ross, 34 Cal.App.2d 574, 93 P.2d 1019. If the act be preceded by and be the result of a concurrence of will, deliberation and intent the crime of murder in the first degree is proved. People v. Ross, supra.

In the present case the following facts appear: The killing was not committed in the commission of an unlawful act, not amounting to felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection and was not the result of a sudden quarrel or heat of passion. Penal Code, § 192, Subs. 1 and 2. The subdivision relating to the lawful and unlawful act may be considered only upon the theory that appellant believed that the deceased was about to break into her apartment and inflict violence. The facts, as related in the majority opinion, demonstrate the contrary. When shot by appellant the deceased was standing down stairs without attempting approach toward appellant. The killing was not the result of a sudden quarrel or heat of passion, but rather the culmination of a series of quarrels in which sudden heat of passion played no part as demonstrated by the evidence.

The majority opinion, quoting evidence given by the defendant, or seemingly in her favor, which must have been disbelieved or discountenanced by the jury to arrive at the verdict, evidently reaches the conclusion that appellant and her witnesses were telling the truth, but frankly admits that the jury accepted the version of the shooting given by the wife of the deceased and then states that such evidence "in our opinion it is legally sufficient to establish that the killing was unlawful." If the wife's version is legally sufficient, then acceptance of appellant's version is a substitution by the reviewing court of its views and conclusion in place of the conclusion of the jury.

The majority opinion holds that in light of all the "surrounding circumstances" that the evidence establishes only the "degree of crime" of manslaughter. Accepting this view in the majority opinion that the evidence establishes that the killing was unlawful but denying that in light of all the circumstances the unlawful killing established only the offense of manslaughter, I note evidence which appears in the record positively evidencing the crime as murder of the first degree.

The killing was not the result of a sudden, but rather of repeated misunderstandings which ripened into quarrels primarily over some noise that emanated from one of the flats. Appellant occupied the upper, and decedent, with his family, the lower flat of premises on Grove Street. The backyard was divided by a fence five feet high.

Mr. Doyen was born in Paris, and his wife in Switzerland. When the Doyens, parents of an infant, found it necessary to use a washing machine appellant ran a vacuum cleaner over an uncarpeted floor. At times, when a dog barked or the baby cried, appellant turned on the radio to loud blasting sounds. Appellant threatened to kill the small cocker spaniel. Thereafter, whenever the dog disturbed appellant the Doyens removed the dog to the flat. The wash or clothes pins occasionally fell over the fence and Mr. Doyen would jump the fence to retrieve such articles. Appellant complained to the landlord that if the Doyens were not evicted "she would do something desperate." The landlord advised appellant's nephew that appellant was high strung and cranky and that she should not live near other people. At the trial witnesses were produced to prove the reputation of the Doyens for peace and quiet. Appellant, within a period of approximately four years, occupied seven houses or flats. There is evidence that in other places similar disturbances occurred particularly if the adjoining flat owners happened to be of foreign birth. Appellant's favorite appellations in addressing the Doyens was "dirty foreigners" and "sons of bitches." Appellant's conduct toward the Doyens generally was indicative of not only a malicious, but a vicious disposition.

On the day of the killing, Doyen, in the act of sweeping, slammed a door. Appellant saw Doyen from her front bedroom window. Doyen approached a door and knocked with the use of a handle of a broom. Appellant, after turning on the radio, deliberately walked approximately sixty feet, obtained a loaded deadly weapon, and returned, opened her bedroom window, and, after a short altercation with Doyen, who was down below, called Doyen a "dirty son of a bitch." "I mean you down there", and said, "I am going to kill you." Thereafter, the shot was fired that caused the death of Doyen. Appellant now claims that she shot to scare, but the aim was true at an angle of 45 degrees, the bullet passing through the right chest, going through a portion of the right lung and into the heart without a deflection. After the shooting she closed the window and dressed. From this evidence and the background of ill will of appellant toward Doyen in the face of the admission of the killing the jury was certainly justified in finding "preparation", "premeditation" and "wilful intent." People v. Wells, supra; People v. Campanella, 46 Cal.App.2d 697, 116 P.2d 633. The decision of the jury should be final. People v. Emerson, 130 Cal. 562, 62 P. 1069.

Peace officers arrived shortly after the shooting. Appellant was still holding the gun. After being disarmed, though she offered no resistance, she was asked why she used the gun. She replied: "I am not going to let anybody tell me what to do or shove me around." When informed that she had shot Doyen, she was cool and calm and evidenced no surprise. Later when asked to relate the happening she said: "Well, I shot that man that lives down stairs." Subsequently she referred to the fact that there was some "irritation"; that the Doyens kept in the alley-way a vicious dog which tore up appellant's plants. When confronted by the widow who identified appellant as the woman who shot her husband appellant commented: "So what" and subsequently when her attention was called to the fact that "You have left that poor woman in there with three children", replied, "Well, I don't care, they are not going to call me any names."

The evidence in its entirety indicates that appellant was possessed of an abandoned and malignant heart. There is no evidence of immediate provocation for the killing. Words of reproach never justify the use of a deadly weapon and do not warrant reduction from murder to manslaughter. People v. Manzo, 9 Cal.2d 594, 72 P.2d 119. The act was preceded by and was the result of a concurrence of will, deliberation and intent. Under such circumstances in amending § 1181 it is inconceivable to me that the legislature intended that a reviewing court should interfere through "judicial commutation." This view was followed in the hereinafter cited cases.

In People v. Shaver, 7 Cal.2d 586, at pages 593, 594, 595 and 596, 61 P.2d 1170, at page 1174, the court said:

"There is no principle of law making it obligatory upon the court or the jury to accept appellant's version of the circumstances leading up to the killing. This principle is so well established that citation of authorities in support thereof becomes unnecessary. Evidently the jury refused to believe appellant's statement of the reasons that prompted him to take his wife's life. This was a question exclusively within their province to decide. Having decided the question adversely to appellant, this court is bound by their decision thereof as it is in the case of any other question of fact passed upon by the jury. * * * This evidence was sufficient to justify a verdict of murder in the first degree. People v. Murphy, 1 Cal.2d 37, 32 P.2d 635; People v. McQuate, 2 Cal.2d 227, 233, 39 P.2d 408; and People v. Ottey, 5 Cal.2d 714, 56 P.2d 193, supra. However, the case is made much stronger against the appellant when we consider his own admissions that he killed his wife with his own hand, and immediately fled from the scene of the crime. The jury was perfectly justified in accepting those portions of the appellant's statement which appeal to them while rejecting those that they did not believe. People v. Murphy, 1 Cal.2d 37, 40, 32 P.2d 635, supra With this evidence before us, we are not able to bring ourselves to the conclusion that the judgment against the appellant should be reduced to murder in the second degree.

"It is not necessary for us to discuss at any length the three cases relied upon by appellant in which there was a reduction of the judgment. The case of People v. Kelley, supra, has been given consideration in our opinion in the case of People v. Murphy, supra. The language used in the opinion in the Murphy case is quite pertinent to the instant case, the two cases having many points of similarity. The other two cases relied upon by appellant are People v. Howard, supra, and People v. Connors, supra, [124 Cal.App. 216, 12 P.2d 43]. In those cases the judgments were reduced from murder in the first degree to murder in the second degree for the reason that, if the jury should reject the statement of the defendant as to the manner in which the deceased met death, then there would be a dearth of evidence tending to show the conditions as they existed at the time of the homicide from which it might be reasonably held that the murder was in fact willful, premeditated, and intentional. No such condition exists in the present case, as we have shown that, if we exclude the entire statement of the appellant, there is then sufficient evidence to show him guilty of murder in the first degree. The instant case is much like the case of People v. McQuate, supra, where the two cases of People v. Howard and People v. Connors, supra, are discussed and distinguished from the McQuate case." People v. French, supra; People v. Greig, supra; People v. Murphy, 1 Cal.2d 37, 32 P.2d 635; People v. Ross, supra; People v. Campos, 10 Cal.App.2d 310, 52 P.2d 251; People v. Chwistek, 134 Cal.App. 32, 24 P.2d 872; People v. Masters, 133 Cal.App. 167, 23 P.2d 774; People v. Green, 124 Cal.App. 709, 13 P.2d 541; People v. McQuate, 2 Cal.2d 227, 39 P.2d 408; People v. Madison, 3 Cal.2d 668, 46 P.2d 159; People v. Fleming, 218 Cal. 300, 23 P.2d 28; People v. Price, 207 Cal. 131, 277 P. 316.

This judgment should be affirmed.

In re WAITS' ESTATE.

ATCHISON, T. & S. F. RY. CO. v. LEET.

Civ. 12496.

District Court of Appeal, First District,
Division 2, California.

Sept. 3, 1943.

Hearing Granted Nov. 1, 1943.

1. Courts 🔑489(9½)
Master and servant 🔑253

The Federal Employers' Liability Act gives plaintiff in action thereunder right to choose forum and bring action wherever defendant may be found in any state or federal court of competent jurisdiction. Federal Employers' Liability Act § 6, 45 U.S.C.A. § 56.

2. Death 🔑31(3)

A cause of action under Federal Employers' Liability Act for employee's death can be prosecuted only by duly appointed personal representative of deceased and not by his next of kin for whose benefit recovery is sought. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

3. Death ⚷32
Executors and administrators ⚷51

In death action, prosecuted by deceased's personal representative under Federal Employers' Liability Act, amount recovered, as in such action under state statute, is not strictly speaking part of deceased's "estate", as it is not subject to payment of his debts, nor distributable under laws of intestate succession or deceased's will, but recovery is made by such representative as statutory trustee solely for benefit of persons specified in such act. Code Civ.Proc. § 377; Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate".

4. Executors and administrators ⚷11

The existence of cause of action under Federal Employers' Liability Act for employee's death is sufficient to confer jurisdiction on state court to appoint administratrix of deceased's estate, though deceased was not a resident of state and left no other assets therein sufficient to confer such jurisdiction. Code Civ.Proc. §§ 377, 1913; Probate Code, §§ 301, 302; Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

In the matter of the estate of Frederick Albert Waits, deceased. From an order denying a motion by the Atchison, Topeka & Santa Fe Railway Company to set aside the appointment of Charlotte E. Leet as administratrix of the estate, the railway company appeals.

Affirmed.

J. C. Gibson, Leo E. Sievert, H. K. Lockwood, and L. W. Butterfield, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod, of Oakland (Louis H. Brownstone, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

This is an appeal by the Atchison, Topeka and Santa Fe Railway Company from an order denying its motion to set aside the appointment of Charlotte E. Leet as the administratrix of the estate of Frederick Albert Waits, deceased.

Said administratrix had been appointed upon the nomination of the widow of said deceased. The motion to set aside the appointment was based upon the claim that the court was without jurisdiction to make said appointment.

This appeal is taken upon the judgment roll alone and, for the purpose of this discussion, the facts are undisputed. The deceased, a resident of Arizona, was killed in New Mexico in the course of his employment by the appellant railroad company while engaged in interstate commerce. His heirs were his widow and minor son who were residents of Arizona. The purpose of the appointment of an administratrix in this state, as alleged in the petition and found by the court in the order of appointment, was that such appointment was necessary in order to prosecute a claim for damages against the appellant railroad company under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. It was further alleged in the petition "that under the provision of said act, such suit, although prosecuted in the name of the administratrix is for the benefit of the wife and minor son of said decedent, and any recovery in such action belongs to the wife and minor son of said decedent as his heirs at law and is not part of the estate of said decedent; that the foregoing claim for damages is the sole estate of said decedent." Certain of the allegations of the petition were in the nature of conclusions of law but the foregoing statement sufficiently presents the factual situation.

[1-3] Before considering the precise question of law presented on this appeal, it is appropriate to refer to certain legal propositions upon which the parties are agreed. It is conceded that no question of the venue of actions under the Federal Employers' Liability Act is involved here. In other words, said act gives the plaintiff in an action brought thereunder, the right to choose his forum and to bring such action wherever the defendant may be found in any state or federal court of competent jurisdiction. 45 U.S.C.A. § 56; Miles v. Illinois Cent. R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129; Baltimore & O. R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222. It is further conceded that the cause of action for death under said act can be prosecuted only by a duly appointed personal representative of the deceased and that it cannot be prosecuted by the next of kin for whose benefit the recovery is sought. 45 U.S.C.A. § 51. It is further conceded that when a cause of action for death is so prosecuted by a

personal representative under the act, any recovery made in said action is not strictly speaking a part of the "estate" of the deceased, as it is not subject to the payment of the debts of the deceased and is not distributable under the laws of intestate succession or according to the terms of the will of the deceased but such recovery is made by the personal representative as a statutory trustee solely for the benefit of the persons specified in said act. Lindgren v. United States, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686; Michigan Cent. R. Co. v. Vreeland, 227 U.S. 59, 33 S.Ct. 192, 57 L. Ed. 417, Ann.Cas.1914C, 176; In re Butler, D.C., 20 F.Supp. 995. In this respect, a recovery made by a personal representative in an action for death brought under said act has a status similar to the status of a recovery made by a personal representative in an action for death brought under section 377 of our Code of Civil Procedure. In re Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A.L.R. 509; Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 P. 330; Webster v. Norwegian Mining Co., 137 Cal. 399, 70 P. 276, 92 Am.St.Rep. 181. Finally, it is conceded by appellant that if the deceased had left "estate" in the county where the administratrix was appointed, the court would have had jurisdiction to make the appointment and that the action, thereafter brought by said administratrix against appellant in the superior court of this state, would have been properly brought in said court. In fact, appellant concedes that if the administratrix had been duly appointed as such administratrix by any court having jurisdiction in any state, she could have brought said action in the superior court of this state but respondent calls attention to section 1913 of the Code of Civil Procedure which provides in part that "* * * the authority * * * of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

[4] The contention of appellant on this appeal is that as it affirmatively appeared upon the face of the judgment roll that the deceased was a resident of Arizona, that he died in New Mexico, and that he left no "estate" in California or elsewhere, the order appointing an administratrix in this state was beyond the jurisdiction of the court and void. Appellant cites and relies upon section 301 of the Probate Code and the authorities above cited defining the nature of a recovery for death made by a personal representative in an action brought under either the Federal Employers' Liability Act or section 377 of the Code of Civil Procedure. Concededly there is no authority in this state directly in point on the question before us. Respondent makes three answers to appellant's contention: First, that the existence of a cause of action for death under the Federal Employers' Liability Act, enforceable in this state, is sufficient to confer jurisdiction upon the courts of this state to appoint an administratrix; second, that when the order of the court appointing the administratrix became final, it constituted "a conclusive determination of the jurisdiction of the court" Probate Code, sec. 302; and third, that appellant had no standing to attack the order made by the court. As we believe the first answer to be sufficient, we deem it unnecessary to discuss the second and third.

While there is a conflict of authority on the subject, the weight of authority supports the view that a cause of action for death, while not constituting "estate" or "assets" of the deceased in the strict sense, does constitute "estate" or "assets" for the purpose of conferring jurisdiction to appoint a personal representative. In 21 American Jurisprudence 396, section 42, it is said: "Although there is authority to the contrary, the weight of authority, supported by the better reasoning, is that a right of action for negligent injuries causing death is an asset sufficient to warrant the granting of letters of administration in a state other than the domicile, although the proceeds of the action are not to be distributed according to the usual course. * * * The fact that the statute provides that the money recovered shall go to particular persons and shall not be general assets of the estate subject to the debts of the decedent does not affect the character of the right as assets for the purpose of conferring jurisdiction to appoint an administrator."

Likewise in 33 Corpus Juris Secundum, Executors and Administrators, p. 894, § 17 b, it is said: "The existence of a cause of action for wrongful death is usually regarded as a sufficient basis for a grant of administration in the jurisdiction where such cause of action arose, or where it may be enforced, even though decedent was a nonresident and left no other assets in the jurisdiction. This view has been maintained notwithstanding a contention that the cause of action did not accrue in decedent's lifetime, that, under the statute, no right of action arose in behalf of anyone until after an administrator had been appointed, or that the administration should properly be in the state of decedent's residence; and a statute providing that the sum recovered for decedent's death shall not be an asset in the hands of the administrator means only that it shall not be an asset subject to payment of decedent's debts." Numerous authorities are cited in support of the text and numerous authorities are likewise collected in Ann.Cas. 1917C, page 1217 et seq.

In the absence of any authority directly in point in this state, we feel impelled to follow the weight of authority as shown by the expressions of the courts of other jurisdictions. We find in the briefs some discussion of policy and of the practical aspects of the determination of the question before us as it affects both those who may desire to prosecute actions for death under the Federal Employers' Liability Act and those who may be called upon to defend such actions. See discussion in Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 832, 86 L.Ed. 1129. But Congress settled the real question of policy by determining the question of venue when it passed said act and, as above stated, no question of venue is involved here. Under the terms of said act, as pointed out by Mr. Justice Jackson in his concurring opinion in the Miles case, "* * * the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy." The only question before us is whether this court should follow the weight of authority and hold that the court had jurisdiction to appoint a personal representative or whether this court should decline to follow the weight of authority and hold that the court had no jurisdiction to appoint a personal representative upon the theory that there existed no "estate" in this state sufficient to confer such jurisdiction. In our view, the failure of the courts of this state to adopt the majority view would result in depriving the surviving dependents in this and many other cases of their right to seek their remedy in the courts of this state in the only manner permissible under the Federal Employers' Liability Act, that is, through a personal representative duly appointed and entitled to sue in the courts of this state. In fact, it is entirely conceivable that the failure of the courts of the several jurisdictions to adopt the majority view might result in depriving surviving dependents, where there was no "estate" in the strict sense, of their right to seek their remedy in any court because of their inability to obtain the appointment of a personal representative in any state. There therefore appears to be sound reason for following the weight of authority on the subject and no good reason for declining to do so.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

In the Matter of the ESTATE of Ivan MILLER, Deceased.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a Corporation), Appellant, v. Charlotte E. LEET, Administratrix of Estate of Ivan Miller, Deceased, Respondent.

Civ. 12497.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1943.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

J. C. Gibson, Leo E. Sievert, H. K. Lockwood, and L. W. Butterfield, all of Los Angeles, for appellant.

Hilderbrand, Bills & McLeod, of Oakland (Louis H. Brownstone, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

This is a companion case to Estate of Waits, 140 P.2d 857, the opinion in which last mentioned case has been this day filed. The facts are substantially the same, the only difference being that Ivan R. Miller, deceased, and his mother, who was his heir, were both residents of New Mexico, the state in which the deceased was killed. The administratrix was appointed upon the nomination of the surviving mother.

The two cases have been submitted upon the same briefs and involve the same legal questions. The same result must follow here for the reasons stated in the opinion in Estate of Waits, 140 P.2d 857.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

In the Matter of the ESTATE of Patricio Carmody SAAVEDRA, Deceased.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a Corporation), Appellant, v. Charlotte E. LEET, Administratrix of Estate of Patricio Carmody Saavedra, Respondent.

Civ. 12534.

District Court of Appeal, First District, Division 2, California.

Sept. 3, 1943.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

J. C. Gibson, H. K. Lockwood, L. W. Butterfield, and Leo E. Sievert, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod, of Oakland (Louis H. Brownstone, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

This is a companion case to Estate of Waits, 140 P.2d 857, the opinion in which last mentioned case has been this day filed. The facts are substantially the same, the only difference being that Patricio Carmody Saavedra, deceased, and his wife and three minor children, who were his heirs, were residents of New Mexico, the state in which the deceased was killed. The administratrix was appointed upon nomination of the surviving wife.

The two cases have been submitted upon the same briefs and involve the same legal questions. The same result must follow here for the reasons stated in the opinion in Estate of Waits, 140 P.2d 857.

The order appealed from is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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60 Cal.App.2d 405

BONFILIO v. GANGER et al.

Civ. 12537.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1943.

Rehearing Denied Sept. 30, 1943.

Hearing Denied Oct. 28, 1943.

1. Appeal and error 🔑935(2)

On appeal from order setting aside a default and judgment by default for plaintiff, where complaint was not a part of the record, reviewing court was required to assume the correctness of special allegations of proposed answer and that defendants had a meritorious defense. Code Civ. Proc. § 473.

2. Attorney and client 🔑77

Ordinarily a litigant is charged with the negligence of his attorney.

3. Appeal and error 🔑957(1)

The discretion of the trial court in ruling on motions to vacate defaults and set aside judgments by default is seldom disturbed. Code Civ.Proc. § 473.

4. Judgment 🔑163

On motion to set aside a default and judgment by default for plaintiff, trial court was authorized to accept or to reject defendants' contradicted affidavits in its discretion. Code Civ.Proc. § 473.

5. Judgment 🔑143(3)

If a mistake might reasonably be held to be excusable, and relief from default will promote justice by determination of the issues upon the merits, a motion to set aside the default should be granted. Code Civ. Proc. § 473.

6. Judgment ⚷337

The statute authorizing the trial court to set aside judgments in the interest of substantial justice is "remedial" and should be liberally construed. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial Statute".

7. Appeal and error ⚷957(1)

Unless the order and the record indicate a clear abuse of discretion in ruling upon motion to set aside a default, a reviewing court will not interfere, and in trial court, doubts should be resolved in favor of the motion. Code Civ.Proc. § 473.

8. Judgment ⚷145(2)

Under statute authorizing trial courts in their discretion to set aside their judgments in the interests of justice, an application to answer the original action must show upon its face a good defense on the merits and therefore the proposed answer may be considered on the motion. Code Civ.Proc. § 473.

9. Judgment ⚷163

On motion to set aside default judgment restraining defendants from discharging sewage upon plaintiff's land, trial court, for purpose of avoiding "multiplicity of actions", was authorized to consider that defendants' claim of an easement for a drainage ditch over plaintiff's land would result in further litigation. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Multiplicity of Actions".

10. Judgment ⚷143(10)

On motion to set aside a default, trial court was entitled to consider all questions involved, including the alleged negligence of defendants' attorney in failing to notify defendants of the threatened default. Code Civ.Proc. § 473.

11. Judgment ⚷143(10)

Where plaintiff, because it was assumed that a settlement would be made by creation of a sanitary project, had not been diligent in filing or in prosecuting action to restrain defendants from discharging sewage upon plaintiff's land, record established that alleged negligence of defendants' attorney in failing to notify defendants of threatened default was excusable, and that trial court did not abuse its discretion in setting aside judgment by default for plaintiff. Code Civ.Proc. § 473.

12. Appeal and error ⚷957(1)
Judgment ⚷139

The granting or denying of a motion to set aside a default is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of discretion, a reviewing court will decline to set aside the trial court's order. Code Civ.Proc. § 473.

13. Judgment ⚷143(10)

Default judgments may be set aside, where the default has been suffered by the excusable neglect of defaulting party's attorney. Code Civ.Proc. § 473.

14. Appeal and error ⚷935(2), 948

On appeal from order setting aside a default judgment, all presumptions will be indulged in favor of the trial court's action, and the burden is upon appellant to make it appear that the trial court's judgment was abused. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Suit by Anthony Bonfilio against Sam J. Ganger and others, to enjoin defendants from discharging sewage upon plaintiff's land and to quiet title. From an order setting aside defendants' default, and judgment by default, plaintiff appeals.

Affirmed.

See, also, Cal.App., 136 P.2d 632.

Jos. H. Huberty, of San Andreas, for appellant.

Virgil M. Airola, of San Andreas, for respondents.

WARD, Justice.

This appeal involves the setting aside and vacating of a default and judgment by default, and presents for determination the question of an alleged abuse of discretion by the trial court in granting said relief on the grounds specified in Code of Civil Procedure, sec. 473.

[1] The motion to set aside the default and judgment thereon were made upon the record and affidavits, counter-affidavits and the proposed answer to the complaint, and these now comprise for the most part the transcript on appeal. The complaint herein

is not a part of the record. The answer, which accompanied the motion and the order setting aside the default judgment admits or denies allegations in certain paragraphs of the complaint and also sets up specific matters of defense. In the absence of the complaint from the record, we must assume the correctness of the special allegations of the answer. Accordingly on appeal it must be assumed that defendants have a meritorious defense.

From the affidavits, etc., it appears that the action was commenced October 31, 1939, and that service on the various defendants was completed on November 12, 1939. The purpose of the action as gleaned from the affidavits and answer seems to be to enjoin the defendants from discharging sewage upon plaintiff's land, and to quiet title. Approximately a year and a half after the filing of the complaint a demurrer was filed and subsequently overruled. During this period, except for the filing of two stipulations extending time to plead, nothing of record appears to have taken place. Notice of overruling of demurrer with the usual ten days to answer was served on July 8, 1941. It appears from an affidavit by plaintiff's attorney that on July 22, 1941, following telephone requests by him to file an answer, he advised defendants' attorney by mail that an answer must be filed within five days "to prevent the taking of a default." On July 29, 1941, the court made an order granting defendants to and including August 4, 1941, within which to answer. This order was filed July 30, 1941. On August 14, 1941, the default of the defendants was entered; judgment was entered thereon October 23, 1941, and recorded two days later. On April 14, 1942, defendants filed a motion to set aside the default, which was granted eight days later.

[2, 3] Up to this point had the court denied the motion to vacate the default and set aside the judgment, a reviewing court would probably have been forced to uphold the order, as the law ordinarily charges the litigant with the negligence of his agent, namely, his attorney, and the discretion of the trial court is seldom disturbed. If the neglect to plead was the result, in whole or in part, of the act or conduct of the opposing litigant or his attorney, then it could well be held, depending upon the circumstances of the case, that an order granting the motion would not be an abuse of discretion.

In the present case the motion to vacate was granted, and so we must proceed to determine whether the court thereby abused its discretion. It appears from an affidavit signed by defendants that some time after filing the action it was agreed between the litigants "that the plaintiff * * * would not force said action to trial or proceed further in the matter" if the citizens of the area involved, Valley Springs in Calaveras County, would organize a sanitary district and endeavor to install a sewage disposal plant that would meet with the approval of the State Department of Public Health; that this information was conveyed to defendants' attorney, and he was directed by his clients to act in accordance therewith until otherwise advised; that the sanitary district was formed at considerable expense of time and money, and approved by the State Department of Health; that the cost of the project as set forth in an application to the Works Projects Administration of the Federal Government, through which agency the major portion of the cost was to be procured, was approximately $23,000; that defendants were advised that the application was approved by the Works Projects Administration, but that they were informed and believed that further negotiations were suspended as a result of the transfer of the country's resources to projects closely related to the prosecution of the present war. The affiants further averred that no notice of any kind was given them or to the Valley Springs Sanitary District of a change of attitude on the part of plaintiff. The above facts are substantially corroborated by an affidavit by the attorney for defendants.

Plaintiff filed an affidavit denying any agreement, oral or otherwise, that he would not proceed with the action. His attorney also filed an affidavit that the prosecution of the case rested entirely with him and that he had never agreed "nor did he ever have any understanding" with any person that plaintiff would not proceed diligently with the action.

[4] From the facts and circumstances presented, the court was justified in concluding that there was an agreement to delay the prosecution of the action. At some expense defendants organized the sanitary district. Plaintiff waited a year and a half before insisting upon an appearance by defendants. Defendants' affidavits could be accepted as a true recitation of the facts

or rejected. A second affidavit filed by the attorney for plaintiff as furnishing "further explanation of the attitude of plaintiff" set forth that he had talked with one of the parties interested in the formation of the sanitary district, also on divers occasions with the attorney for defendants, to whom he stated that plaintiff was willing to assist in the acquisition of a triangular piece of land and that the unsanitary condition must be corrected and controlled voluntarily or by court action, and that the former procedure "was to be preferred to the latter." Affiant further stated that he did not specifically represent that no further court proceedings would be had until further notice was given by him. Affiant also stated that when it appeared "that no government aid would be obtained for the completion of said proposed sewer project," he insisted that defendants' attorney file an appearance. As a matter of fact it does not appear that the application for federal financial aid was ever rejected. Rather, the facts are that the funds were diverted into other channels necessary to the conduct of the war.

Appellant contends that if respondents or their attorney were acting under the impression that it would not be necessary to proceed with the court action, such impression was dispelled by two letters directed to the attorney, particularly the communication dated July 22, 1941, referring to the probability of the entry of a default. Up to the receipt of the letters, it may be admitted by all concerned that the negotiations for a settlement of the matter out of court through the formation of the sanitary district, and the honest efforts of defendants to complete and operate the project, lulled defendants into a sense of security (Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385), which justified them in notifying their attorney not to proceed further in the action until so directed by defendants. An order granting a motion to set aside a default would under such circumstances not be disturbed on appeal.

The action of defendants' attorney in not communicating with his clients immediately upon receipt of the letters, in view of the uncontradicted averment that the defendants had directed him not to proceed until they notified him, does not, as the record is studied, assume such importance as at first appears. Nor is the remissness, if any, of such attorney in delaying the filing of a motion to vacate the default judgment under section 473 vital to the determination of the question on appeal. Under decisions in this state, the trial court may have been correct in its conclusion, if it did so conclude, that the neglect was excusable by reason of a change in the attorney's office personnel, as averred in affidavits. The credence to be accorded to the affidavits, if in conflict, is a matter entirely within the discretion of the trial court. Savings Bank v. Schell, 142 Cal. 505, 76 P. 250.

[5] In Mitchell v. California, etc., S. S. Co., 156 Cal. 576, pages 578, 579, 105 P. 590, at page 592, wherein the mistake or neglect of an attorney's clerk in obtaining orders extending time was held to be excusable, the court said: "The tendency of this court has always been to relieve parties from their defaults and mistakes, upon proper showing, to the end that matters may be heard upon the merits." Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911; Schoenfeld v. Gerson, 48 Cal.App.2d 739, 120 P.2d 674. If the mistake may reasonably be held to be excusable, and relief from the default will promote justice by the determination of the issues upon the merits, the motion should be granted. Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332; In re Mercereau, 126 Cal.App. 590, 14 P.2d 1019; Waybright v. Anderson, 200 Cal. 374, 253 P. 148.

[6, 7] In California, following the general common law rule, to modify or vacate judgments during the term, the power of courts to control their judgments is regulated by statute specifying a time limit and leaving the matter to the discretion of the court in the interest of substantial justice to set aside its judgments. Code Civ.Proc., sec. 473; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155. Section 473 is remedial and should be liberally construed and applied to the end that one who has a meritorious defense may be given an opportunity to present it. Nicoll v. Weldon, 130 Cal. 666, 667, 63 P. 63. Unless the order of the trial court, and the record, indicate a clear abuse of discretion, reviewing courts will not interfere, and in the court wherein the motion is heard doubts should be resolved in favor of the application as "The policy of the law is to have every litigated case tried upon its merits." Bodin v. Webb, supra, 17 Cal.App.2d page 425, 62 P.2d page 156; Beard v. Beard, supra; 14 Cal.Jur., 1009 et seq.

[8] There is no claim that appellant has been prejudiced as a result of the order vacating the judgment, or injured as a result of delay in the application therefor. Under the provisions of section 473 an application to answer the original action must show upon its face a good defense on the merits, and therefore the proposed answer accompanying the application may be considered on the motion. On the present appeal there is no claim that respondents do not have a meritorious defense.

As stated, the complaint herein is not a part of the record on appeal. The allegations of the answer admitting and denying certain paragraphs and parts thereof are therefore in part unintelligible, but as a separate defense it appears that all defendants appearing on the application claim an easement and right of way across the lands of plaintiff, and some of them allege in the answer under oath that on a date prior to the filing of the complaint plaintiff and defendants entered into an agreement whereby plaintiff granted and conveyed an easement and right of way in writing for the maintenance of a ditch for the purpose of conducting drainage and other waters and fluids from the premises of defendants, and defendants caused to be constructed a fence on one side of the ditch to prevent plaintiff's livestock from having access to the ditch. The answer further alleges: "That in pursuance of said agreement aforesaid and for the purpose of carrying out the terms and provisions thereof the said defendants have, at substantial cost and expense to themselves, constructed said ditch aforesaid and continuously maintained the same ever since and said plaintiff has constructed said fence aforesaid and has used and expended the said moneys paid to him by defendants for said purpose and said plaintiff and said defendants at all times since entering into said agreement aforesaid and since the execution of said agreement and conveyance in writing aforesaid have duly performed each and all of the acts and things agreed by them to be done and do now continue so to do."

[9] The judgment is in the form of a permanent injunction and makes no reference to the easement. The record does not disclose, and appellant has not on this appeal claimed, that at the hearing the trial court was informed of the existence of the easement. If the court was so informed it is reasonable to infer that the judgment would have contained a reference to respondents' right of way. If the court was not so informed, the primary reason for the order vacating the judgment is readily ascertainable. In any event the claim of an easement no doubt will result in further litigation which the trial court had a right to consider for the purpose of avoiding multiplicity of actions.

[10-12] Eliminating the question of defendants' alleged right of way, and assuming that plaintiff's complaint is based upon maintenance of a nuisance or upon some other theory, the court had before it the affidavits of the opposing parties. The conditions complained of had evidently existed for over a quarter of a century. Plaintiff had not been diligent in filing or in prosecuting the action, evidently for the reason that it was assumed the litigants would arrive at a settlement by the creation of a sanitary project which it was hoped would relieve all parties of further litigation. The trial court had a right to consider all questions involved, including the alleged negligence of defendants' attorney. We cannot say that upon the record that court could not reasonably conclude that such neglect was excusable under all the circumstances nor consequently that there was such an abuse of discretion as to require a reversal. In Brooks v. Nelson, 95 Cal.App. 144, 148, 272 P. 610, 611, the court said: "The granting or denying of a motion of this character is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court will decline to set aside the trial court's order. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63; Staley v. O'Day, 22 Cal.App. 149, 133 P. 620; Jones v. Southern Pacific Co., 71 Cal.App. 773, 236 P. 336; Jergins v. Schenck, 162 Cal. 747, 124 P. 426; Savage v. Smith, 170 Cal. 472, 150 P. 353; Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Brasher v. White, 53 Cal.App. 545, 200 P. 657; Toon v. Pickwick Stages, 66 Cal.App. 450, 226 P. 628; Rahn v. Peterson, 63 Cal.App. 199, 218 P. 464; Park v. Hillman, 67 Cal.App. 92, 224 P. 100; Sofuye v. Pieters-Wheeler Seed Co., 62 Cal.App. 198, 216 P. 990." See, also, Beard v. Beard, supra; Dunn v. Standard Acc. Ins. Co., 114 Cal.App. 208, 299 P. 575; Olivera v. Grace, supra; Mitchell v. California, etc., S. S. Co., supra; Bodin v. Webb, supra; Nicoll v. Weldon, supra and other cases cited above.

[13, 14] In Stub v. Harrison, 35 Cal. App.2d 685, 690, 96 P.2d 979, 981, the court said: "It has therefore been frequently held that default judgments may be set aside under section 473 of the Code of Civil Procedure where the default has been suffered by reason of the excusable neglect of the attorney. On appeal from an order granting relief under section 473 of the Code of Civil Procedure all presumptions will be indulged in favor of the correctness of the trial court's action and the burden in all cases is upon the appellant to make it appear that the court's discretion was abused in making the order."

Irrespective of the mistake of judgment of the attorney for defendants in failing to notify his clients of the threatened default, the question in this case is—did the order vacating the judgment, under all the circumstances of the case, aid or defeat the administration of justice?

The order is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 276

In re DUPONT'S ESTATE.

HOVANDER et al. v. LAMB et al.

Civ. 12431.

District Court of Appeal, First District, Division 2, California.

Aug. 25, 1943.

Rehearing Denied Sept. 24, 1943.

Hearing Denied Oct. 21, 1943.

1. Wills 🔑50

A testator has sufficient "testamentary capacity" to execute will, if he has sufficient mentality to understand and keep in mind the nature of his act, extent and character of his property, and persons who are natural objects of his bounty.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

2. Wills 🔑34

"Testamentary incapacity" because of unsoundness of mind consists of either insanity of such broad character as to establish mental incompetency generally or some specific and narrower form of insanity under which testator is victim of hallucination or delusion.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Incapacity".

3. Wills 🔑55(3)

To invalidate will on ground that testator was victim of hallucination or delusion, evidence must establish that will was creature or product of such hallucination or delusion or that it bore directly on and influenced creation and terms of instrument.

4. Evidence 🔑568(2)

The weight of lay witnesses' opinions as to testator's mental unsoundness depends on strength or weakness of reasons given for them.

5. Wills 🔑386

A judgment refusing probate of will because of testator's mental incompetency must be affirmed on appeal, if supported by any substantial evidence.

6. Wills 🔑55(1)

Evidence *held* sufficient to support judgment refusing probate of will on ground of testatrix' mental incompetency at time of execution thereof.

7. Wills 🔑53(6)

While neither testator's extreme age nor physical or even mental weakness alone may be sufficient to invalidate will, such circumstances should be considered, together with facts immediately surrounding execution of will, in determining whether testator possessed testamentary capacity.

8. Wills 🔑53(2)

The critical inquiry in determining testator's mental capacity to execute will is directed to his condition of mind at very time of signing will, and evidence of his previous conduct is admissible only for light that it may throw on such condition at that precise moment.

9. Wills 🔑386

In will contest, weight and effect of evidence of testatrix' conflicting statements of amount she was worth as bearing on question of her mental capacity to understand extent and character of her property at time of executing will was for trial judge.

10. Wills ⚷386

On appeal from judgment refusing probate of will on ground of testatrix' mental incapacity, whether testatrix' statement, indicating her lack of sufficient mentality to understand extent and character of her property, was susceptible of explanation compatible with testamentary capacity cannot be considered, as appellate court can only determine whether evidence substantially supports trial court's finding and cannot reweigh evidence or draw different inferences therefrom.

11. Witnesses ⚷200

Generally, under common law, information acquired by attorney in course of interviews and negotiations looking toward his professional employment by informant is "privileged" and cannot be disclosed by such attorney as witness, though he was not actually employed by informant or was afterwards employed by informant's adversary.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege".

12. Witnesses ⚷200

The statute extending witness' "privilege" to communications between attorney and client in course of professional employment is broad enough to cover preliminary statements to attorney in good faith, looking to his engagement as attorney for person making communication. Code Civ. Proc. § 1881, subd. 2.

13. Trial ⚷29(1)
Witnesses ⚷246(2)

Within reasonable limits, it is trial judge's right and duty to bring out facts clearly by questioning witnesses and admonishing counsel not to interrupt them before completion of their answers, so that important functions of judge's office may be fairly and justly performed and in that duty he may not be unreasonably hampered.

14. Witnesses ⚷379(1), 397

In will contest, testimony as to witnesses' prior inconsistent statements to beneficiaries under will was properly admitted, not as proof of any facts stated, but for limited purpose of impeaching such witnesses' credibility.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceedings by Mrs. H. J. Lamb and others for probate of the will of Hilda Susanna Dupont, deceased, contested by Hugo Hovander and others. From a judgment refusing probate, proponents appeal.

Affirmed.

Gordon J. McKenzie, of Santa Rosa, and H. W. McGowan, of Willows, for appellants A. W. Hollingsworth, Jennie Reid and Mrs. H. J. Lamb.

Geary & Tauzer, of Santa Rosa, and A. Dal Thomson, of San Francisco, for appellants Chas. Hovander, as Special Adm'r of Estate of Arlene Hovander and Amanda Hovander.

Clarendon W. Anderson, of Santa Rosa, for respondents Hugo Hovander, Elsa Stromee, Ada Juvet, Angelo Hovander and Otis Hovander.

DOOLING, Justice pro tem.

This is an appeal from a judgment refusing probate of an alleged will of Hilda Susanna Dupont, upon a finding of the court that the deceased was not of sound and disposing mind at the time the instrument was executed.

The proffered instrument was executed by the decedent on December 19, 1940. At that time the decedent was seventy-seven years of age and confined to her bed in a sanitarium, extremely weakened and seriously afflicted by the disease which caused her death on January 3, 1941.

Decedent, a native of Sweden, came to California as a young woman and lived during the rest of her life in this state. She was twice married but both of her husbands predeceased her, she had no children and at the time of her death her legal heirs consisted of a brother, Charles Eric Leaf, living in Wisconsin, and nieces and nephews, the children of a predeceased sister. Her relations with these relatives had generally been friendly up to the time of the onset of her final illness. She was apparently a prolific letter writer and many letters to certain of her nieces and nephews and their children, couched in cordial and affectionate terms, were introduced into evidence. It may fairly be said from the evidence that up to a very short time before the execution of the proffered will, the contestant Elsa Stromee had been her favorite niece. Because she lived in California Mrs. Stromee had been able to, and had visited and seen her aunt with more frequency in the last few years of her life than any of the others. Within the year decedent had taken Mrs. Stromee to the office of her attorney and stated to the attorney that Mrs. Stromee was to be the executrix of her will, and by the terms of an earlier will, unrevoked if the proffered instrument was properly denied probate, Mrs. Stromee besides being named executrix was bequeathed a substantial share of her aunt's estate.

For some days prior to November 27, 1940, decedent had been a patient in the General Hospital in Santa Rosa. On the morning of that day she left the General Hospital, because of dissatisfaction with her treatment there, and went to the home of an old friend, Mrs. H. J. Lamb. At that time she was very ill. She remained at Mrs. Lamb's home until the morning of November 30. On that morning at 4 a.m. she wakened Mrs. Lamb and asked Mrs. Lamb to call a taxi, or to call a messenger boy to send a message to Mr. Hollingsworth, her attorney, to come to see her so that she could ask him to get her some money from the bank. Mrs. Lamb explained to her that this was impossible at that early hour of the morning. Although she had only $1.00 with her, she had not previously mentioned to Mrs. Lamb that she needed any additional funds. A little after 6 o'clock Mrs. Lamb went to a neighbor's house and telephoned for a messenger. She reported to Mrs. Dupont that there would be no messenger boy on duty until 8 o'clock and Mrs. Dupont then asked her to cancel the order for the messenger and call a taxi. Mrs. Lamb, after calling the cab, helped Mrs. Dupont to dress, and when the cab arrived Mrs. Dupont was driven to the home of Mr. Hollingsworth. She arrived at Mr. Hollingsworth's home between 7 and 8 o'clock, while he was still asleep. She was wearing a bathrobe. Mr. Hollingsworth went to his office between 8 and 9 o'clock and when he returned at noon Mrs. Dupont was still in his home. He could see that she was "a pretty sick woman" and he arranged to take her to the Northside Sanitarium where she remained until her death.

The same day Mr. Hollingsworth sent a telegram to Mrs. Stromee advising her of her aunt's serious illness and Mrs. Stromee came to Santa Rosa to be with her aunt, arriving on December 2 and staying until December 5. Upon her arrival Mrs. Dupont asked Mrs. Stromee to get a cot and sleep outside her door. Mrs. Stromee replied that she was tired from her trip and needed a good night's rest. At a later time Mrs. Dupont again asked Mrs. Stromee to lie on a cot outside her door during the nights so that she could attend her if necessary. Instead Mrs. Stromee insisted on employing a night nurse for her aunt, at which the aunt became irritated and displeased. During this period the aunt procured Mr. Hollingsworth to get $100 in cash for her from her bank account. This money was left in a handbag in a drawer in Mrs. Dupont's room and without any clear ground for the accusation Mrs. Dupont conceived the idea that Mrs. Stromee had stolen most of it.

Mrs. Stromee left for home on December 5 and her aunt asked her to take her with her. Her physical condition, as hereinafter described, was such as to render a trip of several hundred miles to Mrs. Stromee's home extremely dangerous to her, if not physically impossible, but Mrs. Dupont was annoyed when Mrs. Stromee told her that she could not take her.

There is evidence from which the court could conclude that after being annoyed at and unfriendly toward Mrs. Stromee for several days following her departure Mrs. Dupont suddenly changed her attitude completely and asked Mrs. Brandborg, an attendant at the sanitarium, to telephone Mrs. Stromee and ask her to return. Mrs. Stromee returned on December 15 and entered her aunt's room with her husband, Carl, who had driven her to Santa Rosa. She said to her aunt: "Wasn't Carl a darling to bring me up here so fast?" The aunt who had always theretofore been friendly to Carl and who had never before used profanity in her niece's presence, replied: "To hell with Carl", and thereafter refused to have anything to do with him.

As suddenly as Mrs. Dupont had changed her mind and sought Mrs. Stromee's return, she again turned against her when she did come back at her request. She said to her on one occasion about December 17: "I suppose you are sending me to a crazy house". No apparent reason appears for this remark in any conduct of Mrs. Stromee, and it is not explicable on any logical ground, unless it was suggested to Mrs. Dupont by her own realization that her mind was no longer normal.

Another incident in the relation between aunt and niece seems to deserve special comment. Some years before Mrs. Stromee's mother had died after the amputation of a leg. Mrs. Stromee had previously told Mrs. Dupont that none of the children had wanted the amputation performed, but that their mother had insisted on the operation over their objection, saying: "I am boss, it is my leg, I can do what I please. The doctor told me I can live ten more years if it is performed and I will go through with it." Sometime during the period December 15 to 17, Mrs. Dupont said to Mrs. Stromee: "You have my sister's blood on your hands. * * * You are not going to kill me that way."

Turning from Mrs. Dupont's relations with her niece to her general physical and mental condition from the time of her arrival at the sanitarium, we find from the medical testimony that she was suffering from very advanced arteriosclerosis and a severe organic valvular heart lesion, the valves of the heart were involved in a degenerative process, the blood circulation as a consequence was sluggish, the blood was dammed back in the lungs and as a result she suffered a great deal of pain, developed a severe cough, her respiration and pulse were abnormally high, she could only speak with an effort because of shortness of breath and at times she suffered from Cheyne-Stokes respiration. Her condition was very advanced and serious, she was incurable and it was only a matter of time when she would die. Dr. Carlson, whose testimony is later discussed at greater length, was her attending physician at the sanitarium. He found her irrational at times and rational at others prior to December 19, the date of the execution of the will.

During her stay at the sanitarium and before the execution of the proffered will Mrs. Dupont was too weak to get out of bed unassisted although she was assisted to a commode for the first few days. She was incontinent at times and did not realize that fact. She took ice from a rubber icebag and put it in a knitted cap and put the knitted cap containing the ice on her head, insisting that she preferred it that way. She would ask to be placed on the commode when she had just used it and insist that she had not. She said that she had herself made the concrete slab on her cemetery plot. She asked to have the undertaker open her grave so that it would be ready for her when she died. She wanted the doctor sent for to spend the night with her. She wanted to take an entire bottle of medicine at one time. She tore a nightgown which the nurse wished to put on her. She screamed at night without apparent reason. She told Mrs. Brandborg that she had gone into the corridor to die and that Mrs. Brandborg "had committed a great sin by dragging her out of her grave". She asked the doctor to call the undertaker because she was going to die. She asked Mrs. Brandborg to telephone to the storage house where her furniture was stored and have them look through her furniture for a pencil sharpener because she wanted to write a letter. A large part of the time she talked irrationally and incoherently. She complained that she could not remember anything and that she could not think any more.

Specifically several witnesses called for the contestants testified that in their opinion decedent before and on the day of execution of the proffered instrument was irrational or of unsound mind. Mrs. Brandborg, who assisted in caring for Mrs. Dupont at the sanitarium, testified that during all the time she was there she was of unsound mind and gave as some of her reasons: Her speech was rambling at times; on several occasions she talked like she was in a coma; she would look at the ceiling and say she was going to heaven; "she told me that I had committed a great sin by dragging her out of the grave, she came there in the corridor to die and I was the instrument of getting her back to earth"; "she asked the doctor one time to call the undertaker because she was going to die on the occasion of the doctor's visit"; she was incontinent in the bed and didn't realize that she had been; she wanted the storage man to search through her furniture for a pencil sharpener because she wanted to write a letter.

Mr. Brandborg, also an employee of the sanitarium, likewise testified that all the time decedent was in the sanitarium she was in his opinion of unsound mind. Some of the reasons given were: Putting ice from an icebag into a knitted cap; she couldn't talk coherently; she insisted on using the commode when she had just finished using it and would insist that she had not done so; she screamed on many occasions so loudly as to disturb other patients and then denied that she had done so; she wanted the doctor called to stay with her saying she had plenty of money to pay him to stay with her all the time and was annoyed when Mr. Brandborg pointed out that the doctor had other patients and could not do that; she said that the nurse had not been in her room all night when the nurse had spent the night there; she wanted to take a whole bottle of medicine which the doctor had prescribed to be taken in doses a teaspoonful at a time; she told him that she herself had made the concrete slab on her grave.

Mrs. Nobles, a night nurse who was with Mrs. Dupont each night from December 3 to December 12, described her appearance and conduct variously as irrational at times; not mentally clear; childish and eccentric; erratic and mentally clouded.

Mr. Batt, neighbor and acquaintance of many years, visited Mrs. Dupont twice at the sanitarium. On the first visit Mrs. Batt was with him; on the second visit he was alone. The second visit was after Mrs. Stromee's return—after December 15. On the second visit Mr. Batt found Mrs. Dupont irrational. Reasons: "she didn't recognize me when I came in"; "she talked wandering like * * * she didn't know what she was talking about, just one thing and another"; "she was so much different than she was when we used to see her out there."

Mr. Churchman, a real estate agent who sold Mrs. Dupont's ranch for her during her illness, saw her successively in the General Hospital, at Mrs. Lamb's and in the Northside Sanitarium. When he saw her in the General Hospital "she was fairly strong"; at Mrs. Lamb's "I wouldn't say that she was of unsound mind but it is hard for me to say that she was of sound mind. * * * My reasons, I have known her for a good many years and she was always very keen, and at that time she wasn't normal in that respect * * * she wasn't keen." When he saw her last in the sanitarium he testified: "I don't think she was of sound mind." His reasons were based upon his observation of Mrs. Dupont for several years, the marked change that had come over her, her appearance and conversation; her failure to remember where she had put the keys to her house and her confused manner in looking in her bag for them and her saying: "I just can't think any more." "She said she couldn't think, she couldn't appear to think properly."

A few hours before the proffered will was drawn and executed, and on the same day, Mrs. Dupont wrote a letter to her brother. It was written partly in English and partly in Swedish. This letter with the Swedish words translated into English reads as follows: "Dear Brother this is my last letter to you Elsa are a rotten sister have nothing to do now with her she has killed me she has stolen all my hard earned money pretend not you receive this letter be so kind. Elsa is rotten sister to take all my money so have nothing to do with her so good bye. I not help but give all what I have to my nurse. My lawyer will see to it tend to it all—God bless you for all you have ever done for family. Good bye do not have to do with Elsa we better not have anything with Elsa. My nurse Mrs. sure done all to make me comfortable to scutt Elsa out Bye Bye Dear Brother."

At the time of the preparation of the will in her sickroom the testimony shows that Mrs. Dupont first said that she wanted her brother to have half of her estate and Mrs. Lamb to have the other half. Then she said: "I want to give something to that nurse", pointing to Mrs. Reid. When asked how much she replied "all she is worth". She was then asked: "How much is that?" Her reply was: "Well, if there is five thousand dollars give it to her, if there is five thousand dollars give it to her." The will was first drawn to leave $5,000 to Mrs. Reid, and later on the suggestion of the draftsman that that was a large sum to leave to a nurse whom she had only known for a few days, Mrs. Dupont at the prompting of the draftsman reduced the bequest to $1,000.

In evaluating this evidence certain well-settled rules are to be borne in mind.

[1-3] A testator has sufficient capacity to execute a will if he has sufficient mentality to understand and keep in mind the nature of his act, the extent and character of his property, and the persons who are the natural objects of his bounty. In re Estate of Sexton, 199 Cal. 759, 251 P. 778; In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25. Testamentary incapacity because of unsoundness of mind is of two classes, "either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases * * * the evidence must

* * * establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument." In re Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130, 133.

[4] The opinions of lay witnesses as to the mental unsoundness of the testator are no stronger than the reasons given for them and must stand or fall on the strength or weakness of the reasons given. In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456; In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149.

[5] Subject to these rules the function of the appellate court is no different on an appeal from a judgment refusing probate to a will because of mental incompetency than in any other case. If there is any substantial evidence to support the judgment it must be affirmed on appeal. In re Estate of Pessagno, 58 Cal.App.2d 457, and cases cited at page 459, 136 P.2d 644.

[6] Tested by these rules we are satisfied that the judgment must be affirmed. We may concede, without expressly so deciding, that the evidence is not sufficient to support a finding that the proffered will was the product of an insane delusion or hallucination of the decedent concerning her niece Elsa Stromee. We may likewise concede that the evidence as to all that occurred prior to the time immediately concurrent with the purported execution of the proffered will might not be sufficient to support a finding of general testamentary incapacity. But that evidence furnishes an illuminating background for the scene that was enacted in Mrs. Dupont's sick room on December 19, at the time that the purported will was actually drafted and signed.

[7] While neither extreme age nor physical or even mental weakness standing alone may be sufficient to invalidate a will, they are circumstances which should be considered together with the facts immediately surrounding the execution of the will in determining whether the testator possessed testamentary capacity. In re Estate of Alexander, 111 Cal.App. 1, 6, 295 P. 53; In re Estate of Miller, 16 Cal.App.2d 154, 164, 60 P.2d 498.

The evidence presents a picture of a woman seventy-seven years old, always theretofore mentally alert and self-reliant, who, under the ravages of a fatal illness, commencing on November 27, when she wakened her friend at 4 a.m. to call a cab or a messenger boy immediately so that she could at once arrange to get some money, thereafter engaged in conduct bizarre, eccentric, extravagant and out of all character with her previous demeanor and way of life. Culminating these marked extravagances, and within a few hours of the drafting and signing of the proffered will, this slowly dying woman who has exhibited so many of the pitiful vagaries of a failing mind, writes a letter to her brother which, measured by the standards of her earlier correspondence in the record, is ill-constructed, labored, repetitious and confused. In addition to a rambling and unjustifiably bitter complaint against Elsa Stromee, it contains the statement: "I not help but give all what I have to my nurse." It is noteworthy, in this connection, that Mrs. Dupont had met this nurse for the first time on the night of December 12, that she apparently did not know her name, that the nurse had been on duty with her at that time during only four nights and two and one-half days, and by her own testimony had never engaged in any conversation with Mrs. Dupont except such as was necessary in the performance of her duties for her patient.

[8] Thus the stage is set for the events immediately surrounding the preparation and signing of the purported will. It is axiomatic that the critical inquiry in determining the mental capacity of a person to execute a will is directed to his condition of mind at the very time of its signing. Evidence of his previous conduct is only admissible for the light that it may throw on his condition of mind at that precise moment. In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897; In re Estate of Miller, 16 Cal.App.2d 154, 60 P.2d 498. From proponent's own witnesses it appears that when the will was being drafted in Mrs. Dupont's sick room she first stated that she had $19,000 in the Exchange Bank and a smaller amount in Postal Savings (which was the fact) and as a part of the same conversation she stated that she wanted to leave "all she is worth * * * to that nurse" (pointing to her) and on being pressed to state the amount she replied: "if there is $5000 give it to her, if there is $5000 give it to her."

[9] The weight and effect of this evidence was for the trial judge. From it he could reasonably find that Mrs. Dupont at that time was so mentally deranged or confused that she did not realize that $19,000 was more than $5,000. If this was so it is clear that Mrs. Dupont at the time of the will's execution did not have sufficient mentality to understand the extent and character of her property. The finding that Mrs. Dupont was not of sound and disposing mind finds sufficient support in this one incident, particularly when viewed against the background of failing mentality portrayed by the other evidence.

[10] The argument that Mrs. Dupont's statement: "if there is $5000 give it to her" is susceptible of explanation compatible with testamentary capacity cannot avail appellants in an appellate court. Our inquiry ends when we determine that it furnishes substantial support for the trial court's finding, and we cannot reweigh the evidence or draw different inferences from it on appeal.

Appellants emphasize the evidence of Dr. Carlson, Mrs. Dupont's attending physician, that in his opinion she was of sound mind on December 19. A reading of Dr. Carlson's testimony shows that he had no independent recollection of the condition of mind of Mrs. Dupont on December 19. He concluded from a conversation that he had with her on December 20 that on December 19 she was of sound mind, but on cross-examination it was developed that he did not discuss with her the terms of her will or ascertain whether she remembered or understood them. He based his conclusion entirely on a statement by her that she had made a will the day before and was satisfied with it, and he further testified, as hereinbefore noticed, that prior to December 19 she had been at times rational and at others irrational. Under the circumstances the trial judge was not bound to accept his opinion of the condition of his patient's mind at the moment of the will's execution.

To appellants' argument based on such cases as In re Estate of Casarotti, 184 Cal. 73, 78, 192 P. 1085, that the testimony of proponents' witnesses must be taken into account in weighing the sufficiency of contestants' evidence it is sufficient to point out that the precise evidence of Mrs. Dupont's conduct and statements immediately preceding the execution of the will, which we have held sufficiently supported the trial court's finding, came from proponents' witnesses including the draftsman and the attesting witnesses of the document itself.

After Mrs. Dupont's death Mrs. Stromee consulted Mr. Tauzer, an attorney-at-law, with a view to employing him as her attorney to contest the will. At the close of the interview Mr. Tauzer refused the employment. It was sought to prove by Mr. Tauzer that during this interview Mrs. Stromee made statements to Mr. Tauzer inconsistent with her testimony. The trial court sustained an objection on the ground of privilege. It is claimed that this was error. In this connection appellants point to the language of Code Civ. Proc., sec. 1881, subd. 2 which extends the privilege to communications between attorney and client "in the course of professional employment" and argue that since Mr. Tauzer refused the employment the situation falls without the language of the section. They also rely on People v. Heart, 1 Cal.App. 166, 169, 81 P. 1018.

[11] It is the almost universal rule in common-law jurisdictions that "Where a person consults an attorney with a view to employing him professionally, any information acquired by the attorney in the course of interviews or negotiations looking toward such employment is privileged and cannot be disclosed, even though no actual employment of the attorney as such follows, and notwithstanding the attorney may be afterward employed by the adversary of the person who made such communication." 70 C.J. 406; 8 Wigmore on Evidence, 3d Ed. (1940) sec. 2304, pp. 587, 588; 5 Chamberlayne, Modern Law of Evidence (1916) sec. 3682, p. 5266; cases collected in notes in 21 Ann.Cas. 217; Ann. Cas. 1913A, 30; and 34 L.R.A.,N.S., 578, 579.

The Supreme Court of Colorado in Denver Tramway Co. v. Owens, 20 Colo. 107, 36 P. 848, was called upon to apply a statute identical in language to our own to facts similar to those presented here. That court said at page 855 of 36 P.: "If a person in respect to his business affairs, or troubles of any kind, consults with an attorney in his professional capacity, with the view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established, and the communication made by the client, or advice given by the attorney, under such circumstances is privileged. An attorney is employed—that is, he is engaged in his professional capacity as a lawyer or counselor—when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him."

As has been pointed out in other cases, no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it.

[12] We are satisfied that the language of Code Civ. Proc. sec. 1881, subd. 2 is broad enough to extend the privilege to preliminary statements to an attorney in good faith looking to his engagement, and that to give it the construction contended for by appellants would unduly restrict its scope and largely destroy the protection to persons consulting lawyers which is its policy and purpose.

The case of People v. Heart, supra, in so far as it may lend support to appellants' argument on this point is supported by no citation of authority. The facts were distinguishable. There a wife sought to employ an attorney to defend her husband and after hearing her statement he declined the employment. He was called to impeach the wife not the husband. The court said [1 Cal.App. 166, 81 P. 1019]: "The inhibition does not extend to communications between the attorney and persons having social or business relations with the client, certainly not when the statement did not purport to be conveyed to the attorney from the client, but, on the contrary, was the representation of a witness as to her knowledge of the transaction."

We are not here called upon to apply the law to a situation such as there disclosed and discussed. The court did state in one sentence of the opinion: "There is no claim that Appel was ever employed or retained." If the court by that single sentence may be said to have held that communications by a party to an attorney whom he is seeking to engage are not privileged it was dictum on the facts of that case, and a dictum which we expressly refuse to follow for the reasons herein stated.

[13] Counsel for appellants, Hollingsworth, Reid and Lamb, claim that the trial judge committed prejudicial error in questioning various witnesses, and in admonishing counsel not to interrupt witnesses before their answers were complete. In this specification counsel for the other appellants expressly refused to join. A reading of the entire record satisfies us that the case was fairly tried, and that the trial judge did not exceed the proper bounds either in seeking to elicit the facts or in maintaining the orderly procedure of the trial. It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. People v. Mendez, 193 Cal. 39, 45, 46, 223 P. 65; People v. Butterfield, 40 Cal.App.2d 725, 731, 105 P.2d 628; People v. Salas, 17 Cal.App.2d 75, 79, 61 P.2d 771; Gerson v. Kelsey, 4 Cal.App.2d 158, 163, 40 P.2d 543, 43 P.2d 266; People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193. For the same reason the trial judge is not to be unduly or unreasonably hampered in his control and conduct of the trial. Commercial U. A. Co. v. Pacific G. & E. Co., 220 Cal. 515, 525, 31 P.2d 793.

[14] Complaint is made of alleged errors in the admission and rejection of evidence. An examination of the record fails to support any of these specifications. As to certain of the witnesses who were beneficiaries under the proffered will testimony of prior inconsistent statements was admitted by way of impeachment. It is claimed that this violated the rule which excludes evidence of admissions of one beneficiary. (10 Cal.Jur. 1070.) The court showed a clear comprehension of this rule and consistently followed it. The evidence complained of was admitted for impeach-

ment only, not as proof of any facts stated but for the limited purpose of their effect on the credibility of the witnesses making them. (27 Cal.Jur. 169.) In this there was clearly no error. The other specifications are either without support in the record or too trivial to require comment.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

WATSON v. COMMON COUNCIL OF CITY OF MARYSVILLE et al.

Civ. 6974.

District Court of Appeal, Third District, California.

Aug. 31, 1943.

Rehearing Denied Sept. 27, 1943.

Hearing Granted Oct. 30, 1943.

1. Municipal corporations 🔑155

Where city charter was silent on question of removal of mayor from office and common council elected petitioner as mayor "for the ensuing year", petitioner did not occupy an office the term of which had been declared by "law" so as not to be subject to removal but held his position during the pleasure of the appointing authority notwithstanding mention of petitioner's removal and the expiration date of his term in nomination of his successor. Const. art. 20, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Law".

2. Officers 🔑7

Under constitutional provision authorizing terms of officers to be declared by law when such terms are not provided for in the Constitution, and providing that if not so declared such officer shall hold his position during the pleasure of the appointing authority, etc., the only way in which the power of removal can be limited is by fixing the duration of time of office and then providing the mode, by which the officer may be removed during the term. Const. art. 20, § 16.

3. Municipal corporations 🔑155

As respects city common council's power to remove the mayor from office, generally where the power of appointment is conferred in general terms, the power of removal at the discretion of the appointing power is implied unless limited by some positive provision of law.

4. Municipal corporations 🔑155

Under parliamentary law, a legislative body having the power to choose its own presiding officer from among its own members has the inherent power to remove such officer at will unless prohibited by some constitutional or statutory provision.

5. Municipal corporations 🔑155

Where city charter was silent on question of removal of mayor from office and charter and ordinances did not impose duties upon mayor other than the customary duties of a presiding officer of the common council, mayor held office at pleasure of the common council in absence of statute and constitutional prohibition.

ADAMS, P. J., dissenting.

◆

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Petition by John W. Watson against the Common Council of the City of Marysville, County of Yuba, State of California, and others as members thereof for a writ of mandamus praying that an alternative writ issue compelling respondents to show cause why petitioner should not be declared mayor of the city of Marysville. From a judgment issuing the writ, respondents appeal.

Reversed.

F. E. Carlin, City Atty., of Marysville, for appellant.

Manwell & Manwell, of Marysville, for respondent.

PEEK, Justice.

The Common Council of the City of Marysville, represented by a majority of its members, appeals from an order granting a peremptory writ of mandate ordering said Common Council to declare John W. Watson, Mayor of the City of Marysville, and to permit him to exercise the duties of that office.

On the first day of February, 1943, the Common Council met in regular monthly session. After the transaction of routine affairs a motion to adjourn sine die was unanimously carried. Immediately following said motion the city clerk called the meeting to order for the acknowledged purpose of electing a Mayor. The petitioner herein was thereupon nominated and elected Mayor of the City of Marysville for the "ensuing year", and immediately assumed the duties of the office. The meeting was uneventful until the Mayor announced his committee appointments which, in the language of the clerk's minutes "caused considerable discussion". That this was not an understatement is evidenced by the fact that the following day a special meeting of the Council was called by a majority of the members, and the Mayor was unseated. Notices of the special meeting were served on all members but only those calling the meeting were in attendance. Immediately after calling the meeting to order a motion was made, seconded and carried that "Mayor John W. Watson be removed as Mayor of the City of Marysville, and that the office of Mayor be declared vacant". Thereafter a motion was made, seconded and carried "that Councilman A. Wallace Fetrow be elected to the office of Mayor of the City of Marysville to fill the *unexpired term of former Mayor of John W. Watson,* who was removed, which term expires on the first Monday of February, 1944".

Thereafter on the 15th day of February, petitioner John W. Watson filed his petition for a writ of mandamus praying that an alternative writ issue compelling respondents to show cause why petitioner should not be declared Mayor. After argument the petition was taken under submission by the court. On March 1, 1943, the court made its findings that John W. Watson was the duly elected Mayor of Marysville, that he was not lawfully removed, and thereupon entered judgment and issued its writ as previously mentioned.

The provisions of the Charter of the City of Marysville relative to the election of Councilmen and Mayor are found in Section 2 of Article II, wherein it is provided that "the Common Council * * * shall consist of five councilmen who shall be elected by the qualified electors of said city * * *", and Section 3 of Article II, which provides that "the Common Council shall elect one of its members as Mayor of the City to serve for such term as the Council shall direct, provided that the Council shall not have power to extend the office of such Mayor beyond the term for which he was elected Councilman."

An examination of the Charter has disclosed only one other provision relative to the office of Mayor, Section 15 of Article II, wherein it is provided that he "shall appoint the various Committees" to be provided for by ordinances. On the question of removal from office the Charter is silent. No further provision is made in the Charter relative to the selection or removal of the Mayor. The Constitution, however, does make specific provision for the situation as presented in this appeal. Section 16 of Article XX thereof provides in part as follows: "When the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years; provided, however, that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to the tenure of office or the dismissal from office of any such officer or employee shall control."

Appellants herein contend that where a term of office is not set by Charter, ordinance or other law the majority members of the Council have the power to remove at will and without cause, and that this would be true whether the Mayor was considered as an officer of the city or only the presiding officer of the Council.

We are entirely in accord with appellants' first contention that the action of the Council in electing petitioner for "the ensuing year" was not such a declaration or fixing of the term of Mayor as is contemplated by said Section 16, Article XX, and therefore he could be removed at the pleasure of the Council.

[1] The sole purpose and intent of the regular meeting of February 1, and of the special meeting of February 2, was to elect a Mayor. Neither meeting was for the purpose of fixing a specific term for the office. The mere fact that in the motion nominating petitioner as Mayor is found the words "for the ensuing year" does not make the motion a declaration by law of a definite term as contemplated by the

Constitution. To place any other construction on the motion would be to read into it something which obviously was not intended. Likewise the wording of the nomination of Mr. Fetrow on the following day "to fill the unexpired term of former Mayor, John W. Watson, who was removed, which term expires on the first Monday of February, 1944", is of no assistance to petitioner. The mention of the removal of Watson and the expiration date of his term is purely surplusage. Were it otherwise, respondent's contention would authenticate as law the Council's redundancy. Something which, without a doubt, was not within the contemplation of the majority members. The petitioner's term had already expired at the will of the majority. The phraseology used in the motion nominating Mr. Fetrow could not be transmuted by some strange metamorphosis into a declaration by law of a definite term as provided for in Section 16, Article XX, supra.

The cases cited by respondent are not in point as they refer to term appointments wherein removal can be only for cause (People v. Jewett, 6 Cal. 291) or specific Charter provisions setting out mandatory procedure to be followed on removal (Boyd v. Pendegast, 57 Cal.App. 504, 507, 207 P. 713) or as in the case of MacAlister v. Baker, 139 Cal.App. 183, 33 P.2d 469, wherein the provisions of the Charter specifically relating to balloting were at issue as well as the executive acts of a Council and rules of parliamentary procedure thereto; and a further point, although not raised in that appeal, of a definite term appointment.

[2, 3] In the present case the Charter of the City of Marysville contains no provision relative to the tenure of office of the Mayor, hence the petitioner held his position at the pleasure of the Council with no limitation as to his removal. Section 16, Article XX, Constitution. Therefore, the power of removal could be exercised at any time in the same manner and subject only to the same provisions as any other motion or resolution by a majority vote of the Council. Section 13, Article II of the Charter. "The only way in which this power of removal can be limited is by first fixing the duration of time of office, and then providing the mode, if deemed necessary, by which the officer may be removed during the term." Decker v. Board of Health Commissioners, 6 Cal.App.2d 334, 44 P.2d 636, 637. McQuillin on Municipal Corporations, 2d Ed. Rev. Vol. II, page 455, Sec. 582, in referring to a case such as is herein presented, states: "In such case the power of removal is regarded as incident to the power of appointment or election. Thus as it has otherwise been expressed, the general rule is that where the power of appointment is conferred in general terms, the power of removal at the discretion and at the will of the appointing power is implied, and always exists unless limited or restricted by some positive provision of the law. In brief the power to appoint carries with it the power to discharge or to remove."

We are also in accord with appellants' second contention. There is nothing in the Charter indicative of an intention to confer powers or impose duties upon the Mayor as an officer of the city other than those belonging, under common parliamentary law, to the presiding officer of a legislative body. The sole purpose of the Charter provisions cited was merely to regulate the time when and the manner in which the Council should meet, organize, and elect their presiding officer. Nor is there anything indicating an intention to create a city office distinct from that of the councilman. The Mayor must be a councilman, and when he ceases to be councilman he necessarily ceases to be Mayor whether he has occupied that position one day, one month or one year, but the termination of his office of Mayor in no way affects his status as councilman. The distinction is readily apparent, one is at the will of the Council, the other is at the will of the people, with the first being completely dependent upon a continuity of the latter.

[4, 5] The historical rule of parliamentary law always has been that a legislative body having the power to choose its own presiding officer from among its own members has also the inherent power to remove such officer at its will or pleasure unless prohibited by some constitutional or statutory provision. Here we find no such prohibition. The Mayor, as such presiding officer, being freely elected by other members of the Council, is removable by them at their pleasure in the same manner. (Cushing's Law and Practice of Legislative Assembly, Section 299.)

"A city council is a local legislative body, and in creating it the legislature, by implication, within the limits prescribed, conferred upon it all the powers and privileges in the manner of conducting their own proceedings usually recognized by parliamentary law as belonging to such bodies; and it would require a clear and explicit expression of legislative intention to that effect to justify the conclusion that it was the design to deprive this city council of the universally recognized parliamentary right of control over their own presiding officer." State of Minn. v. Kiichli, 53 Minn. 147, 54 N.W. 1069, 1070, 19 L.R.A. 779.

It is a basic fundamental of a democratic society and its institutions that the will of the majority shall prevail unless by virtue of the enactment of laws and constitutional provisions the majority, by its own act, has qualified this inherent right.

Under the authorities herein cited we must conclude that petitioner was not the occupant of an office, the term of which had been declared by law, but that he held "his position * * * during the pleasure of the authority making the appointment", Section 16, Article XX, Constitution, and secondly, we find nothing in the Charter or ordinances of the City imposing duties upon the Mayor other than the customary and usual duties of a presiding officer of the local legislative body, in this instance the Common Council, and as such he held office at the pleasure of that body.

The judgment is reversed.

THOMPSON, J., concurs.

ADAMS, Presiding Justice.

I dissent. Section 16 of Article XX of the Constitution expressly provides that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter *with reference to the tenure of office* or the dismissal from office of any such officer or employee shall control.

The charter of the City of Marysville provides that "The Common Council shall elect one of its members as Mayor of the City to serve for such *term* as the Council shall direct." (Italics added.) Pursuant to this authority, petitioner was duly elected by the Council as Mayor of the City, to serve for the ensuing year. The Council thereby exercised its power and fixed a term. Petitioner thereafter held his office for such term and not at the pleasure of the Council. The charter contains no provisions regarding the dismissal from office of any of its officials nor does it authorize the Council to dismiss the Mayor without cause or without notice or hearing. Therefore, petitioner was not subject to dismissal by the Council without cause and without such notice or hearing. Boyd v. Pendegast, 57 Cal.App. 504, 507, 207 P. 713; Legault v. Board of Trustees, 161 Cal. 197, 118 P. 706, 39 L.R.A.,N.S., 519.

That petitioner was elected for a term appears not only from the minutes of the meeting at which he was elected, but from the minutes of the meeting of the following day when the Council purported to remove him and to elect his successor, which minutes recite that a motion was made, seconded and carried that Councilman Fetrow be elected "to the *office* of Mayor * * * to fill the unexpired *term* of former Mayor John W. Watson, who was removed, which *term* expires on the first Monday of February, 1944." (Italics added.)

As to the contention of respondents that the Mayor of Marysville is not an officer of the city, it may be noted that the Council itself refers to the position as an office, that Article 2 of the charter provides that the legislative power of the city is vested in the Mayor and Common Council, and that Article 3 of the charter provides that "The following salaries shall be paid to the several officers of the City, to wit: 1. The Mayor and each member of the Common Council * * *."

The judgment of the trial court should be affirmed.

Rehearing denied; ADAMS, P. J., dissenting.

60 Cal.App.2d 432

BARTELL v. JOHNSON.

Civ. 3304.

District Court of Appeal, Fourth District, California.

Sept. 7, 1943.

Hearing Denied Nov. 4, 1943.

1. Judgment ⚿460(1), 570(5)

A judgment of nonsuit, based on plaintiff's contributory negligence as matter of law, is "res judicata" and bar to subsequent action between same parties on same cause of action, so that complaint, alleging such fact, in suit to set aside default judgment for such plaintiff in subsequent action against same defendant on same cause, states cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment ⚿456(1)

The lapse of over six months after entry of default judgment, without filing of motion to vacate default because defendant lacked notice thereof, did not preclude defendant from bringing independent action in equity to set aside judgment on ground of his mistake of fact in believing that matter involved was closed by affirmance of judgment of nonsuit in previous action against him by same plaintiff for same relief. Code Civ.Proc. § 473.

3. Appeal and error ⚿1040(3)

In action to set aside default judgment, whether plaintiff was entitled to equitable relief because of his mistake of fact in believing that matter involved was closed by affirmance of judgment of nonsuit in previous action against him by same plaintiff for same relief was fact question for lower court, so as to require reversal of judgment based on order sustaining general demurrer to complaint.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Ernest W. Bartell against J. H. Johnson to set aside a default judgment. From a judgment based on an order sustaining a general demurrer to the complaint, plaintiff appeals.

Reversed.

J. Dean LaMotte, of Oceanside, for appellant.

J. H. Johnson, pro se.

GRIFFIN, Acting Presiding Justice.

The trial court sustained defendant's general demurrer to plaintiff's complaint without leave to amend. Plaintiff appeals from the judgment based thereon. The complaint alleges generally that on July 17, 1941, defendant herein, J. H. Johnson, filed a complaint in the municipal court of San Diego County where plaintiff here, Ernest W. Bartell, was a defendant therein; that the complaint there filed purported to allege a cause of action in favor of the plaintiff therein and against the defendant therein for and on account of personal injuries sustained by that plaintiff (Johnson), who is the defendant here, while he was on board of a certain fishing boat known as the "Sportsman", owned and operated by plaintiff Bartell; that a copy of the summons and complaint in that action was allegedly served upon Bartell on March 21, 1942; that on April 1st, 1942, a request for a default of the defendant was filed by Johnson with the clerk of that court; that thereafter, on April 2, 1942, judgment by default was made by the court and entered in plaintiff's favor and against the defendant Bartell in the sum of $770; that Bartell, by reason of accident, mistake, inadvertence, surprise, and excusable neglect and fraud, failed to appear and answer the complaint within the time allowed by law; that plaintiff herein had, at the time of the entry of the default and judgment, and still has, a good and sufficient defense to the action; that an unfair advantage was practised by Johnson upon the court in those proceedings; that previously, about October 14, 1940, a complaint was filed in the municipal court in San Diego wherein Johnson was plaintiff and Bartell was defendant; that the complaint purported to allege and set forth a cause of action in favor of Johnson and against Bartell for damages allegedly sustained by Johnson as the result of personal injuries sustained on board the fishing boat which was operated by Bartell. A copy of the complaint and summons was served upon Bartell in that action. He filed his verified answer thereto denying the allegations of the complaint, and in addition thereto set up a separate affirmative defense of contributory negligence on the part of Johnson. The issues raised by the complaint and answer were duly heard before the municipal court without a jury and at the conclusion of plaintiff's evidence the court granted a nonsuit. On a motion to vacate the order granting the nonsuit the municipal court judge prepared a memorandum decision which is annexed to the complaint on file herein. A copy of the written judgment entered upon the nonsuit was by reference made a part of the complaint filed herein. The complaint further alleges that on September 12, 1941, Johnson filed a notice of appeal to the appellate department of the superior court from the judgment of nonsuit; that later the appeal was duly and regularly presented, argued and heard before said appellate department and a judgment of nonsuit was affirmed. A copy of the opinion of the appellate department of the superior court was annexed to plaintiff's complaint on file herein. The complaint then alleges that notwithstanding the judgment first made and entered in the first action was denominated judgment of nonsuit, that said judgment was, nevertheless, in truth and in fact, a judgment for the defendant based upon the contributory negligence of the plaintiff; that said trial was a full and complete trial, hearing and judicial determination on the merits, and that the judgment entered thereon was and is res judicata and was a bar to any subsequent action between the same parties and involving the same identical issues and subject matter; that the reason the plaintiff Bartell failed and neglected to appear and interpose his good and sufficient defense to the second alleged cause of action after the copy of the complaint and summons in said second cause of action was served upon him on March 21, 1942, was because he was in receipt of a communication in writing from his attorney of record in the first cause of action informing him as follows: "November 25, 1941. Dear Mr. and Mrs. Bartell: I won in your case on appeal. The matter is now finally closed. Kind regards."

The complaint further alleges that plaintiff herein relied upon said communication from his attorney and was inadvertently misled thereby; that he had the utmost faith and confidence in his said attorney and by reason thereof failed to appear and answer the complaint which was served upon him, and that he was ignorant of his legal rights and procedure and for this reason was rendered unable to interpose his good and sufficient defense that existed then and still exists in his favor; that the plaintiff Johnson is an attorney at law and was well read and learned in the law, and used his knowledge to perfect an unfair and inequitable advantage of the plaintiff; that plaintiff had no notice, directly or indirectly of the entry of his default on April 1st, 1942, or of the judgment by default on April 2, 1942; that the first intimation or knowledge that this plaintiff had of said default judgment was on October 28, 1942, at which time Johnson, plaintiff in the second cause of action, caused an execution which had theretofore been issued, to be levied upon the wages and earnings of the defendant; that immediately upon ascertaining said facts the plaintiff herein proceeded to take steps to set aside that judgment; that he has been denied his legal remedy of pursuing a motion to vacate the default pursuant to section 473 of the Code of Civil Procedure for the reason that more than six months had elapsed from the time of the entry of the default and receipt of notice of the same by the plaintiff. Plaintiff then prays that the judgment be declared to be null and void; that defendant Johnson be enjoined forever from enforcing the same; that the default of Bartell and the judgment entered by the municipal court on April 2, 1942, be set aside and vacated and that plaintiff be permitted to appear and interpose his defense to that action, and for general relief. The memorandum decision of the municipal court given on the hearing of the motion to vacate the order granting a nonsuit shows that the nonsuit was granted for the reason that the plaintiff's own evidence showed that he was guilty of contributory negligence. The written judgment of nonsuit recites that it was granted for the reason that "* * * plaintiff had failed to prove a sufficient case for the court." The written opinion of the superior court, sitting as a court of appeals, shows that a perusal of the evidence "convinces us that it sufficiently appears that there was adequate warning to plaintiff before he fell, of the condition of the deck * * *" and held that the nonsuit was proper.

[1] Respondent argues that a judgment of nonsuit is never a bar to a subsequent cause of action, and cites many cases in support thereof. Appellant concedes the general rule where the motion is granted on the ground of insufficiency of the evidence, but contends such is not the rule in those cases like the one at bar, where contributory negligence is pleaded as a separate affirmative defense and is one of the issues

presented and where the nonsuit was based upon the ground that the evidence introduced shows affirmatively as a matter of law that the plaintiff was not entitled to recovery. The exception above noted was referred to in Eulenberg v. Torley's, Inc., 56 Cal.App.2d 653, 133 P.2d 15, 17, where we said: "Cases are cited wherein it has been held that judgments of nonsuit based upon the insufficiency of the evidence are not a bar to subsequent suits on the same causes of action for the reason that they are not judgment on the merits. This is not the rule, however, when a nonsuit is based upon the ground that the evidence introduced shows affirmatively, as a matter of law, that the plaintiff is not entitled to recover." See also Williams v. MacDonald, 180 Cal. 546, 547, 182 P. 29, and cases cited.

Under the authorities cited it appears from the allegations of the complaint that if the judgment of nonsuit in the former action was based upon the contributory negligence of the plaintiff as a matter of law, it is res judicata and would be a bar to any subsequent action between the same parties and upon the same cause of action. If these allegations are true, plaintiff's complaint does state a cause of action.

[2, 3] The only other question presented is whether, in view of the terms of section 473 of the Code of Civil Procedure, where more than six months elapse from the time of entry of the default judgment one might be precluded from seeking relief, plaintiff may now, through an independent action in equity, such as this one, obtain the relief prayed for in the complaint. This same question was thoroughly discussed in the late case of Hallett v. Slaughter, 22 Cal.2d 552, 140 P.2d 3. The majority opinion there held that such an action might be maintained under facts quite similar to the ones here pleaded. Appellant argues that the "dissenting minority opinion expressed the general and dominant law." The Hallett case was an action in equity seeking to set aside and vacate a judgment by default secured against Hallett in a municipal court of Los Angeles County, in which case Slaughter was awarded a money judgment against Hallett for certain sums which Slaughter collected from her by means of levies upon her salary under the municipal court judgment. Enforcement of the municipal court judgment was enjoined and the municipal court was ordered to permit Hallett to file her answer in that court within ten days after judgment in the superior court became final. The judgment of the trial court was affirmed. In that case Hallett was served with a copy of the summons and complaint in the municipal court action. She forthwith employed an attorney to represent her in the action. Her answer to the complaint was prepared by her attorney and verified by her, and was deposited in the mail accompanied by the requisite filing fee, directed to the clerk of the municipal court. On the same day a copy of the answer was mailed to the attorney for the plaintiff in the municipal court action. Neither the original nor the copy of the answer was received by the respective addressees nor returned to Hallett's attorney, but both were lost. The default of Hallett was entered in the municipal court action and judgment by default was taken against her. Execution was levied upon her salary. This was the first knowledge she had that her answer had not reached the clerk of the court and that judgment had been taken against her. The trial court found that plaintiff Hallett had a meritorious defense to the municipal court action but that by the accidental loss of her answer and the mistaken belief on her part and on the part of her attorney that the answer was on file she was prevented from setting up such defense; that the loss of the answer and the mistaken belief that it was on file were due "not to any fault or neglect of hers or her attorney"; that she was diligent in bringing the present suit and not guilty of laches; that Slaughter wilfully and with the intent to lull Hallett into a false sense of security, refrained from proceeding in that action until Hallett's rights under section 473 of the Code of Civil Procedure were barred by lapse of time. Soule v. Bacon, 150 Cal. 495, 89 P. 324, 325, is there quoted with approval as follows: "There are many cases holding that the party may have relief in equity from the consequences of his mistake of fact, although he was somewhat negligent in making the mistake, if his negligence in no way prejudiced the opposing party. * * * At most, it was a question of fact for the court below to determine whether or not the lack of vigilance on the part of the plaintiff was such as would not have occurred with a man of ordinary care and prudence, under the same circumstances. That court has decided the question in favor of the plaintiff, and we are satisfied with its conclusion." It then held that the plaintiff in the

Hallett case was prevented by extrinsic accident and mistake of fact from presenting her defense in the municipal court action, and that such accident and mistake furnished a ground for equitable intervention under the circumstances of the case, citing many cases. We are convinced that the quoted portion from Soule v. Bacon, supra, is equally applicable to the facts pleaded in this case, and that the question whether the plaintiff in the instant action is entitled to relief in equity as a consequence of his mistake of fact is a question of fact for the court below to determine, and the majority holding in Hallett v. Slaughter, supra, is controlling in the instant case.

Judgment reversed.

MARKS, J., concurs.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

WEST KEY NUMBER SYSTEM

60 Cal.App.2d 395

CITY OF CORONADO v. CITY OF SAN DIEGO et al.

Civ. 2899.

District Court of Appeal, Fourth District, California.

Aug. 30, 1943.

Rehearing Denied Sept. 28, 1943.

1. Waters and water courses 🔑200(1)

Where 1912 contract obligating San Diego, without limitation as to time, to sell water required by company supplying Coronado, provided that all waters covered should be delivered at so-called Coronado "Y" at a point below the lower Otay dam, and that the only changes to be made were as to the compensation for such water, and referred in provision for proration in event of a shortage to waters impounded "in the reservoirs", and did not mention any particular streams, dams, or reservoirs, contract did not cover waters later developed and saved by San Diego in the Otay system, where contract did not compel San Diego to increase its system or to develop more water.

2. Waters and water courses 🔑200(1)

Where 1912 contract obligating San Diego to sell water required by company supplying Coronado covered certain waters then being impounded by the Morena and Otay dams, other waters subsequently developed from those rivers and other watersheds would not become subject to the contract merely because a part of the water system affected by the contract was used as a conduit for the new waters.

3. Appeal and error 🔑1152

Where part of judgment awarding "a portion of the waters" to specified parties may have been intended to relate only to the portion of those waters covered by their contract or may have covered an interest in all waters subsequently developed and not covered by the contract, judgment was modified to clarify such question by making judgment relate only to the waters covered by contract.

4. Waters and water courses 🔑200(1)

Where 1912 contract obligating San Diego to sell water required by company supplying Coronado provided that covered water should be delivered at so-called Coronado "Y" and made no reference to delivery of water at foot of Market Street, San Diego began delivering some water at foot of street in 1907, and some waters were delivered at that point each year since 1907, with the exception of two years, and 1936 settlement agreement required San Diego to continue sale of water at both points, evidence established that San Diego had duty to deliver specified monthly and yearly maximums of water at foot of street.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the City of Coronado, a municipal corporation, on behalf of itself and all other water consumers similarly affected and located within the territorial limits of such city, against the City of San Diego, and the California Water & Telephone Company, for declaratory relief and to fix and establish certain water rights. From a judgment, defendant City of San Diego appeals.

Judgment modified, and, as modified, affirmed.

Jean F. DuPaul, City Atty., Bertrand L. Comparet, Deputy City Atty., and Phil D. Swing, all of San Diego, for appellant.

John R. Goodbody, City Atty., and Lindley & Higgins, all of San Diego, Bacigalupi, Elkus & Salinger, of San Francisco, and Philip Storer Thacher, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief and to fix and establish certain water rights. Most of the facts are stated in our decision on a former appeal (City of Coronado v. City of San Diego, 48 Cal.App.2d 160, 119 P.2d 359), and need not be here repeated. We there reversed the judgment and remanded the cause for appropriate action in the trial court, with the suggestion that a new trial was unnecessary unless the parties desired to retry the issues as to their water rights apart from the contract of 1912, and as to the exact amounts of water which the city of San Diego might be compelled to furnish through a submarine pipe line.

Following that reversal a new hearing or trial was had. No attempt was made to establish any water rights independently of the contract of February 6, 1912, and no further evidence was introduced relating to that issue. The only thing that occurred in this connection was that the city of Coronado was permitted, over the objection of the city of San Diego, to amend the prayer of its complaint by substituting in two places the words "such of the waters of the Otay system" for the words "such of the waters of the Dulzura and Otay Rivers." We agree with the trial court that this amendment was unimportant, and it may be observed that other portions of the prayer and many allegations of the complaint, under which the claims of the city of Coronado were confined to the waters of the Dulzura and Otay Rivers, were not amended or changed. Some additional evidence was received on the other issue relating to the submarine pipe line.

The court then made findings and entered a new judgment, both of which largely follow the findings and judgment made and entered at the first trial but with two important changes which are material here. The court found, and entered judgment accordingly, that a portion of the waters of the Otay and Dulzura Rivers either as impounded by the Otay dam and reservoir or otherwise, and of the waters of Pine Creek River as impounded by the Barrett dam and reservoir and the waters of the Cottonwood River as impounded by the Morena dam and reservoir have been dedicated forever to the use of the city of Coronado and its inhabitants, that the rights arising by such dedication and use of said waters were recognized, confirmed and defined in the contract of February 6, 1912, and that as a result thereof there is vested in the city of Coronado the beneficial right to the use of the required quantity of said water, together with other consumers of the California Water & Telephone Company, all as set forth in the contract of February 6, 1912, subject only to the limitation contained in said contract providing for a prorating in the event of a shortage of water. It was also found and decreed that the city of San Diego was under certain obligations with respect to furnishing water through the submarine pipe line, which will be later referred to and considered. From the judgment thus entered the city of San Diego has appealed.

It is first contended that the judgment is erroneous in that it awards to the respondents, subject to the agreement for prorating in the event of a shortage, the right to a portion not only of the waters of the Otay and Dulzura Rivers, whether impounded by the Otay dam or not, but also a portion of the waters of Pine Creek as impounded by the Barrett dam and of the Cottonwood River as impounded by the Morena dam, if and when any or all of these waters may be needed to fill the requirements of the respondents, with the result that the respondents are given the right to share in the waters which were developed and saved by the appellant after the contract of February 6, 1912, was executed and after the appellant purchased the Southern California Mountain Water Company's rights and water system and assumed its burden under that contract. It is argued that our prior decision limited the respondents to an interest or share in the waters of the Otay and Dulzura Rivers and excluded them from any interest in the waters of Pine Creek and the Cottonwood River, and in all waters later developed and saved by the appellant, that this limitation has become the law of the case, and that in any event the respondents are not entitled to any of such additional waters under the terms of the contract of February 6, 1912.

On the first appeal this court pointed out that there was nothing to sustain the finding or conclusion of any particular dedication of waters to the respondents independently of and apart from the contract of February 6, 1912, and that if it was desired to adjudicate any such rights further evidence and findings were necessary. Upon the rehearing no attempt was made to establish any such rights and the respondents now expressly rely upon, and concede that their rights are to be determined in accordance with, the provisions of the contract of February 6, 1912. The main question on the former appeal was as to whether the respondents had lost the rights given them under that contract by failing to purchase and take all of the water necessary to fill their requirements. Among other questions presented was one as to whether the trial court had erred in finding and decreeing to the effect that these respondents had a prior right to all or so much as might be necessary for their requirements of the waters of the Otay and Dulzura Rivers and to the waters of Pine Creek as impounded by Barrett dam and of Cottonwood River as impounded by Morena dam. This court held that while there had been no breach of the contract of February 6, 1912, the court's finding and decree upon the other issue mentioned was neither supported by the pleadings nor by the evidence, and was opposed to established principles of law. The first judgment was reversed because it gave to the respondents water to which they were not entitled and also because it gave them, with reference to waters to which they were entitled, a prior and exclusive right in disregard of the contract which provided for prorating in case of shortage. To a certain extent, an interpretation of the contract of February 6, 1912, which was then before us, was involved in that decision. However, the matter of the interpretation of that contract, with respect to the exact waters to which it related, was not very fully presented in that case and we doubt that our former decision became the law of the case in that regard, except to the extent that we held that the respondents were not entitled to all of the waters in question and possibly in that we held that the awarding of subsequently developed water to the respondents was not supported by the evidence. While a part of our former opinion may have a bearing on the problem now before us, as for instance the statement or inference that the evidence would not support a finding that these respondents were entitled to share in the new water developed by the appellant, it is unnecessary to base our decision on this appeal upon the doctrine of the law of the case. Our present views of the meaning that must be ascribed to the provisions of the contract of February 6, 1912, coincide with those we held at the time of the former appeal.

The respondents now rest their claims to water from this general source entirely on the contract of February 6, 1912, and the question is now more definitely presented as to what waters they are entitled to share in under the provisions of that contract. The appellant contends that the respondents are limited both by that contract and our former decision to a right to share in the waters of the Otay and Dulzura Rivers, as impounded by the Otay dam. The respondent city, the real beneficiary of any water in question, contends that it has the right to share in the waters impounded and taken into the "Otay system" as that system existed on February 6, 1912. It is argued that the Morena dam was then in existence and that although the Barrett dam was not constructed until 1922, all of the waters of Pine Creek were, prior to February 6, 1912, taken through what was known as Dulzura conduit and dumped into the lower Otay basin, and that it follows that there are no newly developed waters which need be considered. This is obviously incorrect as the height of the Morena dam was increased by the appellant after 1912 and the Barrett dam was erected by it in 1922. While some of the water of Cottonwood Creek or river was, prior to 1912, impounded by Morena dam and thence taken to the reservoir formed by the lower Otay dam, and while some part of the water of Pine Creek may theretofore have been taken through the Dulzura conduit to be then impounded by the Otay dam, it clearly appears that not all of the waters now impounded by the Morena and Barrett dams were taken to the lower Otay reservoir prior to 1912, and the trial court found that the appellant, by constructing the Barrett dam and raising the height of the Morena dam and by other improvements, has increased the net safe yield of the "Otay water system" by 8.35 million gallons daily over the safe net yield of that system at the time it was acquired by the appellant. The respondent water company contends that under the 1912 contract the respondents are entitled to share in all the waters impounded by the so-called Otay water system, including the present Morena and Barrett dams, with all improvements that have been made by the appellant and also including any improvements or additions that may be made by the appellant in the future.

[1] The respondents argue that the sale by the California Mountain Water Company to the city of San Diego covered not only its dams and reservoirs but also its potential water rights and that it follows that San Diego took all of these potential rights subject to the contract of 1912. It appears that the city of San Diego had certain water rights on these streams before this purchase was made. The question here is not as to what was transferred in this sale but as to what was covered in the 1912 contract, to which the sale was subject. That contract does not mention any particular streams, dams or reservoirs. It provides that the water furnished under its terms shall be delivered at a point below the lower Otay dam, which point is known as the Coronado "Y". It provides that it is to be a continuing contract for the purpose of supplying those entitled thereto, including future consumers in the city of Coronado, "with water from the system of water works of the said party of the first part, without any limitation as to the time when such obligation to so furnish water shall cease, and that the only changes to be made" are as to the compensation for such water. And in the paragraph providing for proration in the event of a shortage the contract refers to the waters impounded "in the reservoirs." At that time the water company's system consisted of the upper and lower Otay dams and reservoir, and the Morena dam and reservoir, and the Dulzura conduit. It seems reasonable that, in thus speaking of the water company's system of water works and of prorating the water "in the reservoir", the parties were speaking of that water system as it then existed and especially when it was definitely provided that no changes were to be made with respect to this obligation to furnish water except as to the price to be paid. If the parties had intended the contract to cover not only the water system as it then existed but also future installations and developments it would have been a simple matter to have so stated. Not only was such an intention not expressed in the contract but we think it does not inferentially appear therein. There was nothing in the contract compelling the first party to increase its system in the future or to develop more water, and at the time the contract was executed it neither intended nor was expected to do so. While the city of San Diego took over that water system subject to the burden of this contract this burden was limited by the provisions of the contract itself. It would be unreasonable to interpret the contract as extending to and covering any other water system which the purchaser of that system might own, and it would be equally unreasonable to extend it by implication to the additions which San Diego subsequently made at a cost of more than $4,000,000.

This view of the intention of the parties and the meaning of the contract is confirmed by the circumstances surrounding the execution of the contract, and by the subsequent actions of the parties. The Coronado Water Company had had certain rights in Otay River water and had formerly taken water from its wells a few miles below the site where the lower Otay dam was constructed. While that dam would or might interfere with its rights and its wells it had consented to the erection of the dam because of an oral agreement under which the Southern California Mountain Water Company agreed to furnish it water from the reservoir thus created. Water was so furnished for a number of years. In 1912, both parties knew of the proposed sale of the Southern California Mountain Water Company's system to the city of San Diego and this contract of February 6, 1912, was entered into, and the sale to San Diego was made subject to it, for the purpose of continuing the arrangement which had previously been carried out under the oral agreement. The parties contracted with reference to a definite water system which then existed, knowing that this system was about to be sold and that it would not be developed or increased in any way by its then owner. The matter was not questioned for some thirty years, during which period the city of San Diego has continued to take and use all newly developed water. When this action was started by the city of Coronado the pleadings and the prayer of the complaint set forth a claim of rights only in the waters of the Otay and Dulzura rivers. Neither by pleading nor evidence did it make any other claim until the hearing after a reversal of the former judgment. In its brief, on the former appeal, the respondent water company said: "This respondent concedes that appellant is entitled to the use of new water 'developed' after purchasing the system." And again, "there is no party to the litigation contesting appellant's claim, so called, to 'new water' ". However, they are now claiming a right to share in these new waters although the evidence is exactly the same as that held by this court to be insufficient to support such a claim.

[2] This contract may reasonably be supposed to cover certain waters of Pine Creek and of Cottonwood river only because a portion of those waters were then being impounded by the Morena and Otay dams. Other waters, subsequently developed, from these rivers and other watersheds would not become subject to that contract merely because a part of the water system which had been affected by the contract was used as a conduit for these new waters. L. Mini Estate Co. v. Walsh, 4 Cal.2d 249, 48 P.2d 666. We think that the only reasonable interpretation of this contract of February 6, 1912, which determines the rights of the respondents, is that it was limited to this water system as it then existed and that it was not intended to, and did not, cover any future additions by which new water was developed.

[3] The part of the judgment which we are now considering is somewhat ambiguous in that it awards "a portion of the waters" referred to therein to the respondents. While this may have been intended to relate only to a portion of those waters which we have held to be covered by the 1912 contract, it also might be interpreted as covering an interest in all the water subsequently developed and impounded by any of the named dams. This should be clarified and the judgment accordingly modified.

The only other point requiring consideration is with reference to the duty of the city of San Diego to continue some service of water through the submarine pipe line which connects with that city's water system at the foot of Market Street. On the prior appeal this court pointed out that some water had been delivered through this submarine pipe line during most of the years since 1907 and then said: "The only evidence in this connection is that this submarine pipe line has been maintained for emergency purposes and that water was taken through it only at such times as pressure was reduced to a low stage at the northerly borders of the city of Coronado." It was then pointed out that such delivery of water had never been made pursuant to the contract of February 6, 1912, but that in a compromise agreement in 1936 it was agreed that such a service would be continued. We then held that "the only reasonable effect of this agreement in this connection would be that the respondents would have a right to have the delivery of water at the foot of Market Street continued to the extent such deliveries had been made in the past." That part of the judgment was reversed on the ground that it was too broad in that it might be interpreted as giving the city of Coronado a right to compel the delivery of all waters furnished under the 1912 contract at the foot of Market Street rather than at the Coronado "Y". While it was held that the right to such service of water was limited to the extent such deliveries had been made through the submarine pipe line in the past it was suggested that on a retrial the parties, if they so desired, might seek an adjudication of the exact amount of water for which delivery in that manner could be compelled.

On the retrial further evidence was produced on this issue, including evidence as to the maximum daily, monthly and yearly amounts of such deliveries in the past.

[4] In Paragraph VII of the judgment which was entered, the court decreed that the city of San Diego is also legally obligated to sell and deliver water at the foot of Market Street in accordance with the supplemental agreement of 1936 "to the extent such deliveries had been made in the past and as set forth in Finding of Fact No. XX." In Finding XX it was found that long prior to the supplemental contract of 1936 the city of San Diego had supplied practically continuously such amounts of water as were required by the respondent water company, as the conditions of pressure and other circumstances made desirable; that at times the amount of water thus taken has been as much as 500,000 gallons daily and 2,319,300 cubic feet per month; that said submarine line has been left open continuously by San Diego on its side of the same; and that the amount of water thus taken through the years "has been regulated and determined wholly by said California Water and Telephone Company and its predecessor in interest." It was also found in Paragraph XIX of the findings that the maximum amount of water thus delivered in any one year was 15,902,300 cubic feet. The evidence on this issue upon the retrial is precisely similar, in effect, to that of the first trial with the exception of the new evidence as to maximum quantities of water which had thus been furnished in the past. The finding that this submarine pipe line had been continuously left open by San Diego is not sup-

ported by the evidence. While there is evidence that it had usually been left open it appears without contradiction that at times it had been closed on the San Diego side, and there is no evidence which would support a finding that the respondents have a right to have the line left open on the San Diego side at all times. The evidence is wholly insufficient to support the finding to the effect that the respondent water company could take water from this source at any time and for any purpose it desired to do so, and that the amount of water thus taken has been through the years regulated and determined wholly by that company and its predecessor. The evidence is exactly to the contrary. The form of this part of the judgment is as unfortunate as it is unnecessary and unjustified. However, it may easily be so modified as to conform to the real issues presented, to the holding of this court and to all of the evidence, including that produced upon the retrial.

Paragraph I of the judgment is modified by striking therefrom the first subparagraph thereof and inserting in lieu thereof the following: "That a portion of the waters of the Otay and Dulzura Rivers in San Diego County, as impounded by the Otay Dam and Reservoir, and of the waters of the Pine Creek River and of the Cottonwood River, being that portion and to the extent that such waters were impounded by the Otay Water System on February 6, 1912, have been dedicated forever to the use of the City of Coronado and its inhabitants, and that the rights arising by such dedication and use of said waters were recognized, confirmed and defined in the contract of February 6, 1912, executed by and between the Coronado Water Company and the Southern California Mountain Water Company and, as a result thereof, there is vested in said The City of Coronado and its inhabitants, the beneficial right to the use of the required quantity of said water, together with the consumers of the California Water & Telephone Company, as set forth in the said contract of February 6, 1912, subject to any control and regulation thereby of the State of California and the California Railroad Commission, and subject to the limitation contained in said contract of February 6, 1912, in the following words:" Also, Paragraph VII is modified by striking therefrom the last clause thereof which reads: "to the extent such deliveries have been made in the past and as set forth in Finding of Fact No. XX," and inserting in lieu thereof the following: "to the extent such deliveries have been made in the past and with a maximum amount of 2,319,300 cubic feet in any one month and 15,902,300 cubic feet in any one year."

As so modified, the judgment is affirmed.

GRIFFIN, J., concurs.

60 Cal.App.2d 326

KYNE v. KYNE

Civ. 12351.

District Court of Appeal, First District,
Division 1, California.
Aug. 28, 1943.

Rehearing Denied Sept. 27, 1943.

See 141 P.2d 221.

1. Bastards 🔑94

In statutory action against father for support of illegitimate child, allowance of attorney's fee is predicated on theory that attorney's services are part of child's right to support. Civ.Code, § 196a.

2. Bastards 🔑78, 94

In statutory action by illegitimate child against child's alleged father to establish child's paternity, wherein child prevailed, it was duty of court to award an amount sufficient for child's support within father's means including an allowance for attorney fees. Civ.Code, § 196a.

3. Bastards 🔑94
Contracts 🔑108(2)

Contingent fee contract entered into between illegitimate child and child's counsel before commencement of trial of action against child's alleged father to establish child's paternity was void as against "public policy", and did not preclude trial court from making allowance for attorney's fees and costs after child had prevailed. Civ.Code § 196a.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Appeal and error 🔑856(1)

Where trial court, in deciding issues, specifically stated that court was not determining any other issues except a specified issue and refused to pass on any other issues, reviewing court could not affirm trial court's order on any of the other issues involved, where determination of other issues depended on conflicting evidence.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Action by Tom Kyne, Jr., a minor, etc., against Tom Kyne to establish plaintiff's paternity, and to obtain support, costs and counsel fees. Judgment establishing defendant as the father of plaintiff and ordering defendant to make certain payments, was affirmed by the District Court of Appeal, 100 P.2d 806. On an order to show cause why defendant should not be punished as for contempt of court for failure to pay the judgment and why defendant should not pay reasonable attorneys' fees and costs rendered and expended since the original judgment, the trial court made an adverse order, from which plaintiff appeals.

Order reversed.

Allen Spivock, Philander B. Beadle, and Samuel Hauser, all of San Francisco, for appellant.

John Elliott Cook, of San Francisco, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order denying appellant's application for further attorneys' fees and costs. In order to properly understand the issues involved upon this appeal it is necessary to review briefly the history of this litigation.

In November, 1935, plaintiff, Tom Kyne, Jr., brought this action against defendant and respondent, Tom Kyne, to establish his paternity and obtain support, costs and counsel fees under § 196a of the Civil Code. Before trial, in August, 1936, plaintiff, through his guardian, employed Allen Spivock to act as his attorney under a written contract approved by the Superior Court, which contract provided for a forty-five percent contingent fee for prosecuting said action and for procuring all necessary court costs. On December 16, 1937, after three jury trials, judgment was entered establishing respondent as the father of appellant child. The judgment ordered respondent to pay $100 per month from the date of birth to January 15, 1938, and the sum of $60 monthly thereafter for the support of said child. The judgment provided further for the payment of $150 for medical expenses, $3,500 as attorneys' fees and $1,064.20 as costs of suit. This judgment was affirmed by this court on March 22, 1940. Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806.

In seeking enforcement of the original judgment various proceedings were undertaken, all of which involved legal services and expenses. In one of these, under an execution, the sheriff of the City and County of San Francisco seized the sum of $7,659.36 in the hands of respondent. Third party claims were filed and after hearing the Superior Court upheld said third party claims. Upon appeal from such order it was affirmed by the District Court of Appeal but a hearing was granted by the Supreme Court and the order allowing the third party claims was reversed. Kyne v. Kyne, 16 Cal.2d 436, 106 P.2d 620.

The present proceeding was commenced by an order to show cause why respondent should not be punished for contempt of court for failure to pay the judgment and why he should not pay reasonable attorneys' fees and costs rendered and expended since the original judgment. Upon the hearing respondent contended that, because a contingent fee agreement was entered into between plaintiff and his counsel prior to the commencement of the trials, the court was prevented from awarding fees and costs as against the respondent father. Respondent also contended that plaintiff was not entitled to further fees and expenses because of misconduct and bad faith on the part of his counsel. The trial judge first made a minute order allowing $3,250 attorneys' fees and $786 costs, but later set this order aside, stating that he had intended it only as a memorandum opinion, and made an order denying the application for payment of these further and additional fees and costs. The trial judge, throughout the course of the proceeding below, insisted that his order was based solely on the theory that, by reason of the contingent fee contract, the plaintiff was foreclosed from obtaining further attorneys' fees and costs from respondent, and in its order denying attorneys' fees, costs and expenses the trial court stated that "it appearing to the court that the services performed and costs and expenses incurred herein on behalf of plaintiff were rendered and incurred pursuant to a contingent fee contract made in August, 1936, and that therefore this court is thereby precluded from awarding attorney fees, costs or expenses against defendant.

"Now, therefore, It is hereby ordered, adjudged and decreed that neither plaintiff nor his attorneys, or any thereof, is or are entitled to recovery whatever against this defendant for attorneys' fees, * * *."

The only point raised by appellant is that the trial court erred in holding that the execution of the contingent fee agreement precluded the court from awarding counsel fees and costs, and that the order appealed from must therefore be reversed.

[1] It must be taken as settled law in California that, as stated by this court in Kyne v. Kyne, 38 Cal.App.2d 122, at page 132, 100 P.2d 806, at page 811, "In cases under section 196a of the Civil Code the allowance of attorney's fee is predicated upon the theory that such legal services are part of the child's right to support." The child is not only entitled to be awarded an amount necessary for his support, but he is also entitled under our decisions to an allowance of attorneys' fees and costs.

Appellant argues that the contingent fee agreement which sought to assigr forty-five percent of all sums allowed for the support of the child was invalid and against public policy. He argues further that when it was determined to be the law in California that the child in an action to establish his paternity is entitled to the allowance of attorneys' fees as part of his right to support, the invalidity of the contingent contract was likewise determined.

[2] We believe that it must be held that the contingent fee contract here involved was against public policy and therefore void. It was the duty of the court to award for the support of the child, whose paternity has been established, an amount sufficient for his support, within the means of the father, and it was likewise the duty of the court as part of the "child's right to support" to make an allowance of attorneys' fees. The amount necessary for the child's support may not be reduced by permitting the deduction therefrom or the assignment of a part of said support money for the payment of attorneys' fees, when it is likewise the duty of the court to make an allowance for attorneys' fees as a part of the child's right to support. It cannot be argued reasonably that the contract may be upheld upon the theory that it was necessary to enable the child to establish his paternity in the face of the decisions in Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163, and Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806, in which the allowance of attorney's fees were held to be part of the child's right of support. It is true that these decisions had not been rendered when the contingent fee agreement was entered into, but this does not, in our opinion, alter the legal situation or render said agreement less contrary to public policy.

We are not aware of any decision where the precise question here presented was involved. But in the case of Lynde v. Lynde, 64 N.J.Eq. 736, 52 A. 694, 58 L.R.A. 471, 97 Am.St.Rep. 692, the Supreme Court of New Jersey held a contract made by a divorced wife with an attorney, under the terms of which he was to bring suit to recover unpaid support money and was to receive one-half thereof for his services was contrary to public policy and therefore void. In that case a large sum had been recovered and the Court of Chancery, which has jurisdiction of divorce matters in the State of New Jersey, had made an allowance of $1,000 as attorney's fees. The attorney collected a large amount of money for back support and deducted therefrom the proportion that he claimed was due him under the contingent fee contract and remitted the remainder to the wife. She refused to accept it and brought proceedings against the attorney to recover from him the amount he had deducted. In holding the contract void as against public policy and that the wife was entitled to recover back from the attorney the amount he had deducted under the contract, the court, speaking through Justice Pitney, later a Justice of the Supreme Court of the United States, said:

"But there is another question inherent in the admitted facts of this case; and that is whether the subject-matter of the supposed contract between Westervelt and Mrs. Lynde—to wit, her claim for allowance of alimony against her husband—was of such a nature as to admit of being subjected to an engagement of the kind referred to. It is obvious that if her claim was in its essence not assignable, if it was not property, nor a future interest in property, such as could be passed under an equitable assignment, the supposed contract cannot be sustained even if made, and made under such circumstances as otherwise would entitle it to recognition and enforcement; for, if her claim was in its nature not assignable, it could not be subjected to an equitable lien by any contract between the parties; and if any principle of public policy prohibits its assignment, the same result follows. [Page 750 of 64 N.J.Eq., page 699 of 52 A.] * * *

"It follows, as a necessary consequence of what has been said, that a wife's claim for an allowance of alimony is a purely personal right, and not in any sense a property right. It is in its nature not susceptible of assignment by the wife to another, nor capable of enjoyment by her in anticipation. And this result is fully sustained by the authorities. [Page 754 of 64 N.J.Eq., page 701 of 52 A.] * * *

"Not only does it follow, from the very nature of alimony, that it cannot be subjected in advance to a charge in favor of the solicitor through whose services it is awarded, but a like result follows from the plainest principles of public policy. [Page 757 of 64 N.J.Eq., page 702 of 52 A.]"

It should be noted that the case just cited was not a case in which the agreement was entered into before the divorce proceedings were commenced but was an agreement entered into after the divorce had been granted, so that the decision of the court that the agreement was against public policy was not, in any sense, based upon the ground that it might encourage or promote the granting of a divorce or prevent a reconciliation, which was the chief ground upon which the contract in Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548, was declared void. However, in Newman v. Freitas, 129 Cal. at page 292, 61 P. at page 910, the court also said: "Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in this and perhaps most of the states such contracts are allowed, if not favored. This is on the ground that otherwise a party without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. In divorce cases, however, the law has taken care that the wife shall not be without assistance, in proper cases, either to prosecute or defend such actions. The court, in its discretion, may require the husband to pay as alimony any money necessary to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity, therefore, does not exist in such cases, as in the others, for allowing contingent attorney's fees, and, where the reason ceases, the rule or law also ceases."

In 1 Cal.Jur. p. 951, it is stated: "It appears to be a general rule among the courts of this country that a periodical allowance of alimony, whether temporary or permanent, is not susceptible of assignment by the wife to another or capable of enjoyment by her in anticipation of its accrual."

[3] We conclude, therefore, that the contingent fee agreement was void as against public policy because its effect, if carried out, would be to deprive the child of the money necessary for his support and would defeat the very purpose of the statute, which was designed and intended to provide support for an illegitimate child whose paternity had been established. Holding this view we must conclude also that the trial court erred in holding that the execution of said agreement precluded the court from making any allowance for attorneys' fees and costs.

In what we have heretofore said we do not wish to be understood as intimating that the contingent fee agreement, even if valid, would preclude the court from making an allowance for attorneys' fees. The attorneys for appellant have never sought to recover any fees under said agreement and have, at all stages of the proceedings since the order of the trial court awarding attorneys' fees following the verdict of the jury establishing respondent as the father of the child, disclaimed any intention so to do and renounced any rights under said contract. But in view of our conclusion that said agreement was void it is unnecessary to discuss its effect if valid.

[4] The greater part of respondent's brief is devoted to criticism of the methods employed by appellant's counsel and in accusations and imputations of fraud by appellant's counsel upon the trial court and unclean hands. Respondent asserts that appellant's counsel did not disclose to Judge Parker the existence of the contingent fee agreement at the time the order allowing counsel fees was made and also that one of the counsel for appellant sought to obtain the sum of $1,000 for providing a bond of $1,000 to hold the money levied

upon under the execution hereinbefore referred to pending the appeal from the order of the Superior Court upholding the third party claim to said money. Respondent cites authorities to support his contention that a court may deny attorney fees where the attorney is guilty of professional misconduct. It is only fair to state that the evidence in this matter is conflicting and that the evidence of any misconduct on the part of appellant's counsel is by no means conclusive. But it is quite clear from the record that the trial judge in denying the application for supplemental counsel fees and costs did so upon the sole ground that the contingent fee agreement precluded the allowance of counsel fees and costs. While it is ordinarily true, as argued by respondent, that the appellate court need not concern itself with the reasons which impelled the trial court to act, as it is the judicial action and not the judicial reasoning or argument which is the subject of review, yet where, as here, the trial court specifically stated that it was not determining, but refused to pass on all other issues except the existence of the contingent fee agreement, an appellate court is not justified in holding that the order may be supported on any of the other issues involved where the determination of those issues depends upon conflicting evidence. If the court had merely made an order denying the application without specifically stating that it did so on the sole ground of the existence of the contingent fee agreement, the argument of respondent upon this point might be upheld.

In Mathews v. Mathews, 49 Cal.App. 497, at page 500, 193 P. 586, at page 587, the court said:

"Respondent urges that, because of the fact that his motion sought relief on the further ground that the financial circumstances of the parties had changed, we should uphold the ruling of the lower court. We are cited to numerous authorities holding that, in the event of a ruling by the lower court on a demurrer or motion for new trial, the respondent is not limited to the reason assigned by the trial court for its action, but may urge all the grounds specified in his demurrer or notice of motion. Burke v. Maguire, 154 Cal. [456], 461, 98 P. 21; Morgan v. Robinson [Co.], 157 Cal. 348, 107 P. 695. The soundness of these decisions cannot be questioned, but they are not applicable to the present case.

"This appeal is prosecuted from the special order of the trial court above quoted. The proceeding was instituted by defendant's motion. The court did not grant such motion, but made an order which shows by its very terms that it was based upon the proposition that a provision for the payment of alimony in an interlocutory judgment of divorce cannot be enforced unless it is carried into the final decree. Such is not the law. The trial court's order was erroneously made, and is reversed."

In Taylor v. Talbert, 134 Cal.App. 595, at page 597, 25 P.2d 888, the court said:

"Respondent argues that, notwithstanding this ruling we should affirm the judgment because of the equities supporting it, basing her argument on the evidence that, without legal advice, she was induced to part with her separate property through the creation of the joint tenancy. It may be that the transactions were a fraud upon the wife under the terms of section 2235, Civil Code, as interpreted in McKay v. McKay, 184 Cal. 742, 195 P. 385, but that issue was not tried because the trial court limited respondent to the theory of the original Siberell decision [Siberell v. Siberell, Cal.App., 295 P. 385]. Hence the record does not present a case where this court could affirm the judgment upon the evidence before us; it is one where the issue should be fully tried in the trial court.

"The judgment is reversed."

We hold, therefore, that in view of the fact that the trial court specifically stated it was not passing upon the issues of fraud, unclean hands and misconduct injected into the proceeding by respondent, on all of which issues the evidence was conflicting, but was basing its decision entirely upon the view that the existence of the contingent fee agreement precluded the allowance of attorneys' fees and costs, the order must be upheld, if at all, upon the correctness of that view. An appellate tribunal should not support the order upon the ground that counsel may have been guilty of fraud or misconduct when the trial court specifically declined to do so. Issues of fact are properly tried and determined in the trial court.

In our opinion the trial court erred in its view that it was precluded by the contingent fee agreement from making an allowance to appellant for supplemental attorneys' fees and costs and the order must therefore be reversed. Upon a new hearing all issues involved may be heard and determined.

The order is reversed.

PETERS, P. J., and KNIGHT, J., concur.

60 Cal.App.2d 379

EARL RANCH, Limited, v. Dale MARCHUS et al.

Civ. 13886.

District Court of Appeal, Second District, Division 3, California.

Aug. 30, 1943.

Rehearing Denied Sept. 16, 1943.

Hearing Denied Oct. 28, 1943.

1. Landlord and tenant 🔑200(1)

Where lease of alfalfa farm provided base minimum rental of $2,000 a year with an increase of rent of $200 a year for each additional dollar per ton of hay over $10, the words "provided as follows" preceding a schedule showing various prices up to $15 per ton and $3,000 rent, in absence of words indicating that schedule was illustrative, indicated intent that $3,000 should be maximum rental.

See Words and Phrases, Permanent Edition, for all other definitions of "Provided as Follows".

2. Landlord and tenant 🔑37, 200(1)

In construing a lease court must give effect to each provision if it can, and must therefore attribute to parties a purpose in setting out a schedule of rents fixed on a sliding scale.

3. Landlord and tenant 🔑200(1)

Where rent schedule in lease was unambiguous as to sliding scale up to rental of $3,000 per year, but implication that rent might take a higher rate must be found in language uncertain and ambiguous, implication could not be sustained. Civ.Code, § 1654; Code Civ.Proc. § 1864.

4. Landlord and tenant 🔑182

Under statute providing that language of contract shall be interpreted most strongly against party who caused uncertainty and that promisor is presumed to be such party ordinarily tenant, with reference to obligation to pay rent under original lease, is "promisor". Civ.Code, § 1654.

See Words and Phrases, Permanent Edition, for all other definitions of "Promisor".

5. Landlord and tenant 🔑33

Where clear provisions of agreement modifying lease indicated that agreement was in favor of tenants, landlord was "promisor" within meaning of statute declaring that language of contract shall be interpreted most strongly against party who caused uncertainty to exist and that promisor is presumed to be such party. Civ.Code, § 1654.

6. Landlord and tenant 🔑37

Leases are to be construed as are other contracts and, so far as uncertainties are concerned, according to nature of specific obligation under consideration.

7. Landlord and tenant 🔑37

In construing a lease, intention of parties is to be ascertained from consideration of entire instrument, but nature of each covenant must be examined when it is necessary to determine which party is promisor or obligor thereunder. Civ.Code, § 1654.

8. Landlord and tenant 🔑200(2)

Where landlord agrees to abatement of rent which has been already fixed by lease, he is the "promisor" in a simple promise in favor of tenant, and ambiguities in agreement must be resolved in favor of tenant under presumption that authorship of ambiguity is with landlord. Civ.Code, § 1654.

9. Landlord and tenant 🔑213(2)

Where lease provided that tenant should receive credit on rent due for repairs on engine on premises upon presentation to landlord of receipted bill, and year's rental under lease was payable one-half on July 1 of following year, in absence of any time specified within which repair bill should be paid and approved, landlord suffered no prejudice by judgment allowing tenant credit for repairs if he paid therefor before July 1.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Earl Ranch, Limited, against Dale Marchus and Chris Marchus for declaratory relief involving construction of rights of parties under a lease of agricultural land. Judgment for defendants, and plaintiff appeals.

Affirmed.

William Katz, of Los Angeles, for appellant.

Frederick M. Kraft of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiff in an action for declaratory relief involving the construction of the rights of plaintiff landlord and defendant tenants under a lease of agricultural land, the questions in issue being related to rentals to be paid by the tenants and certain credits to be given by the landlord. The principal controversy is over the construction to be given to a written modification of the lease with respect to the payment of cash rentals. The subject of the lease was an alfalfa ranch of some 640 acres and the farming equipment thereon. The lease was entered into February 1, 1940, and was for a term of six years at an annual cash rental of $3,000, payable in stated installments. In November, 1940, the parties executed a modification agreement, the pertinent provisions of which read as follows:

"Therefore, it is understood and willingly agreed that the rental as provided in the main Lease as above referred to, shall and will, on and after January 1, 1941, be as follows and not otherwise. The date and time of payment as provided in the main Lease shall remain as set forth in said Lease. The base minimum rental fixed herein shall be $2000.00 per annum, same to be paid in three equal installments as provided in the main Lease as referred to herein. A graduate scale of rental to be paid over and above and in addition to the $2000.00 rental as herein stated shall be as follows: For each additional Dollar per ton for hay, over and above $10.00 per ton shall provide that the Lessee, Dale Marcus, shall pay $200.00 per year, provided as follows:

"When hay is $11.00 per ton, rental to be $2200.00.

"When hay is $12.00 per ton, rental to be $2400.00.

"When hay is $13.00 per ton, rental to be $2600.00.

"When hay is $14.00 per ton, rental to be $2800.00.

"When hay is $15.00 per ton, rental to be $3000.00.

In arriving at the average price per ton for hay and wherein fractions of the Dollar per ton is arrived at, all fractions of the Dollar shall bear its just proportion to each ton the same as if there were no fractions involved. It is provided further that all additional payments over and above the $2000.00 as mentioned herein, shall be paid in three equal installments and at the same time as the annual installments are made as provided in the main Lease."

There were further provisions for the averaging of the prices of two different grades of hay and for the deduction from the average price of the sum of $2 per ton for hauling, these provisions having the effect of reducing by $2 per ton the prices which would govern the rental to be paid as stated in the agreement. Between the date of this agreement and the commencement of the action, the price of hay through different periods, commencing April 1, 1941, ranged between $17 and $23 per ton.

It is the contention of plaintiff that rental under the modification agreement was increased at the rate of $200 per year with each increase of $1 per ton above as well as below the price of $15. Defendants contended, and the trial court held, that the maximum rental under the agreement was $3,000 per year, which it would be under the agreement at a price of $15 per ton, and that any increase above that price gave the landlord no additional rental. We favor the construction of the lease which was given it by the trial court. Each of the parties insisted upon the trial that the agreement is unambiguous. Plaintiff, at one stage of the case, sought to prove the substance of a conversation between plaintiff's president and one of the defendants during the negotiation of the agreement. Defendants' objection to the evidence was sustained and, as we read the record, plaintiff acquiesced in the ruling, stating in part: "If Your Honor please, I was going to say that in my opinion I think the objection might be well taken, but still, on this proposition I want it put up before the Court and have a ruling on it, and that is when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, and my thought is that the intention of the parties can be ascertained from the writing alone." The trial court reached its conclusion as to the meaning of the agreement without resort to extrinsic evidence, and upon the appeal there is no contention on either side that it is ambiguous.

From our analysis of the agreement we are of the opinion that it is open to the construction which the trial court gave it and that such construction can properly be given without resort to the rules which pertain where ambiguity and uncertainty exist. We are further of the opinion that when it is attempted to apply the sliding scale of rental to prices above $15 per ton the agreement becomes ambiguous and subject to rules of interpretation that would not otherwise obtain.

[1, 2] Disregarding for the moment the question of ambiguity, we see that the agreement called for an increase of $200 per year above the base rental of $2,000 for every dollar per ton in the price of hay above $10 and that the price schedule was preceded by the words "provided as follows." Without this qualifying clause there would have been no ceiling upon the rental to be paid, and yet if we adopt this construction we will have ignored the proviso and will have held that it is superfluous and means nothing. But under familiar rules of construction we must give effect to each provision of the agreement if we can and must therefore attribute to the parties a purpose in setting out the schedule to express their understanding with relation to the matters embraced therein. It definitely covers prices between $10 and $15 per ton and it ends at the higher figure. Plaintiff contends that the scale was added merely by way of illustration as to how the increases would operate, but why such an illustration would have been necessary, in view of the clear provisions that preceded it, is not at all clear. We deem it more reasonable to conclude that the parties did not have in mind and did not intend to contract especially with reference to prices of hay in excess of $15 per ton. It is significant, we think, that the schedule ended at the price which would give the lessor the rate of rental stipulated in the original lease. If it had been intended that the rent should go higher, that could have been easily expressed by adding to the schedule "et cetera" or an equivalent expression. The failure of the lessor to have such words incorporated appears to us to be a sufficient answer to the contention that it would not have consented to a lower rental when hay was cheap unless it had intended to recoup the loss when hay went above $15 per ton. The trial court was therefore warranted in construing the schedule as a modification of the preceding general provision for increased rentals based upon varying prices of hay, and in concluding that the maximum rate would be one which would return an annual rental of $3,000.

[3-5] If, under the construction urged by plaintiff, the agreement would be ambiguous, pertinent rules for the interpretation of ambiguities fortify the conclusion reached by the trial court. We have seen that the rental schedule is quite clear insofar as it runs in favor of the lessees, that is to say, as to all prices of $15 per ton and under, but we find no clearly expressed intention that the lessees should pay at a higher rate than $3,000 per year. If there is any implication that the rent might take a higher rate, it must be found in language which is uncertain and ambiguous. Certain rules of construction which we shall note forbid us to resolve ambiguities in favor of plaintiff to establish the implied obligation for which it contends. Section 1654 of the Civil Code provides that in cases of uncertainty not removed under other rules, the language of a contract shall be interpreted most strongly against the party who caused the uncertainty to exist, and that the promisor is presumed to be such party. Under the rule stated in section 1864 of the Code of Civil Procedure, where the parties do not agree in their understanding of a contract and different constructions are equally proper, the one is to be taken which is more favorable to the party in whose favor the provision in question was made. It would be helpful to know which party was responsible for the ambiguity which led to the dispute, but the record does not show the authorship of the agreement or any part thereof. Under the cited code sections it is necessary to determine which party was the promisor under the modification agreement, for if the new basis of rental was in favor of the tenants, they would have the benefit of the stated rules of construction. It must be conceded that if we were considering the tenants' obligation to pay rent under the original lease, they would be the promisors and presumptively, under the circumstances, responsible for the ambiguity. Simen v. Sam Aftergut Co., 1915, 26 Cal.App. 361, 147 P. 1058. But we think

the reverse is true as to the modification agreement which we construe, so far as its clear provisions go, as one in favor of the tenants. There is nothing in the evidence as to the price of hay on or before the date of the agreement nor for about five months thereafter. But if it was not a fact that the price was less than $15 a ton, the parties evidently expected it to become a fact and the rent was lowered to meet either that existing or expected situation, as otherwise the agreement would have been without purpose. The promise of the landlord was essentially one to accept a rental as low as $2,000 per year. Whatever the range might be between $2,000 and $3,000 per year, the tenants were under no obligation to bring the total up to the higher figure. They were released from their obligation to pay a flat $3,000 per year, which was certainly to their advantage. It would be indeed difficult to doubt that the rental obligation was modified because the flat rental would be unduly heavy at prices below $15 per ton. It would not be so clear, of course, that the tenants were the beneficiaries of the agreement if they were required to pay at rates above $3,000 per year, but we need not consider that situation because we cannot give the contract such a construction. Its failure to provide for higher rates except through a construction which would resolve ambiguities in favor of the landlord leaves it, so far as construction is concerned, as one strictly in favor of the tenants.

[6, 7] Respondents make the broad assertion that leases of real property are to be construed against the landlord and that all uncertainties therein are to be resolved in favor of the tenant. The cases they cite on this proposition do not support it and it is clear that there is no such general rule. Leases are to be construed as are other contracts and, so far as uncertainties are concerned, according to the nature of the specific obligation under consideration. The code sections already referred to are all sufficient for the purposes of the present case. Executory contracts as a rule specify reciprocal executory obligations. In a lease, uncertainty as to the obligations of the landlord or as to those of the tenant may result from erroneous or incomplete expression. While it is to be borne in mind that the intentions of the parties are to be ascertained from a consideration of the entire instrument, it is nevertheless true that the nature of each covenant must be examined when it is necessary to know which party is the promisor or obligor thereunder. Such a one may be found to be the lessee, as in Simen v. Sam Aftergut Co., supra, 26 Cal.App. 361, 146 P. 1058, where the original rental obligation was involved, or it may be found to be the lessor, as was the case in Edward Barron Estate Co. v. Waterman, 1916, 32 Cal.App. 171, 162 P. 410, and Butt v. Maier & Zobelein Brewery, 1907, 6 Cal. App. 581, 92 P. 652, where questions were involved as to the length of the term of leases.

[8] It seems entirely clear that if a landlord agrees to an abatement or reduction of rent which has been already fixed by contract, he is making a simple promise in favor of his tenant. If the agreement is ambiguous the doubts must be resolved in favor of the tenant where, as is true here, authorship of the ambiguity is presumed to be with the landlord as the promisor. We must give effect to this rule of construction even though the trial court believed the agreement to be unambiguous. It is ambiguous only under plaintiff's interpretation.

On November 28, 1940, another agreement was made respecting the terms of the lease and providing as follows: "5. Lessees agree to repair and house that certain Venn Severin Diesel Engine located on the leased premises and that the cost thereof, estimated at approximately one thousand dollars ($1,000.00), shall be credited on account of rent due from Lessees to Lessor for the year 1941 upon presentation by Lessees of an itemized paid bill for said repairs and approval thereof by Lessor. 6. Lessees will pay to Western States Life Insurance Company as and when due for and on account of Lessor all interest for the year 1941 on the note executed by Lessor to Western States Life Insurance Company and secured by deed of trust on the leased premises, which said interest payments shall be credited on account of rent due from Lessees to Lessor under the Lease, as amended, and any balance due as and for rent after crediting said interest payments, as well as the cost of repair of the Venn Severin Diesel Engine in the preceding paragraph mentioned, shall be deferred to 1942 and such balance shall be paid in two equal installments, the first of which installments shall be payable on the first rent day and the second installment on the next succeeding rent day in the year 1942 and shall be in addition to the rentals due from Lessees to Lessor for the year 1942."

[9] The lessees repaired the engine at a cost, as found by the court, of $2,495.11. Defendants were allowed for these repairs a credit of $1,070.42 on account of rent due for the year 1941. Defendants were also allowed a credit of $373.28 on 1941 rent for money paid under the provisions of said paragraph 6 to Western States Life Insurance Company. These credits, totaling $1,443.70, were to be allowed, under the judgment, only in the event that defendants paid $2,495.11 for repairs to the motor before July 1, 1942. It was found that the rental under the lease for 1941 amounted to $3,000 and that after deducting the credits of $1,070.42 and $373.28, there remained a balance of $1,556.30. This the court determined was payable one-half July 1, 1942, and one-half October 1, 1942, the same to be in addition to the 1942 rentals. The judgment was dated April 29, 1942, or some two months before the first payment of deferred rental in the amount of $778.15 fell due. Plaintiff's contention seems to be that the court erred in giving defendants until July 1, 1942, within which to pay for the repairs to the engine and still obtain a credit of $1,070.42 upon the 1941 rent. It is claimed that the failure of defendants to pay the cost of the repairs and to procure the lesssor's approval of the itemized bill in 1941 was a waiver of the right to receive any credit on account of the repairs. No time was specified within which the repair bill should be paid and approved. Deferring it until July 1, 1942, did not affect the amount of the rent to be received by plaintiff, nor did it extend defendants' time, as stated in the agreement, to pay the balance of the 1941 rent in two installments during 1942. It is not clear how plaintiff could have been prejudiced by the court's construction of this provision of the agreement, which we deem to be a reasonable one as between the parties. There was no requirement that the credit be established prior to the time when it was to be applied on the rental account, namely, when the first installment of the balance of the rent fell due.

There are no other points urged by appellant which require discussion. We are of the opinion that the case was decided correctly in all material respects and that there is no reason for disturbing the judgment. The judgment is affirmed.

PARKER WOOD, J., concurs.

SHAW, Justice pro tem., concurs in the judgment.

Hearing denied; TRAYNOR, J., dissenting.

60 Cal.App.2d 413

BARE v. RICHMAN & SAMUELS, Inc., OF NEW YORK et al.

Civ. 6780.

District Court of Appeal, Third District, California.

Aug. 31, 1943.

As Modified on Denial of Rehearing Sept. 29, 1943.

Hearing Denied Oct. 28, 1943.

1. Appeal and error 🔑1039(9)
Pleading 🔑369(1)

Where first cause of action was in assumpsit on contract to market grapes and second was for conversion of grapes, trial court properly reserved ruling on motion to require plaintiff to elect until after introduction of evidence, and inadvertent failure to pass upon motion was harmless, where court assumed that both causes were founded on assumpsit and depended upon same set of facts, and only one judgment was rendered for market value of grapes.

2. Factors 🔑5

Written contract, by which vineyard operator appointed corporate distributor his agent with exclusive right to market 15 cars of grapes to be delivered to distributor during designated season, established relationship of "principal and factor" between vineyard operator and distributor.

See Words and Phrases, Permanent Edition, for all other definitions of "Principal and Factor".

3. Factors 🔑23

In the absence of specific agreement to contrary, it is duty of a factor to obey directions of his principal to sell fruit for a price not less than specified sum per ton, though factor has made advances on the crop. Civ. Code, § 2027.

4. Factors 🔑23

Grower's oral instructions to corporate distributor's local agent to sell grapes for cash market value f.o.b. distributor's packing shed or not at all was not an attempt to modify written marketing contract obligating distributor to sell grapes at best possible price, and distributor having been notified of instructions was liable to grower for loss resulting from sale of grapes at less than such market value, though distributor had loaned money to grower on security of crop mortgage. Civ.Code, § 2027.

5. Contracts 🔑238(2)
Principal and agent 🔑175(2)

A written contract may be modified or replaced by subsequently executed oral agreement between the parties, or by such agreement with agent of a party, when such agreement is accepted or ratified by the principal. Civ.Code, §§ 1698, 2307.

6. Factors 🔑43

Grower's action for unpaid portion of market value of grapes sold by factor in violation of instructions for less than market value was in effect an action in assumpsit for damages for breach of an agreement to pay the market value of grapes, and, where market value at designated point on the respective dates grapes were delivered and accepted for shipment was established, grower was entitled to interest on such unpaid portion of market value. Civ.Code, §§ 2027, 3287.

7. Factors 🔑43

An action for breach of agreement to pay the market value of produce f.o.b. a designated point may be based on either express or implied contract where it appears that terms of agreement have been fully performed with the exception of paying the stipulated sum thereunder.

8. Factors 🔑43

In action for breach of agreement to pay the market value of produce f.o.b. a designated point, mere fact that proof is required to determine the market value of produce on a designated date does not prevent allowance of interest thereon under statute providing for recovery of interest on damages certain or capable of being made certain by calculation. Civ.Code, § 3287.

9. Factors 🔑23

Where factor to whom grapes were consigned for sale under written marketing agreement had loaned money to grower on security of crop mortgage, crop mortgage and marketing agreement must be construed together.

10. Factors 🔑43

Where sale of grapes at public auction was necessary to prevent loss from deterioration after shipment to New York and refusal of proposed buyer to accept delivery and was authorized under crop mortgage to factor, factor was not liable to grower for breach of marketing agreement to sell at not less than market value f.o.b. factor's packing shed in California. Civ. Code, § 2027.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

On rehearing.

Former opinion reversed and judgment below modified and as modified affirmed.

Prior opinion, 138 P.2d 372.

Frank C. Lerrigo, of Fresno, and Sanford Solarz, of New York City, for appellant.

Edward T. Taylor, of Modesto, for respondent.

THOMPSON, Justice.

This case is determined on a rehearing. It appears that the defendant, Richman & Samuels, Inc., a produce marketing corporation of New York, has appealed from a judgment for $2,224.10 and interest, which was rendered against it in a suit in assumpsit for the unpaid portion of the proceeds from sales of fifteen carloads of grapes, pursuant to the terms of an agreement consigning the grapes to the corporation for sale. The plaintiff orally directed the corporation to sell the grapes for market value f.o.b. Turlock, which was shown to be $27.50 per ton. A portion of the grapes was sold at auction, contrary to instructions, for much less than that price. Judgment was rendered on the basis of $27.50 per ton, less stipulated commissions and costs of marketing. From that judgment the corporation has appealed.

The defendant, Richman & Samuels, Inc., is a marketing corporation having its home office in New York City. It operated a fruit packing shed at Turlock, California, which was in charge of its local managing agent, Frank C. Belier. The plaintiff owned and operated a vineyard in Stanislaus County. July 3, 1935, Frank C. Belier, as agent for said marketing corporation, executed on behalf of the distributor a written contract with the plaintiff, by the terms of which the plaintiff "appoints the distributor his agent with exclusive right to market fifteen cars of Alicante Buschet grapes * * * to be delivered to the distributor during the season of 1935." The contract is silent with respect to the price for which the grapes were to be sold. It provided that the grapes were to be delivered at a shipping point "to be designated by the distributor;" that the grower would pay the distributor "a reasonable packing and loading charge;" together with commissions for the sale of said grapes in the sum of "seven per cent of the gross sales on all auction and delivered sales and ten per cent on all f.o.b. sales." The contract also made the distributor "sole judge of the quality of the fruit furnished," and provided that "The distributor agrees to use his best efforts to sell said grapes at the best possible price."

Incident to the foregoing contract, the plaintiff also executed a crop mortgage on the grapes produced on his Stanislaus County farm to secure advances which were paid to him by the distributor. The sum of $1,500 was advanced on that mortgage.

The plaintiff orally instructed the agent, Belier, to sell all of the grapes for market value f.o.b. Turlock, and not otherwise. The agent notified the corporation of that fact. The corporation acknowledged receipt of that notice. All grapes were delivered to the defendants at the packing house in Turlock with that understanding. There is substantial evidence that the market value of the grapes at Turlock was $27.50 per ton. Six carloads of grapes were delivered between the dates of October 8 and 14, 1935, and sold for $27.50 per ton. Nine other carloads were delivered from October 15 to 17, 1935. Some of them were sold, contrary to said instructions, for less than $27.50 per ton. Two carloads were shipped to Eastern markets and sold at auction for comparatively small amounts.

This suit in assumpsit was brought against both the corporation and its agent for the unpaid portion of the market value of the grapes at the rate of $27.50 per ton, aggregating the sum of $2,224.10. The complaint contains a second count which is based on an alleged conversion of a portion of the grapes and the proceeds thereof. The action was dismissed as to the defendant, Belier. Defendants' motion to require the plaintiff to elect whether he would stand upon his cause of action in assumpsit or for conversion of the grapes was denied.

The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every respect. The court specifically found that the written consignment contract was duly executed authorizing the corporation to sell said grapes as a factor or agent of plaintiff for market value f.o.b. Turlock, "and not otherwise"; that the market value of grapes f.o.b. Turlock, at the times of all deliveries, was $27.50 per ton; that a specified portion of the grapes was sold contrary to instructions for less than said price, and that the plaintiff is entitled to judgment for the unpaid portion of the value of said grapes in the aggregate sum of $2,224.10, together with interest from August 26, 1936. Judgment was accordingly rendered against the corporation for that amount. From that judgment this appeal was perfected.

The appellant contends that the court erred in refusing to compel the plaintiff to elect between his cause of action in assumpsit, and his alleged cause based on conversion of the grapes; that the corporation's local agent had no authority to modify the written agreement or to accept the grapes for sale at market value f.o.b. Turlock; that the findings and judgment to the effect that the market value of the grapes f.o.b. Turlock was not shown to be $27.50 per ton at the times of deliveries are not supported; that interest on the amount found to be due plaintiff was wrongfully allowed, and that the factor is not responsible to his principal for loss sustained by a necessary auction sale when the purchaser refused to accept delivery of the shipped grapes.

[1] We are of the opinion the appellant was not prejudiced by the refusal of the court to require the plaintiff to elect whether he would rely upon his first cause of action in assumpsit, or upon the second count for alleged conversion of the grapes, in spite of the fact that the first cause is founded on contract and the second upon tort. The appellant relies upon the case of Bank of America N. T. & S. Ass'n v. Hill, 9 Cal.2d 495, 71 P.2d 258, in support of that contention. The court properly reserved its ruling upon that motion until the introduction of evidence was completed. Inadvertently that motion was not finally determined. The court did not find upon the

second count that the grapes were converted. The findings which were adopted on that cause clearly assumed that the allegations merely amounted to another method of stating an action for assumpsit. Since the court evidently assumed that both counts were founded on assumpsit and depended on the same set of facts, the omission to pass upon defendants' motion for an election was harmless. Only one judgment was rendered upon the entire action for the market value of the unpaid portion of the grapes, together with interest. It has been held that, under such circumstances, the defendants are not prejudiced by a failure to require the plaintiff to elect his remedy as between two separate counts upon different statements of facts. Bank of America N. T. & S. Ass'n v. Hill, supra; Glantz v. Freedman, 100 Cal.App. 611, 280 P. 704.

We are of the opinion the written agreement which is involved in this case was not modified or changed by the plaintiff by the mere direction to sell the grapes for market value f.o.b. Turlock, for the reason that the contract was silent with respect to the price for which they were to be sold. There is ample evidence that the plaintiff specifically directed the agent, Belier, to notify the factor corporation to sell the grapes for market value f.o.b. Turlock, or not at all, and that the corporation received those instructions. October 10, 1935, two days after the first load of grapes was delivered to Belier at Turlock, he received a telegram from the New York Corporation, saying: "We have good market & you can tell growers can sell cars US–1 Alicante Carignanes 27.50 net perhaps more."

October 15th Belier received another message from his principal, reading:

"4 cars 27.50 5 cars

"We sold AOOAF Bare Alicante ACEQA net have AOOAB open [unsold] will work hard trying to sell them today you explain this to Bare tell him not to worry that will work hard sell his grapes f.o.b. Quote $27.50 local."

Clearly the corporation knew the plaintiff had directed the selling of the grapes for market value f.o.b. Turlock at $27.50 per ton. It is conceded some of the grapes were sold for less than that sum. Such sales were in absolute disregard of the instructions received from the plaintiff. There is no dispute regarding the quantity or weight of the grapes received by the distributor.

[2, 3] The relationship of principal and factor between the parties to this appeal is not disputed. That relationship clearly existed. Rhee v. L. K. Small Co., 83 Cal. App. 339, 256 P. 839. In the absence of a specific agreement to the contrary, it is the duty of a factor to obey the directions of his principal to sell fruit for a price not less than a specified sum per ton, even though advances have been made on the crop. Sec. 2027, Civil Code; Rhee v. L. K. Small Co., supra; Bones v. Fusco, 21 Cal. App.2d 476, 69 P.2d 911; Cooper v. American Fruit Growers, Inc., 137 Cal.App. 494, 30 P.2d 558. The foregoing authorities hold that a factor is liable for damages for failure on his part to obey the instructions of his principal with respect to the sale of produce. In those cases the factors failed to sell the produce to proposed purchasers when they were directed by the principals to do so. In the present case the factor deliberately sold a portion of the grapes for less than market value, which was shown to be $27.50 per ton, contrary to the specific directions of the plaintiff to sell them for market value f.o.b. Turlock or not at all. In the Rhee case, the language of the contract was strikingly similar to the agreement in the present case with respect to the factor's promise to "use his best efforts" to sell the products for "the best possible returns". In this case the factor agreed to "use his best efforts to sell said grapes at the best possible price."

Section 2027 of the Civil Code provides that: "A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee."

[4] We conclude that the distributing corporation, as a factor, was liable for the loss sustained by the plaintiff for failure to obey his instructions to sell the grapes for market value f.o.b. Turlock.

[5] In view of our conclusion that this case does not involve the modification or change of a written agreement, it becomes unnecessary for us to determine whether there was an acceptance by the corporation of the instructions given by the plaintiff to

its agent. Those instructions did not amount to a change of the terms of the contract. It is true that a mere agent is not ordinarily authorized to modify or rescind the contract of his principal. State Finance Co. v. Hershel California Fruit Products Co., 8 Cal.App.2d 524, 47 P.2d 821; Thomas v. Anthony, 30 Cal.App. 217, 157 P. 823; 6 Cal.Jur. 374, sec. 225. It is also true that a written contract may be modified or even replaced by a subsequent, executed oral agreement between the parties, or by such agreement with an agent of a party when it is accepted or ratified by the principal. Sec. 1698, Civil Code; Sec. 2307, Civil Code; State Finance Co. v. Hershel Calif. Fruit Products Co., supra; Curtiss v. Starr and Co., 85 Cal. 376, 24 P. 806; 6 Cal.Jur. 375, sec. 226; 17 C.J.S., Contracts, p. 866, § 377b; 2 Williston on Contracts, Rev.Ed., 1702, sec. 591. There may be adequate evidence in this case to show that the New York distributing corporation ratified the directions of the plaintiff to the agent Belier with respect to the minimum price for which the grapes were to be sold, but since we assume that was not a change of the terms of the contract, it is not necessary to determine that question of fact.

[6-8] We are of the opinion the court properly allowed the plaintiff interest, under the provisions of Section 3287 of the Civil Code, on the amount found to be due to him for the unpaid portion of the purchase price of the grapes, from August 26, 1936. That section reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

The interest provided for in the preceding section is in the nature of damages to compensate for the detriment caused by the delay in paying a liquidated sum of money at the time when it is due. This, in effect, is an action in assumpsit for damages for breach of an agreement to pay the market value of grapes f.o.b. Turlock. That form of action may be based on either an express or implied contract when it appears that the terms of the agreement have been fully performed with the exception of paying the stipulated sum thereunder. 7 C.J.S., Action of Assumpsit, p. 116, § 9 bb. Interest may be allowed upon a liquidated amount which one is entitled to recover, or when that sum may be rendered certain by mere calculation, and the right to recover is vested on a particular day. The mere fact that proof is required to determine the market value of property on a designated date, will not prevent the allowance of interest under Section 3287 of the Civil Code. Farnham v. California Safe Deposit & Trust Co., 8 Cal.App. 266, 273, 96 P. 788; Brazil v. Azevedo, 32 Cal.App. 364, 367, 162 P. 1049; 8 Cal.Jur. 791, sec. 49; 15 Am.Jur. 583, sec. 166. In the text last cited it is said in that regard: "The more liberal view now prevails that interest will be allowed as damages where the demand, although unliquidated, is of such a nature that the amount is capable of ascertainment by mere computation, or can be established with reasonable certainty, or determined by reference to well-established market values."

In the text found in 8 California Jurisprudence, page 791, section 49, it is said: "The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under section 3287 of the Civil Code."

Since the contract, as alleged and determined by the court, provided for payment of the grapes at market value f.o.b. Turlock, which was ascertained to be $27.50 per ton, the conditions upon which interest may be allowed under Section 3287 of the Civil Code have been fulfilled. The amount is not uncertain, according to the preceding authorities, because market value at Turlock was agreed upon, and that was definitely determined from the evidence adduced. Nor was the "particular day" on which the plaintiff was entitled to recover uncertain, for, pursuant to the positive instructions, the corporation was bound to sell the grapes for market value f.o.b. Turlock on the respective dates when they were delivered and accepted for shipment. The specific dates of delivery of each and every carload of grapes was alleged and proved.

[9, 10] The crop mortgage which is attached to the complaint authorizes the distributor to sell the grapes at auction. Two carloads were so sold to prevent loss from deterioration after they had been shipped East and acceptance had been refused by a purchaser. The plaintiff was credited on

carload number 25470 the net sum of $96.50, and upon carload number 28720 the net sum of $97.10. The average net sum received for the carloads which were sold for $27.50 per ton f.o.b. Turlock was $372.00 per carload. We have held that crop mortgage should be construed together with the written marketing contract. It authorized the corporation to sell those two carloads at auction. It is therefore entitled to credit for the difference between the f.o.b. Turlock market value of $27.50 per ton, which was included in the judgment for $2,224.10, and the previously mentioned net returns for said two carloads sold at auction. That difference to which the corporation is entitled to credit is the aggregate sum of $550.40. Subtracting that sum from the amount of the judgment which was rendered leaves a balance of $1,673.10. The judgment is therefore modified to allow the plaintiff and cross-defendant judgment against the defendant and cross-complainant the sum of $1,673.10, together with interest thereon from August 26, 1936, at the rate of 7 per cent per annum.

As so modified the judgment is affirmed. The respondent may recover his costs on appeal.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

60 Cal.App.2d 387

WALLACE v. SPEIER et al.

Civ. 6802.

District Court of Appeal, Third District, California.

Aug. 30, 1943.

Rehearing Denied Sept. 29, 1943.

Hearing Denied Oct. 28, 1943.

1. Innkeepers 🔑10

An innkeeper is not absolutely liable for injuries suffered by a guest, but he does owe a duty of at all times maintaining premises in a reasonably safe condition.

2. Innkeepers 🔑10

Innkeeper cannot escape liability to a guest for injuries sustained as result of defect in a fixture by mere fact that originally fixture was properly installed, since innkeeper must use reasonable care to guard against wear and tear of ordinary use or time alone.

3. Innkeepers 🔑10

The negligence of an innkeeper in the protection of his guests from personal injury while in that part of hotel open to public implies a lack of the due care he is required to exercise.

4. Appeal and error 🔑1010(1)
Innkeepers 🔑10

A decision on the question of the exercise of due care by an innkeeper for protection of guests from personal injury is within sound discretion of trial judge, whose findings will not be disturbed on appeal unless there is an entire lack of evidence or reasonable inferences to be drawn therefrom to support his conclusions.

5. Innkeepers 🔑10

In action by guest against innkeeper for injuries sustained in fall while attempting to escape hot water from defective plumbing fixture, evidence sustained finding that innkeeper failed to exercise required due care to keep fixture repaired.

6. Innkeepers 🔑10

Where entire assembly of hot water faucet suddenly came off wall while hotel guest was taking shower and shot spray of hot water across bathroom, doctrine of "imminent peril" applied; hence mere fact that guest, in confusion of the moment, attempted to keep fixture attached to wall did not make him chargeable with contributory negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Imminent Peril".

7. Negligence 🔑72

Under doctrine of "imminent peril", if person injured is confronted with an unexpected situation of danger to himself and under circumstances does what a reasonably careful and prudent person would have done if similarly situated, he cannot be chargeable with contributory negligence.

8. Evidence 🔑512, 513(2)

On question of due care as to frequency with which inspection of plumbing fixtures in hotel should be made, opinion evidence of plumbers as expert witnesses as to life of such a mechanism and as to frequency of inspection was competent. Code Civ.Proc. § 1870, subd. 9.

9. Evidence 🔑506, 547

An expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but facts may be elicited from the witness from which the conclusion inevitably follows. Code Civ. Proc. § 1870, subd. 9.

10. Evidence 🔑512

Action of trial court in permitting expert testimony of plumbers relative to frequency with which inspection of bathroom fixtures in hotel should be made was not objectionable as empowering the witnesses to decide for the court whether or not hotelkeeper used ordinary care since trial judge was not bound to accept their testimony. Code Civ.Proc. § 1870, subd. 9.

11. Evidence 🔑508

The statute granting witness right to express opinion on question of science, art, or trade when he is skilled therein is to be liberally construed. Code Civ.Proc. § 1870, subd. 9.

12. Evidence 🔑512, 513(2)

Trial court did not abuse discretion in permitting experienced plumber to express opinion pertaining to life of plumbing fixtures and frequency with which they should be inspected. Code Civ.Proc. § 1870, subd. 9.

Appeal from Superior Court, Glenn County; W. T. Belieu, Judge.

Action by L. D. Wallace against Leon Speier and others for injuries sustained in a fall in defendants' hotel. Prior to the decision defendant Speier died and the cause was dismissed as to him. Judgment for plaintiff, and defendants Leo Lippow and Palace Hotel appeal.

Affirmed.

Gerald M. Desmond, of Sacramento, for appellants.

George R. Freeman and Elmer Laine, both of Willows, and Hubert I. Townshend, of Oroville, for respondent.

PEEK, Justice.

This is an appeal by defendants Leo Lippow and the Palace Hotel, a partnership, from a judgment rendered against them and in favor of the plaintiff and respondent L. D. Wallace, in the sum of $7,616.50. The personal injuries suffered by the plaintiff were found by the trial court to have been the result of the defendants' negligence in failing to keep a shower in one of their hotel rooms in reasonable repair.

At the first trial the jury failed to agree. At the conclusion of the second trial, which was before the court alone, the defendants moved for a nonsuit and a dismissal of the complaint on two grounds: First, that it appeared as a matter of law that the plaintiff was negligent at the time of the accident, and that his negligence either proximately caused or proximately contributed to the cause of the accident, and, second, that there was no evidence in the record of negligence on the part of either of the defendants. The motions were denied and the case was then submitted on briefs. After the filing of the briefs, but prior to the court's decision and entry of judgment, the defendant Leon Speier passed away, and the cause was dismissed as to him. Thereafter the court made its findings of fact and conclusions of law and entered judgment against Lippow, the surviving member of the partnership, and the Palace Hotel.

The record discloses that the plaintiff registered at the Palace Hotel in Willows on December 13, 1939, and was assigned to a room. Before retiring that evening he took a shower in the adjoining bathroom. At that time no defect was noticed in the operation of the faucet which regulated the flow of hot water through the shower head. On the morning of December 15, he again used the shower. It was then that the entire faucet assembly came off the wall. His testimony concerning the actual happening of the accident is in part as follows: "I turned on the shower, standing facing the shower or, rather to one side, * * * I turned it on with my left hand, * * * and as I turned it there was very little water, * * * just a little sprinkle, so I gave it another turn or so, I don't know just how many possibly two or three altogether and I noticed there was no water * * *. There was water coming around the escutcheon, I call it the collar, and I could see the thing was loose, * * * so I shoved it back and tried to turn it * * * but the escutcheon hit the valve and I was unable to make the connection and as I shoved it back against it it made a spray on my hands and arms so I had to let loose of it so when I let loose of it, the whole of the stream went across the bathroom and in moving away from it, I fell backwards, * * * the back of my head hit the floor * * * and my back hit the rise in the floor of the bathroom."

The defendants, called by plaintiff under section 2055 of the Code of Civil Procedure, testified that the shower fixture in question was installed in 1925; that since that date both defendants had "spasmodically" and "casually" inspected the showers by turning them on and off to ascertain if they were working properly, and that visual examinations also were made to discover leaks, if any. The porter testified that it was his job to inspect each bath and shower every day, following somewhat the same procedure as did the defendants. The maid, however, in answer to a direct question, "Did anybody else in that hotel have anything to do with the shower in room 109, other than yourself," replied, "Not that I have seen in there," and that such inspections were a part of her work. No internal inspection of the fixture had been made since its installation.

The plaintiff called as expert witnesses two plumbers, who testified that leaks were an indication that the plumbing was out of order; that water from a leaky valve would show in only two places, either out of the shower head or through the threads of the nut which holds the valve in place and thence down the wall; that the inspections described by the defendants would discover leaks only if the water was turned on; that the only means to definitely determine whether or not the fixture was operating properly was to remove the faucet handle and examine the assembly itself; that if the fixture was out of order the pressure exerted on the valve by virtue of the faucet handle being turned tightly to the right would keep the valve in place, thereby allowing no water to escape; that if, while still out of order, the handle was turned to the left releasing water through the valve to the shower head such release of pressure on the valve would permit water to leak through the threads on the valve; that therefore only when the shower was turned on could it leak, but because of the action of the shower head in spraying the water over the walls it would be difficult to determine whether the water on the wall or on the shower head itself was leaking water or was water which would normally flow through the shower head when the water was turned on.

One of the plumbers, Mr. Louderback, testified that he was called to repair the fixture on the afternoon of the accident and that he replaced the fixture with the parts as he found them. The other plumber, Mr. Savage, testified to finding ordinary string or twine, which apparently had been used for packing around the valve, when he examined the fixture shortly before the first trial; that string was not a proper packing; that when the string was compressed by turning the faucet to the right it bound the valves so that when the pressure was released by turning the handle to the left it would have a tendency to likewise turn to the left the nut which held the valve so that ultimately it would loosen the entire assembly. There was further testimony that no trouble would be expected from good fixtures properly installed for from six months to a year after installation, and it might not give trouble for a much longer time.

It is the first contention of defendants, appellants herein, that the testimony shows neither actual nor constructive knowledge by them of any defect in the shower, and that inasmuch as innkeepers are not insurers of their guests, such knowledge would have to be shown in order to hold them liable.

[1, 2] It is true an innkeeper is not absolutely liable for injuries suffered by a guest. 14 Cal.Jur. However, he does owe a duty of at all times maintaining the hotel premises in a reasonably safe condition. Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Robertson v. Weingart, 91 Cal.App. 715, 367 P. 741. He cannot escape liability by the mere fact that originally the fixture was properly installed. The wear and tear of ordinary use or time alone should be guarded against with the exercise of the same degree of reasonable care. Ingalls v. Monte Christo Oil & Dev. Co., 23 Cal.App. 652, 139 P. 97.

[3] His negligence in the protection of his guests from personal injury while in that part of his hotel open to the public has been defined to imply a "lack of due care." Adams v. Dow Hotel, 25 Cal.App.2d 51, 76 P.2d 210, 211. In the last citation the porcelain handle of the hot water faucet broke, cutting plaintiff's hand. The trial court, in effect, found that the handle was in a dangerous and unsafe condition and that such condition could not have been ascertained by a reasonably careful inspection, which actually was made.

[4] It is apparent that the trial court in that instance was of the opinion that a proper inspection had been made and that therefore the defendant had used due care. Due care cannot be defined by arbitrary exactness—what might be entirely reason-

able in one case might be wholly inadequate in another. Therefore, "a decision on the question of the exercise of due care, in other words, the negligence of defendant, is one within the sound discretion of the trial judge. He having exercised such discretion, his findings will not be disturbed on appeal unless there is an entire lack of evidence or reasonable inferences to be drawn from the evidence to support his conclusions." Adams v. Dow Hotel, supra.

[5] The instant case does not present a question involving a latent defect in parts or materials used in the assembly of the fixture as in the Dow Hotel case, but rather it is a condition amounting to a lack of repair of the fixture itself. Abundant testimony in this regard was introduced at the hearing. The trial court then found that the defendants "negligently and carelessly failed and neglected" to keep the plumbing fixtures in "proper condition and repair" and "negligently and carelessly" permitted the fixture to be out of repair.

Under such circumstances it naturally would follow that this court could no more conclude, than could the court in the Dow Hotel case, supra, that the findings lack all evidentiary support.

[6, 7] The defendants further contend that plaintiff was guilty of contributory negligence as a matter of law. Here the plaintiff was confronted with an unexpected situation. The entire assembly of the hot water faucet had suddenly come off the wall, shooting a spray of hot water across the bathroom. Such evidence would demand the application of the doctrine of imminent peril, for "even though he may have erred in his judgment, if he did under the circumstances, what a reasonably careful and prudent person would have done under a similar situation, he cannot be chargeable with contributory negligence." Bennett v. Hardy, 108 Cal.App. 473, 291 P. 903, 906. How then can this court say as a matter of law that plaintiff was negligent in trying to keep the fixture attached to the wall? Whether a person in a position of imminent peril acted reasonably is a question of fact for the court or jury. The conduct of the party must be viewed in the light of the confusion and excitement of the moment and not in view of the circumstances and surroundings of one not in danger. 19 Cal.Jur. 600.

[8, 9] Defendants' final contention attacks the admission by the court of the expert testimony by the two plumbers relative to the frequency of inspection of the fixtures and the length of time the fixtures could be used with reasonable safety. It is defendants' position that to allow the witnesses to express opinions called for by such questions is to allow the witnesses to decide for the court whether or not the defendants used ordinary care. Surely such a witness should be allowed to testify to the life of such a mechanism, and that if such question be proper then it should follow that testimony by one skilled in that work, relative to the frequency of inspection, should likewise be admissible. In Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 110, 28 L.R.A. 596, 48 Am.St.Rep. 114, wherein the court allowed an electrician to testify as to what matters should be taken into consideration in locating electric wires, "and whether it was proper or prudent management to put them so low over a metallic roof," the Supreme Court, in affirming the judgment for the plaintiff, stated: "The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate, In Bemis v. [Central Vermont] R. Co., 58 Vt. 636, 3 A. 531, an expert was held not allowed to testify 'that it was not prudent to use a certain hoisting apparatus with less than three men, on a stone of two tons heft.' Yet the court said there might have been shown 'the number of men required, danger in its use by a less number, its safety and adequacy when properly used,' and added that then the jurors could as well decide for themselves. Of course, the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question; and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do not think it should be so held here."

[10] The ultimate questions to be determined by the trial court were whether or not the facilities provided by the defendants for the use of the plaintiff were reasonably safe, and had the defendants taken reasonable precaution by inspection or otherwise to maintain the fixtures in such condition? During the course of the examination of both expert witnesses many facts were brought out relative to the construction, operation, maintenance and inspection of shower fixtures. The questions to which

objections were made were but the summation of their testimony as directed towards the ultimate questions to be decided by the court.

As was said in the case of Silveira v. Iversen, 128 Cal. 187, 60 P. 687, 688, wherein a witness was allowed, over objection, to answer the question: "How can it be determined, Mr. Ericson, whether a rope has become rotten and unsound?" The Supreme Court stated: "The question might have been in different form, but it was proper to inquire whether the defect could have been discovered by the use of ordinary diligence, which was really what was done."

The trial court did not empower the witness to decide any facts nor was he bound to accept their testimony. That the trial court did not have this in mind is evidenced by his response to defendants' objections. "He is learned and schooled in a line of mechanics, * * * I am not * * * I think the court should know with what frequency, if any, such mechanisms should be inspected * * *. In arriving at the question as to what constitutes reasonable care this, in my opinion, would be material." With all due deference to the learned trial judge and with sincere humility evidenced by a reluctant confession of our own mechanical deficiencies we venture to agree with his forthright observation that the witnesses knew far more concerning the intricacies of plumbing than did he.

[11] Section 1870, subdivision 9 of the Code of Civil Procedure specifically grants to a witness the right to express his "opinion on a question of science, art, or trade, when he is skilled therein." To attach to that section limitations of the nature proposed by the defendants would be to unduly restrict the province of the opinion evidence, for if that section is to have any degree of efficacy, then of necessity it must be viewed in the light of liberality. It might be said with little fear of contradiction, that rarely, if ever, does an expression of opinion by a so-called expert not amount to that which either the court or jury might adopt as a basis for the ultimate decision in the case. However, that does not mean that the witness is deciding the case or that in so testifying he is usurping the functions of the jury. He is merely giving an opinion based upon his technical training which the court may or may not accept as testimony that "was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue." Fonts v. Southern Pacific Co., 30 Cal.App. 633, at page 641, 159 P. 215, at page 218.

The case of Howland v. Oakland C. St. Ry. Co., 110 Cal. 513, 521, 42 P. 983, 985, presented a situation very similar to that found herein. There, the Supreme Court, in passing upon a question involving opinion evidence, stated:

"We cannot say the court abused its discretion in holding that the witness McCarthy had shown himself sufficiently qualified to answer the hypothetical question tending to elicit his opinion as to *whether the car of appellant could with proper care and attention have been stopped in time to avoid the collision.* This is a question largely for the determination of the trial judge, and his ruling will not be disturbed, except error clearly appears. In this case it does not so appear. * * * Nor is there any question but that the subject was one upon which the opinion of the witness was admissible. *The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is not a matter of such common knowledge that the jury could judge as intelligently as one skilled in their use. It was therefore proper to* resort to expert evidence." (Italics ours.)

[12] Likewise we cannot say that the court abused its discretion in the present case.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

TAYLOR v. CLARKE.

Civ. 14041.

District Court of Appeal, Second District, Division 1, California.

Sept. 8, 1943.

Rehearing Denied Sept. 24, 1943.

Hearing Denied Nov. 4, 1943.

1. Partnership ⚷53

In action for dissolution of a partnership and an accounting, wherein defendant claimed sole ownership of property involved, evidence sustained findings that written lease of property by plaintiff to defendant was executed merely to facilitate operation of business and was not intended to be binding and that a partnership existed between the parties.

2. Partnership ⚷64

That certificate of doing business under a fictitious firm name required by statute did not show name of person who furnished capital for the business as a partner had no material bearing upon question of existence of a partnership as between the parties thereto, since filing of certificate is required to protect third parties and does not affect relation of partners as between themselves. Civ.Code, § 2466.

3. Evidence ⚷428

Testimony relative to conversations regarding circumstances under which written lease was executed was admissible when offered for the purpose of showing there was in fact no binding agreement and not for the purpose of varying terms of a written instrument.

4. Appeal and error ⚷1056(1)

Exclusion of evidence which, if admitted, would not have affected the judgment rendered or compelled entry of a different judgment, was not prejudicial.

5. Partnership ⚷53

Evidence as to manner in which one claiming to be a copartner and seeking dissolution of alleged partnership treated business relations with defendant in his income tax returns would carry little weight upon question of existence of the partnership.

6. Appeal and error ⚷173(2)

Defense under the maxim of clean hands could not be raised for the first time on appeal.

7. Partnership ⚷26

Oral agreement under which capital for business venture was furnished by one party, who acted as the silent partner of another who actively operated the business, was not illegal or against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

◆

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by J. Hartley Taylor against F. A. Clarke, also known as Frederic A. Clarke, for dissolution of a partnership and an accounting, wherein defendant filed a cross-complaint seeking to establish his sole ownership of the property involved. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Marshall Stimson and Fred Horowitz, both of Los Angeles (Leslie S. Colyer, of Los Angeles, of counsel), for appellant.

Brooks Gifford and William E. Fox, both of Pasadena, for respondent.

DORAN, Justice.

The defendant in an action to have a partnership declared, for dissolution of the partnership and for an accounting, appeals from a judgment in favor of plaintiff. After a trial of the issues presented by the pleadings, the trial court found in favor of the allegations of plaintiff's amended complaint and granted judgment accordingly. Defendant by his cross complaint sought to have established his sole ownership of the property involved; but the court found against defendant upon the issues raised by his cross complaint.

Briefly, the controversy arose out of the following situation, revealed by the transcript: Appellant had induced respondent to invest in the stock of a corporation in which appellant was interested. Thereafter the corporation was declared bankrupt; and appellant then proposed that respondent purchase the assets of the bankrupt corporation. Respondent advanced the money for the purchase of the assets; and respondent told appellant that after purchase of the assets respondent would allow appellant to run the business and respondent and appellant would be equal partners in the business and divide the profits equally. The assets of the bankrupt corporation were purchased and the business was thereafter carried on by appellant, who kept in touch with respondent regarding the operations. Respondent also advanced certain additional sums when appellant requested the money as necessary to carry on the business.

[1, 2] The greater part of appellant's contentions are in the final analysis concerned with the sufficiency of the evidence to support the findings of the trial court; and appellant's principal argument in this regard is directed to the effect of a purported lease of the assets involved, made by respondent to appellant, after the alleged partnership arrangement had existed for about three months. There is evidence that this lease was executed at appellant's request, that it was understood the lease was not intended to affect the partnership relation, and that respondent executed the lease upon the representation by appellant that it would enable appellant to run the business more conveniently. The trial court found that the lease was to have no legal force or effect between the parties, that it was not to be binding upon either plaintiff or defendant, that the terms of said document were never to be performed by either of the parties, that said document was to be a sham, and that it was made only so that the business could be operated more conveniently by the defendant and appellant. The record reveals support for such a finding in the evidence. Appellant also adverts to the fact that the certificate of doing business under a fictitious firm name, required by section 2466 of the Civil Code and filed by appellant, did not show the name of respondent as a partner. This fact has no material bearing upon the question of the existence of a partnership between the parties. The certificate of doing business under a fictitious firm name is required to be filed for the protection of third parties (Andrews v. Glick, 205 Cal. 699, 272 P. 587) and does not affect the relation of partners as between themselves. The transcript of the proceedings in the court below clearly reveals sufficient support for the findings made by the court.

[3-7] Appellant claims error in the admission of testimony relative to conversations respecting the circumstances under which the purported lease was executed by respondent, contending that such testimony was an attempt to vary the contents of a written instrument. It is at once evident that the testimony in question was not introduced for the purpose of varying the terms of a written instrument, but was introduced for the purpose of showing that there was in fact no valid or binding agreement at all. Appellant also contends that the trial court erred in denying appellant's request that respondent be required to produce for inspection and use of appellant upon the trial, the income tax returns of respondent, and in sustaining respondent's objection to the questions propounded by appellant relative to said income tax returns. Appellant argues that the manner in which respondent treated his business relations with appellant in his income tax returns made under oath was very material in determining whether a partnership actually existed. Without passing upon the merits of appellant's contention, it is apparent that the admission of such evidence for consideration by the trial court could not affect the judgment rendered by the court or compel the entry of a different judgment. The refusal of the trial court to consider the excluded testimony cannot under the circumstances be held prejudicial. As a matter of fact, such evidence, if held material, would carry but slight weight upon the question of the actual existence of a partnership. Appellant seeks to invoke the equitable maxim of "clean hands", but appears to have raised this question for the first time upon this appeal. Resort to such defense must be had in the trial court to be available, and appellant may not raise this point for the first time on appeal. Moreover, it does not appear that the maxim is applicable to the facts of the present case. There is no merit in appellant's contention that the alleged oral agreement of partnership upon which respondent relies is against public policy and void. As between the parties themselves there was no illegality or impropriety in respondent furnishing capital for the business venture and acting as the silent partner of appellant. It is unnecessary to discuss other specific exceptions taken by appellant.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

60 Cal.App.2d 504

In re GIANOLI'S GUARDIANSHIP.

Civ. 6959.

District Court of Appeal, Third District, California.

Sept. 16, 1943.

Hearing Denied Nov. 8, 1943.

1. Guardian and ward 🔑8

Under Probate Code section providing that Superior Court of county in which minor resides or is temporarily domiciled may appoint a guardian for his person or estate or both, Superior Court had jurisdiction to appoint guardians for a minor where minor lived in county for seven years with her father's permission, though her father lived in a different county. Probate Code, § 1440.

2. Guardian and ward 🔑10

A child over 14 years of age may nominate her own guardian, and such nominee, if approved by the court, must be appointed. Probate Code, § 1406.

3. Guardian and ward 🔑10

Where child over fourteen years of age whose mother was dead nominated as guardians her uncle and aunt and preferred to live with them, and her father purposed to remove her from the surroundings in which she had lived for many years to live in another county, facts sustained finding of necessity and convenience which Probate Code section required for appointment of aunt and uncle as guardians, notwithstanding that all persons were concededly fit to have child's custody. Probate Code, § 1440.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Petition by Floyd Walker and Ida Walker to be appointed the guardians of the person of Roberta Mabel Gianoli, a minor child over the age of fourteen years, opposed by Fred Gianoli, child's father, contestant. From an order appointing petitioners guardians of the minor, contestant appeals.

Affirmed.

Taft & Spurr, of Ukiah, for appellant.

Preston & Gibson, of Ukiah, for respondent.

ADAMS, Presiding Justice.

Floyd Walker and Ida Walker, his wife, petitioned the Superior Court of Sonoma County to be appointed the guardians of the person of Roberta Mabel Gianoli, a minor child over the age of fourteen years, their petition being accompanied by a nomination of petitioners by the said minor.

Petitioners represented that the mother of said minor was dead, and that the child had been permitted by her father to make her home with petitioners at Cloverdale for the past seven years; that during said time the child had gone from grammar school into high school, and had built her life around her present home and surroundings, which she desired not to have changed; that her father had now demanded custody of said child and intended to remove her to another county; that it was necessary and convenient that a guardian of said minor be appointed; that petitioner Ida Walker is the maternal aunt of said child, and that petitioners are fit and proper persons to have her care and custody.

The father of said child contested the granting of said petition, urging that the facts stated by petitioners did not show either necessity or convenience for the appointment of a guardian. He admitted that he had permitted said child to remain with petitioners for the purpose of attending school, but alleged that he had paid for her maintenance. He further alleged that he had remarried and had a home for said child at Hopland, that he was capable of maintaining her, and that he and his wife both desired to have the child make her home with them.

At the trial of the proceeding it was stipulated that both petitioners and contestant are fit and proper persons to be appointed guardians of said child. Mrs. Walker testified that on the death of her sister, the mother of said child, Fred Gianoli had let petitioners take Roberta and her younger brother, and that both children had been living with them since that time; that their father had paid $10 per month each for their care, but was somewhat behind in his payments; that Roberta was in her second year in high school, had formed associations with her schoolmates and was happy and contented; that she and her husband were able and willing to have the custody of Roberta, and to maintain and support her; and that Roberta had signed the nomination freely and voluntarily without any request or suggestion on her part. Roberta testified that she desired to remain with her aunt and uncle, did not want to leave her present home and go to Hopland, that she had signed the nomination of petitioners as her guardians of her own free will, and that she desired that they be appointed her guardians. Fred Gianoli testified that he lived near the high school in Hopland, that he was employed by the Highway Commission with a salary of $140 per month, that he had allowed Mrs. Walker to have the two children and had paid for their maintenance until a short time before when a certain controversy had arisen between him and the Walkers, that he had visited the children often and that they had been well cared for, that he had furnished them clothing and had taken them on frequent week-end trips to the home of his father and mother in Mendocino County.

The trial court found that said child was temporarily domiciled in Sonoma County and had been so domiciled for more than six years; that she had been permitted by her father to make her home with the Walkers, during which time she had gone from grammar school into high school, and had built her life around her present home in Cloverdale; that her father had not, until September 1, 1942, made any request that her custody be surrendered to him; that he intended to remove her to another county, but that said child did not desire to have her surroundings changed and was desirous of having petitioners appointed as her guardians; that said petitioners were fit, proper and suitable persons to have the custody of said minor, and that it was necessary and convenient that a guardian or guardians of her person be appointed; that the nomination by the minor was her free and voluntary act.

An order appointing petitioners guardians of the person of said minor followed, and contestant has appealed, contending that the Superior Court of Sonoma County had no jurisdiction of the guardianship proceedings, and that neither necessity nor convenience for the appointment of a guardian was shown.

Section 1440 of the Probate Code provides that when it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled may appoint a guardian for his person or estate, or both, and that the appointment may be made upon the petition of a relative or other person on behalf of the minor, or on petition of the minor, if fourteen years of age. And under the provisions of Section 1406 of the Probate Code, if a child over the age of fourteen years nominates his guardian such nominee must be appointed if approved by the court.

[1, 2] The child involved in this controversy had lived in Sonoma County for seven years, and was obviously within the jurisdiction of the Court of that County within the meaning of Section 1440, supra. Collins v. Superior Court, 52 Cal. App. 579, 199 P. 352; In re Green, 67 Cal. App. 504, 226 P. 76; Ricci v. Superior Court, 107 Cal.App. 395, 290 P. 517; In re Guardianship of Kerr, 29 Cal.App.2d 439, 85 P.2d 145; In re Guardianship of Burket, Cal.App., 137 P.2d 475. She had arrived at the age of fourteen years and therefore had an absolute right to select and nominate her guardian or guardians, and her nominees having been found to be fit and proper persons, the court was required to appoint them. In re Kirkman's Estate, 168 Cal. 688, 144 P. 745; In re Estate of Meiklejohn, 171 Cal. 247, 152 P. 734; Collins v. Superior Court, supra; In re Guardianship of Kerr, supra; Guardianship of Burket, supra. As for appellant's contention that neither necessity nor convenience for the appointment of a guardian was shown, the court said in Guardianship of Burket, supra, that (a) the minor had reached the age of fourteen years, (b) he had nominated his father, (c) he preferred to live with his father, and (d) his age was such as to require "education and preparation for labor and business", Sec. 1408, Probate Code, and that each of the foregoing facts established the necessity or convenience for the appointment.

[3] In the case before us the child is over fourteen years of age, she has nominated respondents, she prefers to live with them, and her father purposes to remove her from the home and surroundings in which she has lived for many years and take her to live in another county. These facts are sufficient to sustain the court's finding of necessity and convenience for the appointment of petitioners as guardians. And as for appellant's contention that because he is the father of the child,

is a fit and proper person to have her custody, and is prepared to make a home for her, the court said in Re Guardianship of Kerr, supra, that parental relationship is of no consequence because the statute gives a minor over the age of fourteen years the authority to select her guardian. And in Re Estate of Meiklejohn, supra, the right of the minor, on reaching the age of fourteen years, to have another guardian substituted for her father who had previously been appointed, was sustained, even though the fitness of the father was unquestioned.

The judgment appealed from is affirmed.

PEEK and THOMPSON, JJ., concur.

60 Cal.App.2d 451

COOKE v. COOKE.

Civ. 3320.

District Court of Appeal, Fourth District, California.

Sept. 13, 1943.

1. Appeal and error ⇨607(1)

A motion to terminate proceedings for the preparation of a transcript is generally addressed to the sound discretion of the trial judge presiding in the court in which that document is prepared.

2. Appeal and error ⇨607(1)

The decision of the trial judge on a motion to terminate proceedings for the preparation of a transcript will be disturbed only if an abuse of discretion is shown.

3. Appeal and error ⇨985

Where record on motion to dismiss appeal showed nothing that occurred at time of its denial, and it contained nothing pointing to an abuse of the discretion on part of trial judge in denying the motion, motion was properly denied, there being a presumption of regularity of orders of the trial court.

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2. Partnership ⇨47, 64

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marguerite K. Cooke against Dorothea Dyer Cooke, as executrix of the estate of Stephen B. Cooke, deceased, and others. From a judgment, named defendant appeals. On motion to dismiss appeal.

Motion denied.

Bertrand L. Comparet, of San Diego, for defendant, respondent, and appellant.

R. M. Switzler, of San Diego, for plaintiff, respondent and appellant.

MARKS, Justice.

This is a motion to dismiss the appeal of Dorothea Dyer Cooke, as executrix, because of delay in filing the record on appeal.

The action was filed on March 14, 1941. Judgment was entered on August 10, 1942. Motion for new trial was denied on August 28, 1942. Notice of appeal and request for clerk's and reporter's transcripts followed. On June 24, 1943, an order to show cause why the proceedings to secure transcripts should not be terminated was issued. On June 30, 1943, the trial judge denied the motion to terminate the proceedings to secure the transcripts and on August 10, 1943, the transcripts were certified and presented for filing in this court on August 19, 1943. The filing fees were promptly paid and the filings completed. On the face of the record the filings here were timely.

[1, 2] A motion to terminate proceedings for the preparation of a transcript is generally addressed to the sound discretion of the trial judge presiding in the court in which that document is being or should be prepared. Unless an abuse of discretion is shown, the decision of the trial judge on that question will not be disturbed by an appellate court. Shutz v. Western Wholesale Liquor Distributors, 24 Cal.App.2d 659, 76 P.2d 135; Hohnemann v. Pacific Gas & Electric Co., 31 Cal.App.2d 692, 88 P.2d 748; Walker v. Etcheverry, 38 Cal.App.2d 611, 101 P.2d 709; Colburn Biological Institute v. DeBolt, 6 Cal.2d 631, 59 P.2d 108.

[3] The record on this motion to dismiss the appeal shows nothing concerning what occurred at the time of the denial of the motion. Therefore it contains nothing pointing to an abuse of discretion on the part of the trial judge in denying the motion. On the other hand, the presumption of the regularity of orders of the Superior Court comes to the support of the

ruling. Assuming, but not holding, that this question may be raised on this motion to dismiss the appeal, we cannot grant it because the record fails to support the argument of the plaintiff that there was an abuse of discretion on the part of the trial judge in denying the motion for an order terminating the proceedings for the preparation of the transcripts.

The motion to dismiss is denied.

GRIFFIN, Acting P. J., concurs.

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60 Cal.App.2d 453

RIDGE et al. v. BOULDER CREEK UNION JUNIOR-SENIOR HIGH SCHOOL DIST. OF SANTA CRUZ COUNTY (two cases).

Civ. 12456.

District Court of Appeal, First District, Division 2, California.

Sept. 14, 1943.

Hearing Denied Nov. 8, 1943.

1. Schools and school districts 🔑112

A statement, in verified claim against high school district for personal injuries, that claimant was a student at defendant's high school, constituted substantial compliance with statutory requirement that claim specify claimant's address, though it did not specify claimant's home address. School Code, § 2.801, as amended by St.1937, p. 414; § 3.

The word "address" is defined as directions for delivery of a letter; the name or description of a place of residence, business, etc., where a person may be found or communicated with, and hence is not always synonymous with word "residence".

See Words and Phrases, Permanent Edition, for all other definitions of "Address" and "Residence".

2. Schools and school districts 🔑112

In deciding what is substantial compliance with statute prescribing contents of claim against school district for personal injuries, no weight should be given to fact that information imparted by claim was not intended to comply with statute, but only issue is whether acts done subserved purpose of statute, complying therewith in substance, but not in exact form prescribed. School Code, § 2.801, as amended by St. 1937, p. 414; § 3.

3. Schools and school districts 🔑112

Statements in claim, filed with high school district by minor student and his father, for personal injuries to student, that claimants were citizens and residents of county in which district was located and that minor was student at district high school, constituted substantial compliance with statute as to specification of father's address. School Code, § 2.801, as amended by St.1937, p. 414.

4. Schools and school districts 🔑112

A claim against school district for injuries to student as alleged result of district's "carelessness, negligence, recklessness and willful misconduct" was not insufficient because of willful misconduct allegation, which was "surplusage", in absence of evidence of injury to district because of reliance on such allegation. School Code, § 2.801, as amended by St.1937, p. 414.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

5. Negligence 🔑66(1)

Knowledge that danger exists is not knowledge of amount of danger necessary to charge person with negligence in assuming risk caused thereby, but doing of act with appreciation of amount of danger, as well as of danger itself, is necessary to render person negligent as matter of law in assuming such risk.

6. Schools and school districts 🔑122

Where 17-year-old high school student, receiving good grades in woodworking classes, was never instructed not to use power saw without guard, and his instructor used saw in front of students without guard attached, such student's knowledge of danger of such use was not sufficient as matter of law to charge him with contributory negligence barring his recovery of damages from school district for resulting injury. School Code, § 2.801, as amended by St.1937, p. 414.

7. Schools and school districts 🔑89

A school district is not liable under statute for injuries to student because of willful misconduct. School Code, § 2.801, as amended by St.1937, p. 414.

8. Trial 🔑**252(8)**

In action against high school district for injuries to student in woodworking class while operating power saw without guard, where there was no evidence that plaintiff's instructor knew that plaintiff was uninstructed in use of saw or that saw was dull or would be used without guard, trial court properly refused instructions on law of willful misconduct as applied to such instructor, though he used saw without guard in front of students, as conscious misconduct is necessary to constitute "willful misconduct". School Code, § 2.801, as amended by St.1937, p. 414.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

9. Appeal and error 🔑**1069(1)**

In action against high school district for injuries to student, jurors' question to court during their deliberations as to whether school board carried compensation insurance *held* not to justify reversal of judgment on verdict for plaintiffs on ground that jury was guilty of prejudicial "misconduct" in considering insurance, especially where court properly instructed jury to disregard insurance. School Code, § 2.801, as amended by St.1937, p. 414.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

10. Appeal and error 🔑**930(2)**

The appellate court must assume that jury followed trial judge's instructions, in absence of contrary evidence.

11. Schools and school districts 🔑**21**

A "school district" is political subdivision of state, created for state purposes, subject to same privileges and immunities in regard to suit as state.

See Words and Phrases, Permanent Edition, for all other definitions of "School District".

12. Costs 🔑**3**

The right to costs is purely statutory and did not exist at common law.

13. States 🔑**215**

General statutes allowing costs to parties are inapplicable to state, in absence of express provision respecting costs in suit to which state is party.

14. Costs 🔑**32(1)**

The right to judgment does not inherently give right to costs as matter of justice.

15. Schools and school districts 🔑**126**

The statute creating liability of school district for any judgment against it does not include liability for costs incurred in obtaining such judgment. School Code, § 2.801, as amended by St.1937, p. 414; § 3.

◆

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by R. C. Ridge and Walter Ridge, a minor, by his guardian ad litem, R. C. Ridge, against the Boulder Creek Union Junior-Senior High School District of Santa Cruz County for personal injuries to minor plaintiff while operating a power saw. From a judgment for plaintiffs, defendant appeals, and from an order striking plaintiffs' cost bill, plaintiffs appeal.

Judgment and order affirmed.

Benjamin B. Knight, Dist. Atty., and Murphy & Hall, all of Santa Cruz, for appellant School District.

Rittenhouse & Rittenhouse and W. A. Deans, all of Santa Cruz, for respondents and cross-appellants.

NOURSE, Presiding Justice.

This was a suit by a minor and his father for personal injuries arising from the negligence of defendant school district. The jury gave a verdict for $266.52 to the father and $750 to the son. The court entered judgment against defendant for these amounts but ordered that the plaintiffs' cost bill be stricken. The plaintiffs have appealed from the order striking their cost bill and defendant has appealed from the judgment entered against it. The two appeals are consolidated by stipulation and only one set of briefs has been filed.

The plaintiff minor, Walter Ridge, aged 16 years 9 months, injured the index finger of his right hand while operating a power saw without a guard or a fence upon it. Young Ridge knew what these objects were for, to prevent injury, but others in the class used the saw without the guard because the fence was broken. The fence guided the wood to be sawed and if the saw was operated with the guard without the fence, it was extremely difficult to saw the board on the markings. Ridge was not instructed not to use the saw without the safety devices, and the instructor and other students used the saw without the safety devices on some occasions.

The plaintiffs filed their claim with the school district pursuant to section 2.801 of the School Code, as amended by St.1937, p. 414, alleging that the injury was caused by "the carelessness, negligence, recklessness and wilful misconduct of the said school district" and that the claimants were "citizens and residents of the County of Santa Cruz, State of California, and the said R. C. Ridge is the father of the said Walter Ridge, a minor, who is a student at said Boulder Creek Union High School." The complaint based on this claim alleged negligence on the part of defendant district. The answer denied the allegations of the complaint and as a separate defense alleged that Walter Ridge was guilty of contributory negligence. The court refused to give instructions at defendant's request on the issue of wilful misconduct.

Toward the end of the jury's deliberations, they returned with the following question: "May we as the jury inquire if the Boulder Creek School Board carries compensation insurance?" Whereupon the court gave an instruction whereby they were told to disregard insurance and that no insurance company was a party to the action. At no time was the subject of insurance brought up during the course of the trial.

Appellant school district contends that the court erred in ruling that the claim was sufficient in that no specific address of the claimants was stated as required by the School Code, and in that the charge of "wilful misconduct" did not allege any proximate cause for which they were authorized to allow claims. It also contends that the minor was guilty of contributory negligence as a matter of law, that the trial court erred in not giving the proposed instruction on wilful misconduct, and that the misconduct of the jury in considering compensation insurance was prejudicial.

[1] The judgment against the school district is controlled by the provisions of the statute relating to the filing of claims. Section 2.801 of the School Code requires the claimant to file a verified claim which "shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." In this connection it is conceded that the claim filed here did not specify the home address of the claimants. However, the claim did state that they were "citizens and residents of the County of Santa Cruz" and that Walter Ridge was a "student at said Boulder Creek Union High School."

Webster's dictionary defines the word "address": "The directions for delivery of a letter; the name or description of a place of residence, business etc., *where a person may be found or communicated with.*" (Emphasis ours.) This definition clearly indicates that the word "address" is not always synonymous with the word "residence", although for the purpose of some statutes the courts have so interpreted its meaning. For example, in San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 427, 70 P. 299, the court held that "address" and "residence", for the purpose of section 413 of the Code of Civil Procedure concerning the mailing of summons to absentee defendants, were synonymous as distinguished from the word "domicile." It should be noted that here we are dealing with a statutory requirement designed to give a public agency the knowledge whereby its liability can be investigated.

In interpreting a similar requirement for filing of a claim in suits against municipalities, the court said in Uttley v. City of Santa Ana, 136 Cal.App. 23, 25, 28 P.2d 377, 379: "The purpose of the statute would seem to be accomplished if an address is given *at which or through which the claimant may be found, in order that the city officials may make such investigation of the merits of the claim as may be desired.* The statute does not definitely require the giving of the claimant's home address or usual business address, and it is conceivable that a claimant might have neither a home address nor a permanent business address. * * * In the absence of any showing that the appellant (municipality) was misled or prejudiced, we think the allegations of the complaint are sufficient to show a substantial compliance with the statute." (Emphasis ours.) In that case the court held that the address of the claimant's attorney within the verified claim was a substantial compliance with the statute which required the claimant's address to be in the verified claim. The situation of claimant Walter Ridge is comparable to that of the claimant in the city case. The recital in the claim that Walter Ridge was a student at Boulder Creek Union High School informed the school district where he could be reached the major portion of the daylight hours. A letter addressed to him there would reach him. An inquiry by the school district at that place would have reached him personally or would have revealed his home address. There is no claim that the school district was misled nor that it could have been misled by the information imparted by way of an address of claimant Walter Ridge. Section 3 of the School Code enjoins the courts to construe its provisions liberally "with a view to effect its objects and to promote justice." In view of the foregoing we hold that the giving of a pupil's school address within the verified portion of the claim constitutes substantial compliance with the address requirement of section 2.801 of the School Code.

[2] In deciding what is in fact substantial compliance with a statute, no weight should be given to the fact that the information imparted was not intended to comply with the statute. The only issue, as we see it and as the doctrine is enunciated in the cases, concerns the purpose of the statute and whether in fact the acts done subserved the purpose of the statute, complying therewith in substance but not in the exact form prescribed. Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29. Those cases cited by appellant in which there was a complete failure to state in the verified claim any facts on which a finding of substantial compliance with the statutory requirements could be based are inapplicable to claimant Walter Ridge.

[3] A slightly different question is presented in considering the claim in support of the judgment in favor of R. C. Ridge, the father. However, the reasoning concerning the son's substantial compliance with the statute applies to the father, even if not so clearly. There is no claim here that the school district was misled. By inquiry at the son's school the residence and business address of the father could have been ascertained. It may be assumed that the school authorities knew his address through the son's registration. A letter addressed to the father at the school would probably have reached him, but, if not, the secretary of the board could have located him personally or by letter addressed to Boulder Creek. We hesitate to tear down the statute by statements of what the court may deem to be "substantial" compliance with its terms. But, under all the circumstances we must hold that the claim stated a sufficient address of the father within the doctrine of substantial compliance as heretofore enunciated.

[4] Appellant school district makes a second attack on the validity of the claim on the grounds that in no event did the claim state a cause for which the board was authorized to grant relief to the pupil in that "wilful misconduct" of the school district was one of the causes of the injury alleged. In the face of the allegations in the claim that the injury was caused by "carelessness" and "recklessness" we can not say that the board was misled by this surplusage in the claim. Section 2.801 does not require the legal conclusion of the claimant as to the cause of the injury to be stated; hence, all the legal conclusions regarding cause were surplusage. No estoppel by the plaintiffs' course of action is claimed. In the absence of any evidence of injury on the school district's part, due to reliance on the statement that the injury was caused by wilful misconduct, we can not say that the claim with its surplusage was insufficient in form to fulfill the condition precedent required by section 2.801 of the School Code in an action for negligent injury. The authorities cited by appellant support only the proposition that a complaint based on the wilful misconduct of the school district does not state a cause of action within the School Code and that no recovery is allowed on that score. Whiteford v. Yuba City Union High School Dist., 117 Cal.App. 462, 4 P.2d 266; Serres v. South Santa Anita School Bd., 10 Cal.App.2d 152, 51 P.2d 893.

[5, 6] On the merits of the claim itself the appellant school district attacks the submission of the case to the jury. The school district contends that Walter Ridge was guilty of contributory negligence as a matter of law. Although young Ridge knew what the guard was for—to prevent injury—he saw other students and the instructor use the saw without the guard. The fence which guided the wood to be sawed was broken and to operate the saw with the guard when the fence was broken was inconvenient. The markings on the board showing where the board was to be sawed could not be seen when the guard was down, and accurate sawing was practically impossible. Ridge was never instructed not to use the saw without the safety devices. On this state of the facts even though Ridge received good grades in his wood-working classes and was almost 17 years old at the date of the accident, we can not say as a matter of law that he should have appreciated the danger and not used the saw in its condition without the guard. Knowledge that danger exists is

not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. The doing of an act with appreciation of the *amount* of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent. We can not say that the knowledge of danger which Walter Ridge had, in the face of the facts that he received no instructions not to use the saw without the guard and that the instructor used the saw in front of the students without the guard attached, was as a matter of law sufficient to charge him with negligence contributing to his accident.

Those cases cited by appellant school district in support of its position involve cases where the minor was proved to have had knowledge of the specific risks which he ran in doing the acts causing the injury. In Bolar v. Maxwell Hardware Co., 205 Cal. 396, 271 P. 97, 60 A.L.R. 429, the 15 year old minor had sufficient knowledge of the risks run with explosives to hide his experimental cannon and the gun powder from his parents. In Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445, the 16 year old boy was an experienced rider of bucking horses and knew the risks attached. In Quinn v. Recreation Park Ass'n, 3 Cal.2d 725, 46 P.2d 144, the 14 year old girl deliberately chose in the face of the knowledge of the risk of foul balls to sit in an unscreened section, because she wished to sit near first base. In Mathews v. City of Albany, 36 Cal.App.2d 147, 97 P.2d 266, 98 P.2d 1025, the child was shown to have known the difference between explosive gun powder and fire cracker powder and had played with gun powder for a number of years. Here the boy was in his first year with power driven tools, the school recognizing that only after a certain age and instruction are children comparatively safe in using power driven tools; he had never been specifically informed of the danger although he knew what the guard was for; and the example of his instructor indicated to him that the use of the saw could not be too dangerous or the instructor would not have used the tool without the guard. On the whole it would appear to be a case where the boy knew the saw was not a plaything, but an instrument to be used with caution and care.

[7, 8] Appellant school district's next claim of error concerns the court's refusal to give instructions offered concerning the law applicable to wilful misconduct. The school district would not have been liable under sec. 2.801 of the School Code for injuries caused by wilful misconduct. Whiteford v. Yuba City Union High School Dist., 117 Cal.App. 462, 4 P.2d 266; Serres v. South Santa Anita School Bd., 10 Cal.App.2d 152, 51 P.2d 893. It contends that there was evidence in the record from which the jury might have concluded that Walter Ridge was injured through the wilful misconduct of Everett M. Brown, the instructor. It points to the following evidence in support of this contention: "The youth of the operator (Walter Ridge), the claimed lack of instruction, the claimed dullness of the saw, and the broken fence." Pacific Employers Ins. Co. v. Industrial Accident Commission, 209 Cal. 412, 288 P. 66, although cited in support of appellant's position, is distinguishable on its facts. In that case, in contravention of an Industrial Accident Commission Safety Rule which was known to the employer, an employee was allowed to use a power saw which did not have a guard covering the open blade. In the facts before us it is shown that a guard was provided even though the efficient use of the saw was restricted by its use. Further, there is no evidence that Everett M. Brown knew that Walter Ridge was uninstructed in the use of the power driven saw or that he knew the saw was dull, or that he knew the saw would be used without the guard. The use of the saw by the instructor without the guard in front of the students is not wilful misconduct. In Helme v. Great Western Milling Co., 43 Cal.App. 416, 421, 185 P. 510, 512, it is said: "To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." See also Malone v. Clemow, 111 Cal.App. 13, 17, 295 P. 70. The element of *conscious* misconduct is necessary to charge wilful misconduct, and here there is no evidence in the record from which the jury could have found that Everett Brown knowingly wilfully misconducted himself to plaintiff's injury. The trial court properly refused to give the instructions requested.

[9, 10] Finally the school district contends that the jury was guilty of prejudicial misconduct in considering insurance

and that such misconduct justifies a reversal. First it should be noted that we do not agree with the school district's contention that the jury in using the words "compensation insurance" had reference to the technical connotations of the words concerning absolute liability. They used the term in the same sense as a layman might use the term compensation to mean the technical term indemnity. Secondly, there was no prejudicial error because the jury were promptly instructed to disregard insurance in their deliberations, and we must assume that they followed the judge's instructions in the absence of other evidence. Maggart v. Bell, 116 Cal.App. 306, 309, 2 P.2d 516; Sweet v. Sager, 28 Cal.App.2d 211, 214, 82 P.2d 201.

[11-15] The plaintiffs Walter Ridge & R. C. Ridge appealed from the order taxing and disallowing costs. They contend that section 2.801 of the School Code in creating a liability "for any judgment against the district" included a liability for costs by reason of section 3 of the School Code enjoining the liberal construction of the Code "with a view to effect its objects and to promote justice." A school district is a political subdivision of the state created for state purposes subject to the same privileges and immunities in regard to suit as the state. Skelly v. Westminster School District, 103 Cal. 652, 658, 37 P. 643. It has long been settled law in California that the right to costs is a purely statutory right which did not exist at common law. General statutes allowing costs to parties have been construed not to apply to the state in the absence of express provision respecting costs where the state was a party. Connecticut Gen. Life Ins. Co. v. State, 47 Cal.App.2d 88, 177 P.2d 377; 23 Cal.Jur. 587. There is nothing in the right to a judgment which inherently gives the right to costs as a matter of justice. Therefore, we hold that section 2.801 of the School Code was properly interpreted by the lower court not to include the right to costs incurred in obtaining the judgment provided for. It should be noted that at the last session of the legislature, section 1028 of the Code of Civil Procedure was amended to provide that costs were to be awarded against the state "on the same basis as against any other party" thereby changing the prior law in the State of California when the state was a party to an action.

For the reasons hereinabove expressed the judgment is affirmed. The order taxing and disallowing costs is also affirmed.

SPENCE, J., and DOOLING, Justice pro tem., concur.

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60 Cal.App.2d 473

BRINER v. BRINER.

Civ. 6973.

District Court of Appeal, Third District, California.

Sept. 14, 1943.

1. Army and navy 🔑34

Allegations of army captain's motion to stay proceedings on appeal from judgment for him that he was unable to leave distant city, in which he was stationed, to confer with his attorneys, and financially unable to meet appeal expenses, and pay attorneys, did not show that his ability to conduct defense to appeal was materially affected because of his military service so as to entitle him to relief prayed for under Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 201, 50 U.S.C.A. Appendix §§ 510, 521.

2. Army and navy 🔑34

The mere fact that it would be disconcerting to army officer for him to incur further indebtedness to his attorneys for defending appeal from judgment for him does not justify stay of proceeding on such appeal under Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 100, 201, 50 U.S.C.A. Appendix §§ 510, 521.

◆

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Action by Monica S. Briner against C. Conrad Briner. Judgment for defendant, and plaintiff appeals. On respondent's motion to stay proceedings on appeal.

Motion denied.

James J. Arditto, of Sacramento, for appellant.

T. L. Chamberlain and Gussie A. Stewart, both of Auburn, for respondent.

ADAMS, Presiding Justice.

This is a motion of defendant and respondent above named to stay proceedings on appeal in this court under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C.A. Appendix § 501 et seq., until the termination of the period of his military service and until three months thereafter.

Respondent represents that he is, and has been since the 20th day of September, 1942 (and prior to the filing of this appeal on March 19, 1943), a captain in the Medical Corps of the United States Army, stationed at Washington, D. C. He sets up that he has no regular income or means of livelihood other than his pay as such captain, that he has a wife and two minor children solely dependent upon him for support, and has other family obligations, and that in making a defense herein he is handicapped by reason of said obligations and the curtailment of his income since he entered the military service; also that his ability to make his defense on this appeal is materially affected by the requirement that he be in Washington where he is stationed, and that he is unable to absent himself therefrom to confer with T. L. Chamberlain and Gussie A. Stewart, the attorneys who represented him on the trial of said action in the lower court; that he is unable to meet the expenses necessary to be incurred on his part in connection with this appeal, which he alleges will include a copy of the reporter's transcript, the printing of respondent's brief, expenses of counsel and his per diem for arguing the case, and possibly items for a petition for rehearing and for a hearing in the Supreme Court; that he has no attorney authorized to act for him, and is indebted to his former attorneys, and that it would be humiliating and disconcerting for him to incur further indebtedness for attorney's fees; and he deems it necessary to devote his entire energies to the military needs of the nation, that his work includes medical research which requires a high degree of concentration, and that the pendency of this appeal will, unless stayed, impair his ability to promote the efficiency which is one of the purposes of the Solders' and Sailors' Civil Relief Act; that the amount involved in the action is substantial and the threat of reversal which would result from a prosecution of the appeal while he is in the military service would cause mental strain, distress and anguish to affiant and impair his efficiency.

In opposition to respondent's affidavit, appellant filed her affidavit in which she alleges on information and belief that respondent has a substantial income and is a comparatively wealthy man; that he has income in addition to his army pay, owns corporate stock and other property both personal and real, and he would be in no wise financially embarrassed if his motion were denied; that a suspension of the appeal would not strengthen the national defense; that his presence is not necessary and that his military service does not interfere with his ability to conduct his defense as he is able to pay costs and attorney's fees; and that the ends of justice will be served by a denial of the motion.

Respondent's motion, affidavit, and accompanying brief were presented by two attorneys, and the motion was argued on his behalf by one of said attorneys. Thereafter respondent, through said attorneys, filed a closing affidavit in which he denied allegations of appellant's affidavit as to his financial status, and realleged his inability to pay expenses on appeal, asserting that his whole income is necessary for the support of his family. He alleged that he has no means of paying the attorneys who have heretofore represented him "and that consequently he has no attorney authorized to act for or on behalf of him as to the requisites incident to the appeal." He reasserts that his ability to conduct his defense is materially affected by reason of his military services in that he is financially unable to employ counsel to represent him, and that the prosecution of the appeal would cause him mental strain and worry him when his first duty is to do the things assigned to him in the armed forces.

Do the foregoing representations by respondent justify a suspension of this appeal under the Soldiers' and Sailors' Civil Relief Act? Section 201 of that act provides: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, *unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.*" (Italics ours.)

In Boone v. Lightner, 63 S.Ct. 1223, at page 1226, 87 L.Ed. 1587, at page ——, in which the history and purpose of the act are fully discussed, the court said: "The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says 'unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.'" And in that case it was held that the stay of proceedings urged by defendant was properly refused.

[1, 2] We are of the opinion that the matters alleged by respondent in this case do not show that his ability to conduct his defense to this appeal is materially affected by reason of his military service. The presence of respondent in this court is unnecessary, and even assuming that his financial condition is as alleged by him, he is in no different position than any other litigant who may, by reason of a limited income, find it difficult or inconvenient to meet the expenses incident to an appeal. As for his allegation that it will be necessary for him to have a copy of the reporter's transcript, a copy of same is already on file in this court, and we do not agree that it is essential on such appeal that respondent have a copy of same. Our record shows that at least one of the attorneys who represented him in the lower court is appearing for him on this motion, and he is doubtless sufficiently familiar with the record to prepare a brief. As to the necessity for printing such brief, the filing of a typewritten brief may be allowed by the court on a proper showing; and as for respondent's allegations regarding his inability to pay his counsel, the counsel of record in this court who have at all times represented respondent on this motion have taken no steps to withdraw as such counsel and have made no showing of unwillingness to proceed on respondent's behalf. The time and effort already expended by them in presenting this motion would probably have been quite sufficient to prepare respondent's brief and argue his defense to the appeal. In Weynberg v. Downey, 176 Misc. 196, 25 N.Y.S.2d 600, an action to foreclose a mortgage, one of the defendants was in the armed service, and an attorney was appointed by the court to represent him. In connection with the question of how, if at all, such counsel might be compensated, the court said that such attorney in time of war should regard such service as a patriotic duty and act regardless of compensation. To the same effect see In re Cool's Estate, 18 A.2d 714, 19 N.J.Misc. 236. And as for respondent's contention that this proceeding should be stayed because it would be "disturbing and disconcerting" to him for same to proceed, we are cited to no authority holding that the mere fact that mental distress may be caused a litigant justifies a suspension of a proceeding under the Soldiers' and Sailors' Civil Relief Act. The rights of those in the armed service to have legal proceedings suspended are not unlimited. The purpose of the act is recited in section 510 thereof which states: "In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of *civil liabilities,* in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions *which may prejudice the civil rights* of persons in such service during the period herein specified over which this Act remains in force." (Italics ours.)

Respondent's civil rights will not be prejudiced by permitting this appeal to take its orderly course. Should the judgment of the lower court be affirmed on appeal, the litigation would be at an end and respondent's burden of mental distress lifted. And if such judgment should be reversed and a new trial become necessary requiring respondent's presence in order to protect his civil rights, a motion in the lower court to stay such trial would then be in order, and doubtless would be granted on a proper showing that such rights would be imperiled by reason of his military service.

We are cited to no cases in which proceedings on appeal have been stayed under the Soldiers' and Sailors' Civil Relief Act. In Rosenthal v. Smith, Ohio App., 42 N.E. 2d 464, a motion to dismiss an appeal on the ground that appellant had failed to comply with the rules of the court requiring the filing of assignments of error, briefs, etc. within fifty days after notice of appeal, was resisted by counsel for appellant who represented to the court that appellant was in the armed forces and that counsel had been unable to contact him. The court said: "The Soldiers' and Sailors' Civil Relief Act of 1940 * * * does not accord the benefits thereof to a person in the military service who is represented by legal counsel. Nothing appears in the memorandum to the effect that counsel for appellant were not authorized to act for and on behalf of him as to all requisites incident to the appeal, including the filing of the briefs, etc. The filing of such briefs are the work of counsel only, and do not require the presence nor assistance of appellant." And the motion to dismiss was granted.

In Pope v. United States Fidelity & Guaranty Co., 67 Ga.App. 415, 20 S.E.2d 618, the court said that a person in the military service is not entitled as matter of law to a stay of a judgment against him under the provisions of the Soldiers' and Sailors' Civil Relief Act, nor is he entitled to a stay merely by virtue of that act unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his service; and there an order rendering judgment against the defendant was affirmed. Also see Charles Tolmas, Inc., v. Streiffer, 199 La. 25, 5 So.2d 372.

As we are of the opinion that respondent's ability to conduct his defense to this appeal will not be materially affected by reason of his military service, respondent's motion is denied.

THOMPSON and PEEK, JJ., concur.

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60 Cal.App.2d 500

CAMPBELL v. RUSTIGIAN et al.

Civ. 6949.

District Court of Appeal, Third District, California.

Sept. 16, 1943.

Rehearing Denied Oct. 15, 1943.

Hearing Denied Nov. 8, 1943.

1. Appeal and error ⟹110

A suit to quiet title, wherein neither pleadings, findings, nor judgment raised issue of right to possession of realty or any other issue at law, was "equitable" in nature so that jury trial was not matter of right, and order granting plaintiff new trial after judgment on court's findings in accordance with jury's verdict for defendant was not appealable. Code Civ.Proc. § 592; § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Suit in Equity".

2. Jury ⟹13(1)

A right to jury trial attaches only when issues of law are involved in pleadings.

3. Jury ⟹12(1)

The right to jury trial must be determined by character of pleadings considered as whole.

4. Appeal and error ⟹110

An action to quiet title, pleaded and considered by court in its findings and judgment as purely equitable in nature, may not be converted into lawsuit, so as to confer right of appeal from order granting new trial, by merely introducing evidence that one of parties was in actual possession of realty involved. Code Civ.Proc. § 963, subd. 2.

◆

Appeal from Superior Court, Madera County; H. S. Shaffer, Judge.

Suit by E. B. Campbell against Harry M. Rustigian and Miron Rustigian and wife to quiet title to realty. Judgment for defendant spouses, and, from an order granting plaintiff a new trial, defendant spouses appeal. On plaintiff's motion to dismiss the appeal.

Motion granted, and appeal dismissed.

David E. Peckinpah, Fred J. Rogers, Frank E. Curran, and L. Barber, all of Fresno, for appellants.

Barbour & Backlund, and Lawrence W. Young, all of Fresno (Keyes & Erskine, J. Benton Tulley, and Herbert W. Erskine, all of San Francisco, of counsel), for respondent.

THOMPSON, Justice.

This is a motion on the part of plaintiff to dismiss the purported appeal from an order granting a new trial, on the ground that the notice of appeal is ineffectual because this court lacks jurisdiction since subdivision 2 of Section 963 of the Code of Civil Procedure authorizes an appeal "from an order granting a new trial" only in "an action or proceeding where a trial by jury is a matter of right." In this suit to quiet title to real property, equitable issues only are presented by the pleadings or determined by the findings and judgment. In neither the pleadings nor the findings nor the judgment does it appear that the plaintiff or any of the defendants held possession of the real property. It is purely an equitable suit to quiet title and not "an action for the recovery of specific real property" contemplated by Section 592 of the Code of Civil Procedure.

The complaint merely alleges that the plaintiff acquired title to the real property in question by purchase at a Sheriff's sale under execution pursuant to a judgment which was rendered in favor of the plaintiff in another suit against one of the defendants, Harry M. Rustigian. The last mentioned party filed a disclaimer in this action. The other defendants, Miron Rustigian and Hagoohi Rustigian, who are husband and wife, filed an answer merely denying the material allegations of the complaint, and affirmatively asserting that they bought the property from the Security First National Bank of Los Angeles May 4, 1937, and that "these defendants, and each of them, are the sole and absolute owners of said real property". The prayer of the answer merely asks that plaintiff take nothing by his action and that the defendants "go hence with their costs". Neither the complaint nor the answer alleges possession or asks for possession of the property.

At the time of the trial the defendants demanded and were granted a jury trial, on the theory that its verdict would be advisory only. The cause was fully tried and the jury returned a general verdict "in favor of defendants, Miron Rustigian and Hagoohi Rustigian." Plaintiff's motion to set that verdict aside was denied. The court adopted findings in accordance with the verdict favorable to the last mentioned defendants, and rendered judgment accordingly to the effect that neither the plaintiff nor Harry M. Rustigian had any right, title or interest in the real property, and upon the contrary that Miron Rustigian and Hagoohi Rustigian "are the sole, absolute and lawful owners" of the real property in question. The last mentioned defendants were awarded their costs in the sum of $167.85.

Plaintiff moved for a new trial on the grounds of lack of evidence to support the findings and judgment and for errors committed in the course of the trial. That motion for new trial was granted on the ground last mentioned. From the order granting a new trial the said defendants gave notice and prepared and filed their record on appeal. The motion to dismiss the appeal was duly made on the ground that this court is without jurisdiction since the action to quiet title is not one in which "a trial by jury is a matter of right."

[1, 2] We are of the opinion the purported appeal should be dismissed for the reason that neither the pleadings nor the findings nor the judgment raises the issue of the right to possession of the real property in question, and no other issue at law is presented. It is purely a suit to quiet title to real property which is equitable in its nature. It is only when issues of law are involved in the pleadings that a right to a trial by jury attaches. It has been held in an action for recovery of specific real property, as provided by Section 592 of the Code of Civil Procedure, when an issue of law is raised by allegations in a complaint, answer or cross-complaint that the plaintiff is out of possession and seeks thereby to recover possession, or where the plaintiff is in possession and the defendant by his answer or cross-complaint seeks to oust him and recover possession in his own behalf that the right of trial by jury then exists. Thompson v. Thompson, 7 Cal.2d 671, 681, 62 P.2d 358, 117 A.L.R. 1; Reiner v. Schroeder, 146 Cal. 411, 420, 80 P. 517. No such issue was raised in the present action. The right of possession of the real property is not involved.

[3, 4] The right to a trial by jury must be determined by the character of the pleadings considered as a whole. Fillmore

v. Reilly, 28 Cal.App.2d 460, 463, 82 P.2d 739; 15 Cal.Jur. 334, sec. 12. An action to quiet title to real property which is pleaded and considered by the court in its findings and judgment as purely equitable in its nature may not be converted into a law suit, conferring the right of appeal from an order granting a new trial, by the mere fact that evidence was introduced showing that one or the other of the parties was in actual possession of the property. If the possession or the right of possession of the property is neither pleaded nor determined by the court, the actual possession by one of the parties does not change the nature of the action. We therefore conclude that this suit to quiet title is equitable and that the parties were not entitled to a trial by jury as a matter of right.

It follows that since the parties to this action were not entitled to a trial by jury as a matter of right, on any issue involved in this litigation, the order granting the motion for a new trial is not appealable. Crouser v. Boice, 51 Cal.App.2d 198, 124 P.2d 358. The defendants will still have their day in court upon the new trial.

The motion to dismiss the appeal is therefore granted, and the appeal is accordingly dismissed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CURTIS, CARTER, and TRAYNOR, JJ., dissenting.

BONNER v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14063.

District Court of Appeal, Second District, Division 3, California.

Sept. 2, 1943.

Rehearing Denied Sept. 20, 1943.

Hearing Granted Oct. 28, 1943.

1. Workmen's compensation 🔑1280

For limitation purposes, silicosis is not an "injury" until the employee knows, or by due care and diligence is presumed to know, that he has an occupational disease which has progressed to the extent that he is so disabled that the efficiency of his work is appreciably affected thereby, and such injury may not arise until after the employment proximately causing it has ceased. St.1937, pp. 266, 295, §§ 3208, 5405, 5406.

See Words and Phrases, Permanent Edition, for all other definitions of "Injury".

2. Workmen's compensation 🔑1280

In case of a latent and progressive disease such as silicosis, the "injury" does not necessarily date from the last day of exposure to dust-laden atmosphere, so that the prescription periods begin to run from that date, but the date of the injury is the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by ordinary care it is discoverable that a compensable injury was sustained. St.1937, pp. 266, 295, §§ 3208, 5405, 5406.

3. Workmen's compensation 🔑1279

The word "time", as used in statute providing that, for an employer to be liable for compensation, employee at time of the injury must be performing service growing out of and incidental to his employment, etc., does not thereby differ from word "date" in the statute, providing limitations from the date of injury for compensation proceedings. St.1937, pp. 269, 295, §§ 3600 (b), 5405, 5406.

See Words and Phrases, Permanent Edition, for all other definitions of "Date" and "Time".

4. Workmen's compensation 🔑52

The statutory rule of interpretation that the compensation provisions of the Code shall be liberally construed is given judicial recognition and is itself liberally construed so that its principle is extended to benefit dependents of persons injured in the course of their employment. St.1937, p. 265 et seq., § 3201 et seq.

5. Workmen's compensation 🔑201

Where a disease constituting an injury is contracted during employment with first employer, and its existence becomes known and it becomes disabling during employment with second employer, which second employment has had no effect upon the disease, first employer is liable for compensation for injury; but, where both of succeeding employments contribute to or are further proximate causes of the disease, compensation liability falls upon each succeeding employer. St.1937, p. 269, § 3600 (c).

6. Workmen's compensation ⚷566

The statutes providing that, in case of aggravation of diseases existing prior to a compensable injury, compensation shall be allowed only for that proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury, are intended to pare down and not to impose liability. St.1937, pp. 266, 284, §§ 3208, 4663.

7. Workmen's compensation ⚷1763

The Industrial Accident Commission's failure to find that an injury was sustained, or that a disease was contracted during a particular employment, will not support an award against the one who was the employer during that term. St.1937, pp. 266, 284, §§ 3208, 4663.

8. Workmen's compensation ⚷201, 1707

The period during which one has been exposed to silica dust prior to the time when the exposure has resulted in a diseased condition is not to be considered in determining how much of the burden of compensation is to be placed upon the employer in whose service the disease was contracted, or, having already come into existence, was aggravated, and where the line is to be drawn is a question of fact. St.1937, pp. 266, 284, §§ 3208, 4663.

9. Workmen's compensation ⚷1347

An employer seeking to escape a portion of the liability for compensation for silicosis on the theory that he alone is not responsible therefor has the burden of proving that other employers should share the responsibility. St.1937, pp. 266, 284, §§ 3208, 4663.

10. Workmen's compensation ⚷201

Where an employment has brought about silicosis which was aggravated by a subsequent employment, the burden of compensating the employee for the resulting disability must be divided among the employers upon whom the liability exists, irrespective of whether death results. St. 1937, pp. 266, 284, §§ 3208, 4663.

11. Statutes ⚷225¾

Where a statute has been judicially construed and is later re-enacted in the same or substantially the same terms, it is presumed that the Legislature was familiar with the construction and that such construction, in the absence of an express provision requiring a different construction, was adopted by the Legislature.

12. Statutes ⚷225¾

Where subdivision of the Compensation Act providing that "injury" should include any injury or disease arising out of the employment, and that in case of aggravation of any pre-existing disease compensation shall be allowed only for such proportion of disability due to the aggravation as may reasonably be attributed to the injury, was adopted into the Labor Code, the adoption wrote into the law the construction placed upon the Compensation Act sections by the cases. St.1937, pp. 266, 284, §§ 3208, 4663.

13. Workmen's compensation ⚷1285

Under statute providing that no limitation in compensation proceedings shall run against any person under 21 years of age, where applicant for death benefits was a minor, limitation statutes did not run. St.1937, p. 296, § 5408.

14. Workmen's compensation ⚷201

Where tunnel superintendent had been working for his last employer off and on for three-year period before his silicosis became so bad that he had to quit his job permanently, and he died of silicosis and tuberculosis, and the conditions under which superintendent worked for his last employer were the proximate cause of his breakdown, an award of $5,000 as a death benefit would have been supported. St. 1937, p. 284, § 4702.

15. Workmen's compensation ⚷201

While determination of compensation to be allowed under an apportionment among claimant's employers because of aggravation of a pre-existing disease, is left to the sound discretion of the Industrial Accident Commission, it is a discretion to be exercised upon a legal and factual and not an arbitrary basis. St.1937, pp. 266, 284, §§ 3208, 4663.

16. Workmen's compensation ⚷1761

Finding, revealing that prior to tunnel superintendent's last employment he was exposed to conditions which might or might not have impaired his health, did not authorize apportionment of benefits for his death from silicosis over the entire period of his employment in mines and tunnels among various employers. St.1937, pp. 266, 284, §§ 3208, 4663.

17. Workmen's compensation ⚷201

Unless an employee dying from silicosis contracted the disease more than two years before he was required permanently to quit his job because of his bad condition, the Industrial Accident Commission, in apportioning death benefit over the period of his employment, could not consider years prior to the two year period. St.1937, pp. 266, 284, 295, §§ 3208, 4663, 5405, 5406.

18. Workmen's compensation ⚷1433

Evidence did not establish that tunnel superintendent dying of silicosis contracted the disease before his last employment, so as to authorize apportionment of death benefits over his entire employment in mines and tunnels among various employers. St.1937, pp. 266, 284, §§ 3208, 4663.

19. Workmen's compensation ⚷1779

Under statute providing that compensation awards shall not be altered after 245 weeks from date of the injury, finding that employee dying of silicosis had first contracted silicosis during some employment previous to his last employment was not a prohibited attempt to modify finding in his compensation proceeding that, by a date more than 245 weeks ago, employee had sustained an industrial injury during his last employment. St.1937, p. 301, § 5804.

20. Workmen's compensation ⚷1779

Under statute providing that limitations shall not run against persons under 21 years of age, etc., minor's proceedings for benefits for death of employee dying of silicosis was protected against limitations of statute prohibiting alteration of compensation awards after 245 weeks from the date of the injury, and hence finding in employee's proceeding that during his last employment he sustained an industrial injury being silicosis, did not preclude inquiry in minor's proceeding as to time when employee first contracted silicosis. St.1937, pp. 296, 301, §§ 5408, 5804.

21. Workmen's compensation ⚷1186

A minor, in a compensation proceeding which would be barred but for statute providing that limitations shall not run against any person under 21 years of age, cannot take the position that the Industrial Accident Commission has jurisdiction to make findings in her favor but no jurisdiction to make findings which do not favor her. St.1937, p. 296, § 5408.

22. Workmen's compensation ⚷1778, 1781

A finding is not "res judicata" during the period when the Industrial Accident Commission has continuing jurisdiction over its awards, so that the commission may rescind, alter, or amend such awards for good cause. St.1937, p. 301, § 5804.

23. Workmen's compensation ⚷1779

Under statute providing that limitations shall not run against any person under 21 years of age, unless a guardian is appointed, the time limit under statute providing that no compensation award shall be altered, etc., after 245 weeks from the date of the injury, does not apply with respect to minors until guardians are appointed for them. St.1937, pp. 296, 301, §§ 5408, 5804.

24. Workmen's compensation ⚷1779

Finding, in employee's compensation proceeding, that during his last employment he had sustained an industrial injury being silicosis, was not "res judicata" as to time when employee first contracted silicosis, where minor, before a guardian was appointed, had applied for benefits for employee's silicosis death, and the Industrial Accident Commission's jurisdiction was continuing in deciding her application. St. 1937, pp. 296, 301, §§ 5408, 5803.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

25. Workmen's compensation ⚷1791

Where Industrial Accident Commission found in employee's compensation proceeding that employee during his last employment sustained an industrial injury being silicosis, commission was not "estopped" from finding in compensation proceeding for employee's silicosis death that the disease began prior to beginning of employee's last employment. St.1937, pp. 266, 284, §§ 3208, 4663.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Application by Margaret Mary Bonner, a minor, by her guardian ad litem and trustee, Margaret Bonner, against the Industrial Accident Commission of the State of California and others, for a writ to review a compensation award in favor of petitioner.

Award annulled.

Richard C. Olson, of Los Angeles, for petitioner.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondent Industrial Accident Commission.

Herlihy & Herlihy, of Los Angeles, for respondent Industrial Indemnity Exchange.

BISHOP, Justice pro tem.

The petitioner in this proceeding, the wholly dependent, minor, daughter of J. J. Bonner, made application for a death benefit, following her father's death. Bonner's death was due to silicosis, contracted at some time during his twenty and a half years' work in mines and tunnels. The Commission at first awarded a death benefit of $5,000, but upon rehearing changed the amount awarded to $583. The tentative conclusion which led to the issuance of the writ of review has been confirmed; the award should be annulled because it goes beyond the support afforded either by the findings or by the evidence.

Basically, the correlative rights and obligations of the parties to the proceeding before the Commission rest upon these pertinent provisions of the statutory law, continuously in effect from their appearance in section 6 of the Workmen's Compensation, Insurance and Safety Act of 1917, Stats.1917, p. 831, 841, up to and including their restatement in section 3600 of the Labor Code, St.1937, p. 269:

"Liability for the compensation provided by this division * * * shall * * * exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

"(a) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.

"(b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.

"(c) Where the injury is proximately caused by the employment * * *." Earlier in the Labor Code, in section 3208, we find this definition: "'Injury' includes any injury or disease arising out of the employment * * *."

[1, 2] For the purposes of the statute of limitations (formerly, section 11, of the Workmen's Compensation Act; now, sections 5405 and 5406 of the Labor Code), the disease of silicosis is not regarded as an injury "until the employee knows, or when by the exercise of due care and diligence, he is presumed to know, that he has an occupational disease which has progressed to the extent that he is so disabled that the efficiency of his work is appreciably affected thereby." Argonaut Mining Co. v. Industrial Acc. Comm., 1937, 21 Cal.App.2d 492, 496, 70 P.2d 216, 219. The injury thus described may not arise until some time after the employment which proximately caused the injury has ceased. These words, found in Marsh v. Industrial Acc. Comm., 1933, 217 Cal. 338, 351, 18 P.2d 933, 938, 86 A.L.R. 563: "'From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease, such as [silicosis], it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment * * *'" reappear, in part at least, in Giminez v. Industrial Acc. Comm., 1933, 132 Cal.App. 638, 640, 23 P.2d 425; Argonaut Mining Co. v. Industrial Acc. Comm., supra, 21 Cal.App.2d 492, 497, 70 P.2d 216; and Price v. Industrial Acc. Comm., 1935, 9 Cal.App.2d 213, 215, 49 P.2d 294, 295. In the Marsh case the employee, whose name identifies the case, quit his employment in February, 1928, for reasons bearing no relation to the disease of silicosis, the symptoms of which did not appear until December, 1928. The disease was not identified until a week before his death, February 14, 1930. The application for a death benefit, filed October 20, 1930, was held, under the facts stated, not necessarily barred by the statute, and the award denying the application was annulled "to the end that further proceedings may be had to ascertain when the statute of limitations began to run." The "date of the injury" in the Price case was fixed as

May 30, 1934, although the employment had terminated in November, 1933, when the employer ceased business.

[3, 4] For the purposes of the statute of limitations, then, the injury may be deemed not to occur until some time after the employment, which was its proximate cause, has ended. But, as we have noted, one of the conditions which must "concur" in order that an employer may become liable to pay compensation for disability or a death benefit, is that "at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment." Sec 3600 (b), Labor Code. The "time of injury" of section 3600, Labor Code, is not to be differentiated from the "date of injury" of sections 5405 and 5406, by making a distinction between "time" and "date," for there is no authority for relying upon the distinction that makes no difference between these two innocent words. The inconsistent positions that have been reached grow out of the desire, and the necessity, of interpreting Division IV of the Labor Code (which is, in substance, a codification of the Workmen's Compensation Act), as directed by its section 3202: "The provisions of Division IV * * * of this code shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." This rule of interpretation has, of course, been given judicial recognition (Pacific Lbr. Co. v. Industrial Acc. Comm., 1943, 22 Cal.2d 410, 139 P.2d 892) and has itself been liberally construed so that its principle is extended to benefit the dependents of "persons injured in the course of their employment." Mark v. Industrial Acc. Comm., 1938, 29 Cal.App.2d 495, 497, 84 P.2d 1071.

[5] We are dealing with a silicosis case, and our conclusions, however broadly stated, are limited to such a case. "The law clearly distinguishes between a physical injury sustained as the result of an accident and injuries which develop from progressive occupational diseases like silicosis." Argonaut Mining Co. v. Industrial Acc. Comm., supra, 21 Cal.App.2d 492, 496, 70 P.2d 216, 219. It is established, then, we may say, that a disease contracted during an employment may appear as an injury sometime after the employment has ceased. One consequence of this is that in the case of successive employments a disease which becomes disabling and so compensable, during the period of the employee's service with employer C, may have as its sole proximate cause the previous employment with employer A. That is to say, a disease, constituting an injury, may have been contracted during the employment with A, although its existence may not have become known, nor may it have become disabling, until during the employment with C, an employment which had no effect upon the disease. If so, then for the results of the injury the first employer alone would be liable, for one of the conditions which must concur to create liability is: "Where the injury is proximately caused by the employment * * *." Sec. 3600 (c), Labor Code. It may be, however, that both of the succeeding employments with B and C contributed to, that is, were further proximate causes of the disease which constituted the injury, in which event liability for compensation for any disability would fall upon each of the three.

The question which arises in the event a disease, contracted during one employment, was contributed to by succeeding employments, that is, whether or not each of the several employers is liable for the full amount of compensation, as general and special employers are for compensation to their common employee (American M. Ins. Co. v. Industrial Acc. Comm., 1937, 8 Cal. 2d 585, 588, 67 P.2d 103), and a principal and agent are for their employee (Cowell v. Industrial Acc. Comm., 1938, 11 Cal.2d 172, 176, 78 P.2d 1016, 1019), has been answered for us by the case of Blanchard v. Industrial Acc. Comm., 1924, 68 Cal.App. 65, 228 P. 359. In that case the employee, Blanchard, had "glass-blowers' arm," or, more accurately, glass-blowers' arms, for when his right arm became useless in his trade, he used his left arm until that too was no longer serviceable. Blanchard had worked as a glass blower for three, it might indeed be said for four, employers: twelve years with A, six months with B, six months with C, and then forty minutes with B again. It appears that he contracted the disease while employed by A, and knew that he had it, but continued to work on, though with less efficiency, until he finally had to quit. The Commission determined that he had become fifteen percent totally disabled and awarded him $1,249.80, but then prorated the amount among the three employers. As Blanchard's claim was barred against two of them, he was left with an effective award of only $468.70 against B, and petitioned the District Court of Appeal to have the award annulled. "The purpose of this petition," the reviewing court stated (68 Cal.App. at page 67, 228 P. at page 360), "is, therefore, to seek the annulment of that portion of the Commission's award which prorates the compensation between the three employers * * *." The court then proceeded: "Subdivision 4 of section 3 of the Workmen's Compensation Act, as amended (Stats.1919, p. 911), defines 'injury' for which compensation may be awarded under the act as follows: 'The term "injury," as used in this act, shall include any injury or disease arising out of the employment, including injuries to artificial members. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury.' Under this section it was plainly the duty of the Commission to apportion the award of compensation among the respective employers, and in doing so the Commission was required to exercise a discretion based upon the evidence of the various periods of employment, which is not attacked in this proceeding."

[6] The subdivision, it will be noted, which the court quoted and which, it declared, made plain the duty of the Commission to apportion the award, does not contain the word "apportion" or "prorate," or any word of similar import. That which the subdivision was framed to accomplish, as we can determine from the words employed, was the paring down of liability, not its imposition. This observation is not intended as a criticism of the court's conclusion in the Blanchard case, but to emphasize that that conclusion was based on two grounds. It was based not alone on the subdivision expressly referred to as its support, but also on the facts, previously reviewed but not reiterated, which revealed that liability for compensation rested upon the earlier employers. We do not interpret the Blanchard case as either holding or declaring that its subdivision 4 of section 3 authorized the spread of the burden of compensating an employee injured (by disease) upon previous employers who, but for the subdivision, would have no liability.

[7] Our conviction that subdivision 4 of section 3 is not to be construed as creating a liability is fortified by a further decision, six months later than that in the Blanchard case, and rendered by the same court. We refer to Moore Shipbuilding Co. v. Industrial Acc. Comm., 1925, 70 Cal.App. 495, 233 P. 392, 393, where the disease involved was lead poisoning, a disease which, judging from the facts of the case, is much more rapid in its development than is silicosis. For about two months prior to March 6, 1924, the applicant had worked for the petitioner as a burner of armor plate. From March 10 to March 21 he worked as a burner for a second employer, becoming disabled from lead poisoning on the last mentioned date. The Commission found that the disease was contracted during the second employment, but held that the compensation should be apportioned in accordance with the time worked by the employee "under exposure to lead." We quote at length the not lengthy remarks of the reviewing court:

"The attack of the petitioner upon the award is that it is wholly unsupported by the findings on the part of the Commission. The point is that the jurisdiction of the Commission to apportion compensation among several employers where an employee has contracted an occupational disease during the course of the several employments can be sustained only upon a finding that the disease which constituted the 'injury' defined in subdivision 4 of section 3 of the Workmen's Compensation Act (St.1917, p. 831), as amended in Statutes 1919, page 911, existed at some stage of each prior employment. That is to say, that the power of the Commission to apportion the liability among several employers under the terms of the section cited is limited to a 'case of aggravation of any disease existing prior to any such injury.'

"The petitioners set forth in their petition extracts of the evidence which was heard by the respondents covering the subject of the injury to the applicant, and the respondent concedes that this evidence is correctly stated. From the petition it appears that there was no evidence of any nature tending to show that the applicant had incurred or had shown any symptoms of the disease while employed by the petitioner Moore Shipbuilding Company, and the absence of such evidence was apparently in the minds of the members of the respondent Commission, when they failed to find on that fact. On the other hand, the findings are that the applicant sustained injury while employed by the General Metal Supply Company, and the apportionment of the award against the petitioner was based solely on the conjecture that, while employed by petitioner, the applicant might have contracted the disease to some extent. But the direct testimony of the applicant showed that he had no symptoms of the disease while in the employ of the petitioner.

"The Commission is required to make findings upon all facts involved in the controversy (section 20, Workmen's Compensation Act of 1917), and a failure to find that an injury was sustained or that a disease was contracted during a particular employment will not support an award against the one who was the employer during that period. In this case the jurisdiction of the Commission to apportion the award rests upon a showing that the disease was contracted while in the employment of the Moore Shipbuilding Company. In this respect there is a failure in both proof and finding. It follows that the Commission exceeded its jurisdiction."

[8, 9] We conclude, then, that the period during which one has been exposed to silica dust, prior to the time when the exposure has resulted in that serious impairment of the functions of the lungs which may properly be termed a diseased condition, is not to be taken into consideration in determining how much of the burden of compensation is to be placed upon an employer in whose service the disease was either contracted or, having already come into existence, was aggravated. In many cases, no doubt, the first, imperceptible, minute, infiltrations of silica dust come to one during the days of boyhood play, upon the vacant-lot ball field, along the dusty road, up in the hay loft. These years are not to be taken into account in apportioning compensation for silicosis, years later, not because they are not industrial years, but because they have resulted in no pre-existing disease which can be said to have been aggravated or to have imposed liability as for an injury. The same is true of years spent in industry which have passed without that effect upon the bodily health which constitutes a disease; these years are not to be counted in apportioning the burden which the law places upon industry. Where the line is to be drawn between a healthy condition and a diseased one is, of course, a problem of fact, often difficult to solve with definiteness. An employer, upon whom the facts and the law place responsibility for compensation for silicosis, who would escape a portion of the load on the theory that he alone is not responsible, necessarily has the burden of proving that other employers should share the responsibility. Moquin v. Industrial Acc. Comm., 1939, 33 Cal.App. 2d 511, 516, 92 P.2d 413.

[10] Our conclusion, that where it is made to appear that an employment had brought about a case of silicosis which was aggravated by a subsequent employment, the burden of compensating the employee for the resulting disability is properly divided among the employers upon whom liability exists, is not only supported by the Blanchard case, but also by Associated Ind. Corp. v. Industrial Acc. Comm., 1932, 124 Cal.App. 378, 384, 12 P.2d 1075, where the Blanchard case was cited, and by Argonaut Mining Co. v. Industrial Acc. Comm., supra, 21 Cal.App.2d 492, 70 P.2d 216, where such an award was affirmed as a matter of course. It is argued to us that the statute, sub. 4, sec. 3, may authorize an apportionment in the case of a disability but not in a death case. We are of the opinion that this argument places too much strain on the use of the word "disability" in the subdivision. It would indeed be an anomalous situation if compensation should be apportioned among several employers for the period of disability due to a disease, but that when death resulted either the entire burden should be placed on the last employer, or equally on all. We hesitate to believe that the legislature intended that one rule should hold respecting compensation for disability and a different rule should follow death. The reviewing court, in Mullane v. Industrial Acc. Comm., 1931, 118 Cal.App. 283, 5 P.2d 483, determined that subdivision 4 of section 3, applied where a death benefit was being sought. In that case an injury aggravated an existing disease for which the employer had no responsibility, disability first, then death, resulting. The Commission first awarded a death benefit without apportionment, and then on rehearing withdrew it entirely. The court stated (118 Cal.App. at page 289, 5 P.2d at page 484) that the finding on the rehearing, that death "was not caused by injury arising out of or in the course of the said employment," is "contrary to the undisputed evidence * * * and contravenes the plain provisions of said act, as declared in subdivision 4 of section

3 thereof. Therefore, the decision of the commission based thereon, denying petitioner any relief whatever, should be annulled, and the proceeding remanded to the commission for further action pursuant to the provisions of the act last mentioned * * *."

[11, 12] It is true that no one, apparently, had argued in the case just referred to, that the subdivision was not applicable to a death case. However, we are of the opinion that the construction which it and the other cases cited have placed upon subdivision 4, section 3 of the Workmen's Compensation Act, has much more binding force than is due to their value as precedents. This is so because: "If a statute has been judicially construed and is later re-enacted in the same or substantially the same terms it is presumed that the legislature was familiar with the construction which had been placed upon the statute by the courts and that such construction, in the absence of an express provision requiring a different construction, was adopted by the legislature as a part of the law." In re Estate of Hebert, 1941, 42 Cal.App. 2d 664, 668, 109 P.2d 729, 731. For applications of this principle see: In re Baker & Hamilton, 1880, 55 Cal. 302, 303, 304; State Commission in Lunacy v. Welch, 1908, 154 Cal. 775, 777, 99 P. 181; Harris v. Barlow, 1919, 180 Cal. 142, 143, 179 P. 682; Lindsay-Strathmore I. Dist. v. Superior Court, 1920, 182 Cal. 315, 333, 187 P. 1056; People v. Ellis, 1928, 204 Cal. 39, 44, 266 P. 518. The first sentence of subdivision 4 of section 3 we have already discovered in section 3208 of the Labor Code. The second sentence also appears there, with alterations of no consequence, as section 4663. The adoption of sections 3208 and 4663 accomplished more than the mere reenactment of subdivision 4 of section 3 of the Workmen's Compensation Act; it wrote into the law the constructions placed upon that subdivision by the cases.

[13, 14] In the proceeding under review the fact that the applicant for a death benefit was a minor has kept the case free from questions involving the bar of the statute. Sec. 5408, Labor Code. The questions that have arisen, however, make it important to note that the evidence clearly establishes that Bonner had been working as tunnel superintendent for J. F. Shea Company (whose insurance carriers are respondents in the pending proceeding) off and on for a three year period between June 15, 1933, and April 18, 1936. At the end of this period his condition, soon discovered to be due to silicosis, became so bad that he had to quit his job, permanently. On June 6, 1941, Bonner died "as the result," the Commission found, "of silicosis, upon which was superimposed tuberculosis." The evidence discloses, further, that the conditions under which Bonner worked during his last three active years could well have been *a* proximate cause, if not *the* proximate cause, of Bonner's breakdown. These facts would support the Commission's original award of $5,000 as a death benefit. Sec. 4702, Labor Code. (We are not passing upon petitioner's suggestion that that award should have been $6000.) What is there in the findings of the Commission, or in the evidence, which justifies the reduction of the amount awarded to $583?

[15-17] This finding of the Commission is put forward as the basis for the reduced award. "2. Prior to the date of June 15, 1933, J. J. Bonner was employed for a period of approximately seventeen and one-half years outside the State of California in mining and tunnel work. As a result of exposure in his work prior to June 15, 1933 he contracted silicosis which was further aggravated by the work which he performed for the J. F. Shea Company subsequent to June 15, 1933." The Commission had previously found that Bonner had worked for some seventeen months, between June 15, 1933, and April 18, 1936, for the J. F. Shea Company, and it is apparent, both from the findings and from the Commission's brief, that the reduced award was the result of apportioning the death benefit over the entire period of decedent's employment in mines and tunnels. While it is true that the determination of the amounts to be allowed, under an apportionment, is a matter left to the sound discretion of the Commission (Tanenbaum v. Industrial Acc. Comm., 1935, 4 Cal.2d 615, 618, 52 P.2d 215), it is a discretion to be exercised upon a legal and factual, not an arbitrary, basis. We consider the finding that "as a result of exposure in his work prior to June 15, 1933 he contracted silicosis" as too general a finding to warrant the inclusion of the seventeen years' work previous to 1933 in the total upon which the apportionment was based. It would not be at all inconsistent with the finding for the fact to be that at no time prior to 1931, let us say, did Bonner have any symptoms of silicosis, or that,

prior to that arbitrarily selected date, he had not incurred the disease of silicosis. The most that the findings reveal is that he was exposed to the conditions which might, but might not, have impaired his health. Unless he contracted silicosis by the year 1931, the years prior to that year had no place in the Commission's calculations.

[18] Enough concerning the findings, for there is a more fundamental weakness in the foundation upon which the award was erected. There is evidence that Bonner worked in mines and tunnels over a period of years before he began his last employment, with J. F. Shea Co., Inc., but there is no evidence to support a finding that he had contracted silicosis before the beginning of that employment. The evidence reveals but little of the character of the conditions under which Bonner worked with respect to their possible effect upon his health, quite an insufficient amount to support an inference that his health had been impaired, that he had a disease that could be aggravated by the employment that began June 15, 1933.

The petitioner makes another argument which merits attention because unless disposed of it might make trouble at any further hearing of this matter before the Commission. It appears that in a proceeding begun by Bonner to recover compensation for the disability resulting from his diseased condition, the Commission determined, in 1939, that his right to relief was barred by the statute. Among other findings made was one to the effect that during the course of Bonner's employment with the J. F. Shea Co., Inc., between June 15, 1933 and April 18, 1936, he "sustained an industrial injury, being silicosis. * * *" Petitioner contends that this is a finding of fact which closes the door, in the proceeding instituted by her, to all inquiry as to the time when Bonner first contracted silicosis, presenting in support of her contention: (a) "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury," Labor Code, sec. 5804; (b) the 1939 finding renders the date of injury res judicata; (c) the commission is estopped to make a different finding. None of these theories is tenable.

[19-21] With respect to the limitation of section 5804, two answers suggest themselves. In the first place, in the light of what the cases have said about the nature of silicosis as an injury, a further finding to the effect that Bonner first contracted silicosis during some employment previous to June 15, 1933, would not be inconsistent with, and so be regarded as an attempt to modify, the finding of 1939, made to determine the running of the statute of limitations, that between 1933 and 1936 he had "sustained an industrial injury." But if the new finding could be said to be an alteration of the old, it would not, by section 5804, be placed beyond the jurisdiction of the Commission to make, for the applicant in the new proceedings is a minor, and that proceeding is protected against the limitations of section 5804 by these words of section 5408 of the Labor Code: "* * * no limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent unless and until a guardian or trustee is appointed." A minor, certainly, in a proceeding which would be barred but for section 5408, cannot be permitted to take the position that the Commission has jurisdiction to make findings in her favor but no jurisdiction to make findings which do not favor her.

[22] Nor is the power of the Commission to make a further finding, even if it be inconsistent with the 1939 finding, lacking because of the common law doctrine of res judicata. The authorities agree that during the period when the Commission "has continuing jurisdiction over all its orders, decisions, and awards" so that "at any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor," quoting from section 5803, Labor Code, a finding is not res judicata. Cowell v. Industrial Acc. Comm., supra, 11 Cal.2d 172, 178, 78 P.2d 1016, and cases cited. The Cowell case is quite in point. There, in a proceeding instituted by an injured employee, the Commission had found that a corporation was the employer and made an award against it, discharging two individuals who had been named defendants at the Commission's order because they were thought to be employers. Thereafter the employee died, and his two minor sons filed an application for a death benefit in which they claimed that the two individuals who had been discharged were the employers. The sons' proceeding was consolidated with one instituted by the widow, and the corporation and the two individuals were found

by the Commission to have been the employers and an award made against the three of them.

[23, 24] The individuals referred to appear as the petitioners in the Cowell case, contending, among other things, that the award against them violates the principles of res judicata. Of this contention the court states (11 Cal.2d at page 178, 78 P.2d at page 1020): "Neither were the findings and awards made during the life of the employee res judicata upon the subject of petitioners' status. This is so because the applications for death benefit made by the widow and children were filed well within the period during which the commission had continuing jurisdiction of the cause, to take further evidence or, upon due showing, to rescind, alter, or amend prior findings and awards. The commission committed no impropriety and no act in excess of jurisdiction in entertaining the applications of the dependents, in rehearing the issues, and in rendering altered findings. To such procedure the doctrines of res judicata, and estoppel, are inapplicable. This is well settled. [Citing cases.]" True, in the Cowell case, the applications of the widow and of the sons were filed within some 130 weeks after the date of the injury, so that whatever limitation section 5804, Labor Code, places upon the Commission's continuing jurisdiction did not apply. But, again we point out, by virtue of section 5408 of the Labor Code its time limits respecting industrial accident proceedings do not apply with respect to minors until guardians are appointed for them, and in the case now under review the petitioner had applied for a death benefit before a guardian was appointed. In deciding her application, then, the Commission's jurisdiction was still continuing, so that if any finding which it should determine it was proper to make could be said to be a modification of the 1939 finding, it would have power to make it. By the reasoning of the Cowell case, therefore, the 1939 finding cannot stand in the way of a new finding because of the doctrine of res judicata.

[25] Petitioner's third position is expressed thus: "Having once found that decedent was disabled in his employment, the Commission should be estopped from finding, upon the same evidence, after his death, that he was not so injured or disabled, since his dependents are otherwise left in the position where they are required to prove that which neither the Commission nor respondents ascertained or proved by the evidence previously submitted to the Commission." What we have stated earlier in this opinion, particularly respecting the lack of evidence and the burden of proof, perhaps cures the evil to which the petitioner here voices an objection. If so, the objection does not question the right of the Commission to make a finding that silicosis was incurred prior to 1933, upon sufficient evidence. Upon a new hearing it is not to be supposed that the Commission will make a finding that Bonner contracted silicosis before June, 1933, if the evidence before it is no different from that it already has had. On no theory of which we know can it be said that the Commission will be estopped to find that the disease began in 1932, if there is evidence to support such a finding. On a rehearing of this proceeding, therefore, the time when Bonner first contracted silicosis will be a proper subject of inquiry.

For the reasons given, the award is annulled.

PARKER WOOD, J., concurs.

SHINN, Acting Presiding Justice (concurring).

I concur in the judgment and in the reasons given therefor, except upon the last point discussed as to the conclusiveness of the finding at the former hearing of the time when petitioner's father sustained an industrial injury, namely, between June 5, 1933, and April 18, 1936. Where the injury is the disease of silicosis, which comes on gradually and may progress through several different employments, I think the former finding would not be in conflict with a possible later finding that the employee had suffered an industrial injury from silicosis prior to June 5, 1933. But however that may be, I think the Commission in the present proceeding for recovery of the death benefit would not be bound by a finding as to the time when the injury was sustained, made in the proceeding to recover compensation for injury. Section 5803 of the Labor Code provides in part: "The commission has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the commission may rescind, alter, or amend any such order, decision, or award, good cause appearing therefor." In the exercise of this jurisdiction the Commission may, where good cause therefor appears, make findings at variance with or contrary to those previously found. Bartlett Hayward Co. v. Industrial Acc. Comm., 1928, 203 Cal. 522, 265 P. 195. The power to alter or amend an order, decision or award would have little efficacy if new awards had to be based upon the former findings. The only limitation upon the continuing jurisdiction of the Commission is found in section 5804, which provides that: "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury." This section is inapplicable here for reasons which are not recognized in the main opinion. A proceeding for the recovery of a death benefit should be deemed a separate proceeding from one to recover compensation for injury insofar as may be necessary to allow the Commission to exercise its full powers in connection with a claim for a death benefit. An award of compensation for injury in a proceeding instituted by an employee cannot be considered as having been made in a later proceeding for the recovery of a death benefit. Of course the powers of the Commission are the same whether it be considered that there are two proceedings or only one for the claims are separate in substance as is the procedure for their enforcement. In no view of either can an award of a death benefit be regarded as a rescission, alteration or amendment of a previous award of compensation for injury within the meaning of section 5804. It would seem clear that the section was not intended to apply to original applications to recover the death benefit. Under section 5406, Labor Code, the claim of an adult for a death benefit may in some cases be filed as late as 240 weeks after the injury, and in the case of a minor that time would not begin to run until a guardian had been appointed, which, of course, might be long after the expiration of 245 weeks. A claim for a death benefit may be, and often is, allowed even though there has been no proceeding on behalf of the employee. Petitioner's claim was filed within the time allowed by law and in such cases, whether the claimant be an adult or a minor, the Commission has jurisdiction to proceed in the usual course to a final decision. Section 5804 imposes no restriction on the jurisdiction of the Commission, in a proceeding to recover the death benefit, to decide all pertinent questions of fact, even though such decisions may be contrary to findings on the same issues made in an earlier proceeding by the employee to recover compensation for injury. Under any construction of the earlier finding, it is not conclusive as to the date when petitioner's father contracted silicosis as an industrial injury, even though petitioner's application for the death benefit was filed long after the expiration of 245 weeks from the time of the injury, as found in the first proceeding.

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